



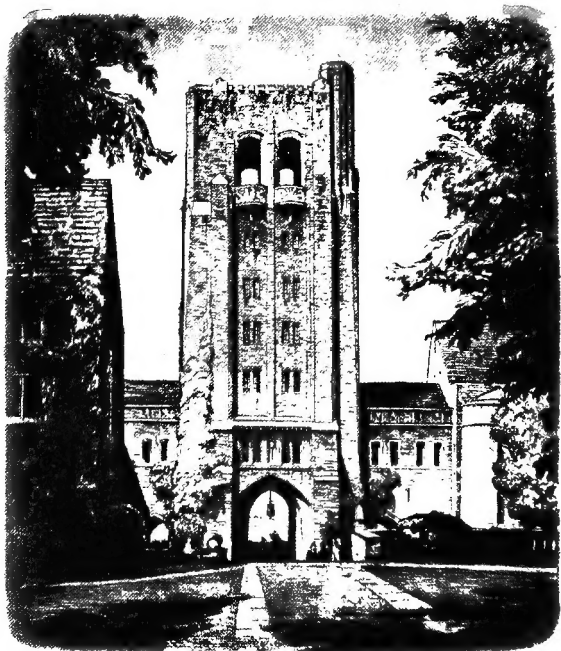
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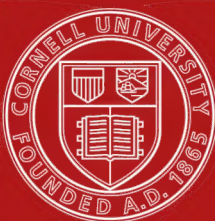
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Law and practice in bankruptcy.



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LAW AND PRACTICE IN BANKRUPTCY.

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THE

PRACTICE IN BANKRUPTCY,

WITH THE

BANKRUPT LAW OF THE UNITED STATES

AS AMENDED,

AND

THE RULES AND FORMS;

TOGETHER WITH

NOTES REFERRING TO ALL DECISIONS

REPORTED TO SEPTEMBER 1, 1877.

BY ORLANDO F. BUMP,

REGISTER IN BANKRUPTCY.

Tenth Edition.

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## PREFACE TO THE TENTH EDITION.

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THIS edition contains references to all cases reported to September 1, 1877. The decisions that have appeared since the work was in press have been placed in Addenda. The whole work has been carefully revised so as to correspond with the late important decisions. The references have also been carefully verified so as to eliminate all errors that may have crept in from inadvertence or from mistakes incident to successive editions. Inaccuracies in language and conclusions not drawn with sufficient care, have been corrected. In fine, no pains have been spared to make the work worthy of the approbation which the profession have thus far accorded to it. The aim has been to make a practical, not a theoretical work, to show what is established, not what may be decided, to follow rather than anticipate decisions, to furnish a practical guide rather than brilliant theories. This plan, though not as tempting as others that might have been pursued, has stood the test of trial and met with approbation.

In this edition, all the cases decided under the acts of 1800 and 1841, so far as they are applicable, have been cited, and the work now contains references to all which are of any value that have ever been decided in this country. In this particular it is prior to any former edition. The greater part of that which has been added pertains not to the practice in bankruptcy, but



in the State courts. A glance at the topics indicated will at once show the fullness of the citations and the value of the additions.

In this edition the citations from the Bankrupt Register are all taken from the octavo volumes, and the references are accordingly made to the reprint and not to the original quarto volumes. The Bankrupt Register has taken its place among the regular reports, and the author has deemed it best to refer to that edition which will hereafter be most frequently used.

The author takes the opportunity to return his thanks to those judges, registers and lawyers who have called his attention to new decisions and to defects or errors in his work, and to request similar favors from the profession generally. Those who examine only one particular point, will from the very nature of the case discover defects, which others taking a survey of the whole field would not perceive. It is only by the combined efforts of all that a harmonious and symmetrical system can be developed.

ORLANDO F. BUMP.

BALTIMORE, September 1, 1877.

## ABBREVIATIONS USED IN THIS WORK.

Abb. C. C.....	Abbott's United States Reports.
A. L. J.....	Albany Law Journal.
A. L. Reg.....	American Law Register.
A. L. Rev.....	American Law Review.
A. L. T.....	American Law Times.
Ben.....	Benedict's Reports.
Biss.....	Bissell's Reports.
B. R.....	Bankrupt Register.
B. L. T.....	Baltimore Law Transcript.
C. L. B.....	Cincinnati Law Bulletin.
C. L. N.....	Chicago Legal News.
Cent. L. J.....	Central Law Journal.
I. R. R.....	Internal Revenue Record.
Lans.....	Lansing (N. Y.)
Leg. Int.....	Legal Intelligencer.
L. L. J.....	Louisiana Law Journal.
L. T. B.....	Law Times Bankrupt Reports.
Mich. L.....	Michigan Lawyer.
Mon.....	Montana.
N. Y. Sup.....	New York Superior Court Reports.
N. Y. Supr.....	New York Supreme Court Reports.
Pac. L. R.....	Pacific Law Reporter.
Pitts. L. J.....	Pittsburgh Legal Journal.
Sween.....	Sweeny (N. Y.)
s. c.....	Same Case.
W. J.....	Western Jurist.
W. N.....	Weekly Notes.
Wool.....	Woolworth.





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# PRACTICE IN BANKRUPTCY.

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## CHAPTER I.

### COMMENCEMENT OF PROCEEDINGS IN VOLUNTARY BANKRUPTCY.

THE bankrupt law declares that any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, may apply for the benefit of its provisions (§ 5014). As to the parties who may apply, the statute is broad and comprehensive. Any person possessing the requisite qualifications may become a voluntary bankrupt. The term has been held to include aliens.<sup>1</sup> It is also broad enough to include *femes covert*<sup>2</sup> and infants.<sup>3</sup> There could be no question about the right of partners to apply jointly under this provision, even though there were not a distinct recognition of that right in other sections of the act (§ 5121). The term person also includes corporations (§ 5013), but in this sense is limited to moneyed, business, and commercial corporations.<sup>4</sup> It does not, therefore, extend to municipal, charitable or

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<sup>1</sup> In re Goodfellow, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69; Cutter v. Folsom, 17 N. H. 139.

<sup>2</sup> In re O'Brien, 1 B. R. 176; in re Harriet E. Collins, 10 B. R. 335; s. c. 3 Biss. 415; in re Kinkead, 7 B. R. 439; s. c. 3 Biss. 405; in re Julia Lyons, 2 Saw. 524; s. c. 1 A. L. T. (N. S.) 167.

<sup>3</sup> In re Book, 3 McLean, 317; in re Samuel S. Cotton, 2 N. Y. Leg. Obs. 370.

<sup>4</sup> Sweatt v. Railroad Co. 5 B. R. 234; s. c. 1 L. T. B. 273; Adams v. Railroad Co. 4 B. R. 314; s. c. 1 Holmes, 30; s. c. 6 A. L. Rev. 365.

literary corporations. It does, however embrace railroads,<sup>1</sup> steamboat companies,<sup>2</sup> and insurance companies.<sup>3</sup> A voluntary bankrupt who has contracted new debts since the filing of his petition may file a new petition.<sup>4</sup>

The persons, however, who wish to file a petition, must possess certain qualifications before they can do so. They must, at the time of their application, reside in the United States, and owe provable debts to an amount exceeding three hundred dollars. Persons who are non-residents, or whose provable debts are less than three hundred dollars, can not become bankrupts. The residence required by the statute will probably be held to mean domicile, so that citizens temporarily residing abroad may enjoy the benefits of its provisions.<sup>5</sup> What are provable debts is clearly defined in the act (§§ 5067 to 5072); and, unless the debtor's liabilities are included among those enumerated, he can not file a petition. If a *feme covert* is not under the State laws liable for debts contracted by her, she is not embraced within the provisions of the statute.<sup>6</sup> An infant also is not embraced within its provisions, in respect to his general contracts.<sup>7</sup> The petitioner must also set forth his inability to pay his debts, and this inability has been construed to mean legal insolvency.<sup>8</sup>

In the case of corporations there is an additional qualification. The officer who files the petition must be duly authorized to do so by a vote of a majority of the

<sup>1</sup> *Adams v. Railroad Co.* 4 B. R. 314; s. c. 5 B. R. 234; s. c. 1 Holmes, 30; s. c. 6 A. L. Rev. 365.

<sup>2</sup> *Sweatt v. Railroad Co.* 5 B. R. 234; s. c. 1 L. T. B. 273.

<sup>3</sup> *In re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243; *Smith v. Teutonia Ins. Co.* 4 C. L. N. 130.

<sup>4</sup> *In re Drisko*, 13 B. R. 112; s. c. 14 B. R. 551.

<sup>5</sup> *In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

<sup>6</sup> *In re Rachel Goodman*, 8 B. R. 380; s. c. 5 Biss. 401; *in re Schlichter*, 2 B. R. 336; *in re Howland*, 2 B. R. 357.

<sup>7</sup> *In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.

<sup>8</sup> *Hardy v. Clark et al.* 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11.

corporators, at a legal meeting called for the purpose (§ 5122). The meeting at which the vote is given must be legal, and must also be called for the express purpose of considering the question of going into bankruptcy. But where all practical means have been taken to have a fair stockholders' meeting, the vote will be deemed sufficient, although there was an irregularity in the call on account of the contumacy of some of the directors.<sup>1</sup> It must be a meeting of those who are the corporators, according to the terms of the charter and the laws of the State in which the corporation is located. Such is the express requirement of the statute. But a corporator, as understood in the law respecting corporations, is one of the constituents or stockholders of the corporation.

The form prescribed for a corporation petition<sup>2</sup> also mentions directors or trustees; but, unless the directors, or trustees, as the case may be, are the actual corporators, their vote would not be sufficient; for the power of the justices of the Supreme Court to prescribe forms and rules does not enable them to dispense with an express requirement of the statute.<sup>3</sup>

A petition filed by direction of a board of trustees alone, without the consent of the corporators duly obtained in the prescribed mode, is illegal, although the board of trustees is authorized by the laws of the State to manage all the ordinary business of the corporation. Even a subsequent ratification by the corporators will not give validity to such a petition, for it is not a question of agency but of jurisdiction.<sup>4</sup> Whether the officer has been duly authorized to file the petition or not, is a question of fact which should not be determined without some

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<sup>1</sup> *Davis v. Railroad Co.* 13 B. R. 258; s. c. 1 Woods, 661.

<sup>2</sup> Form No. 3.

<sup>3</sup> *In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

<sup>4</sup> *In re Lady Bryan Mining Co.* 4 B. R. 144, 394; s. c. 1 Saw. 349; s. c. 2 Abb. C. C. 527; *Ansonia Brass Co. v. New Lamp Chimney Co.* 10 B. R. 335; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 13 B. R. 385; s. c. 91 U. S. 656.

evidence having a legal tendency to establish it, for if there is a total defect of evidence to prove the essential fact, the proceedings will be void.<sup>1</sup>

The debtor may file an application in the district court of the United States for the district in which he has resided or carried on business for the six months next immediately preceding the time of filing such application, or for the longest period during such six months. Where the debtor resides and carries on business in the same district, there is but one court in which he can file his application. But where he resides in one district and carries on business in another, he has an election, and may make his application in either district. It has been intimated that residence, as used in the statute, is equivalent to domicile, and such was its meaning under the insolvent law of Massachusetts.<sup>2</sup> If this should be the meaning ultimately attached to the term, then all questions in regard to residence would be determined by the law relating to domicile. That law has already been applied to the determination of one case. Thus, where a native of Massachusetts had for a time been domiciled in California, but had left California with the intent to return to his native State, going, however, in the mean time to France, and staying there eleven months, it was held that his native domicile revived *eo instanti* as soon as he left his acquired domicile.<sup>3</sup>

It has, however, been held, that the term "residence" is used specifically in the statute, as contradistinguished from domicile, so as to free cases under it from the difficult and embarrassing presumptions and circumstances upon which the distinctions between domicile and residence rest. The two terms certainly have distinct meanings; and it appears to be the better construction to hold that

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<sup>1</sup> *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.* 13 B. R. 385; s. c. 10 B. R. 335; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

<sup>2</sup> *In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

<sup>3</sup> *In re W. S. Walker*, 1 B. R. 386; s. c. Lowell, 237; s. c. 1 L. T. B. 38.

the proceedings should be instituted with reference to the actual residence of the party, or his place of business, and not with reference to his domicile.<sup>1</sup> The term "residence" denotes an actual inhabitancy in contradistinction to a mere temporary abode in lodgings.<sup>2</sup> If the debtor has a family, his residence is where they reside, although he may make temporary sojourns in another State.<sup>3</sup>

The phrase "carried on business" has been comparatively little considered or discussed. Business is a term of extensive import and indefinite meaning. In its broadest sense it includes nearly all the affairs in which an individual can be an actor. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion, may be exceptions, but the employment of means to secure or provide for these is business. The term, as used in the statute, is not, however, synonymous with employment or vocation. A minister may have a vocation, and an operative may have an employment, but neither a minister nor an operative can well be said to be in business. To bring himself within the terms of this phrase, the debtor must be engaged in something that is commonly denominated business. Thus, a person who merely has an office in the district, where he receives letters, and is engaged in winding up the affairs of an insolvent firm to which he belonged, does not carry on business.<sup>4</sup> It is not sufficient, however, to be engaged in it; he must carry it on. Hence, a clerk, although engaged in business, can not apply in the district where he is employed.<sup>5</sup> There is also a difference between superintending business and carrying on business. A person who superintends a business can not be said to carry on the

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<sup>1</sup> In re Watson, 4 B. R. 613.

<sup>2</sup> In re Israel Kinsman, 1 N. Y. Leg. Obs. 309.

<sup>3</sup> Stiles v. Lay, 9 Ala. 795.

<sup>4</sup> In re Little, 2 B. R. 294 ; s. c. 3 Ben. 25.

<sup>5</sup> In re Magie, 1 B. R. 522 ; s. c. 2 Ben. 369 ; in re Israel Kinsman, 1 N. Y. Leg. Obs. 309.



business; for all his acts are, in fact and in contemplation of law, the acts of his principal. There is, moreover, another objection. If he merely superintends the business, he does not furnish the capital; and no one carries on a business unless he provides the money that is needed in it, or has an interest in it by contributing his labor. The capital may be borrowed, but it must stand in the debtor's name. From this it follows that the business which is carried on must be the debtor's own business, and not that of another. Such would seem to be the proper construction of the phrase. There are, however, two cases that apparently conflict with this view. In both the debtors had carried on business within the district for a long time, and had failed. After their failure, one had been employed as a clerk and the other as an agent to superintend business, and both had been so employed during the whole of the six months that preceded their application; yet it was held that their applications were properly filed.<sup>1</sup> The court appears to have been influenced by the fact that they had always been engaged in business within the district. In one case, however, the debtor did receive a share of the profits of the business which he superintended,<sup>2</sup> and hence might be considered to carry on the business, for a person may furnish labor as well as capital.

The phrase "carrying on business" looks to the scheme and purpose to which all the transactions tend, the design and object which the party has in view. In carrying on a business there are many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business is located, and such transactions may be of such frequent and even daily occurrence as to require an agency of considerable duration. Such collateral or incidental transactions do not

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<sup>1</sup> In re Bailey, 1 B. R. 613; s. c. 2 Ben. 437; in re Belcher, 1 B. R. 666; s. c. 2 Ben. 468.

<sup>2</sup> In re Bailey, 1 B. R. 613; s. c. 2 Ben. 437.

constitute the business of the debtor, nor are they a carrying on of business in the sense of the law.<sup>1</sup>

The time during which the debtor has resided or carried on business in the district must also be considered. If he has resided or carried on business within the district during the whole of the six months that immediately precede his application, then no question can arise. If, however, he has resided or carried on business in different districts during such six months, then the application must be made in the district in which he has resided or carried on business for the longest period during that time. The phrase "longest period" means the longest period during which the debtor has resided or carried on business in any district.<sup>2</sup> Thus, during the six months, the debtor may have resided or carried on business in one district for two months, in another for one month and three-quarters, in another for one month and one-quarter, and in another for one month. In such case, the proper district in which to make the application would be the one in which the debtor has resided or carried on business for the two months. So, also, if he has had but one residence in the United States of less than six months, his application may be made in the district where he has so resided, although it may be made on the day after his residence has been established, for no district can be shown in which he has had a longer residence.<sup>3</sup>

Although the debtor may select the district in the first instance, yet when proceedings have been once commenced in either district, similar proceedings can not be had in any other district, and the jurisdiction is exclusive in that court where the jurisdiction first attaches.<sup>4</sup>

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<sup>1</sup> In re Ala. & Chat. R. R. Co. 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.

<sup>2</sup> In re Foster, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127.

<sup>3</sup> In re Goodfellow, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

<sup>4</sup> In re Horace Hall, 5 Law Rep. 269.

The jurisdiction, power and authority conferred upon the district courts in cases in bankruptcy, are also conferred upon the Supreme Court of the District of Columbia (§ 4977), and upon the district courts of the several territories, when the bankrupt resides in the District of Columbia, or in either of the territories (§ 4978; Act of 22d June, 1874, § 16); and the power vested in the district courts of the territories may be exercised by either of the justices thereof while holding the district court in the district in which the petitioner or alleged bankrupt resides.

The questions that have been considered thus far are all of vital importance, for they affect the jurisdiction of the court over the person of the debtor. If the court has no such jurisdiction, the proceedings will be a nullity. In such case any creditor may, on filing a petition for that purpose, have the proceedings discontinued at any time;<sup>1</sup> or may defeat the application for a discharge by showing that the court had no jurisdiction over the case.<sup>2</sup>

The application for the benefit of the statute must be made by a petition, with a schedule of liabilities and a schedule of property annexed (§ 5014). A petition alone, without these schedules annexed, would not be such a petition as the statute requires. Several forms for petitions to suit the character of the petitioner have been prescribed by the justices of the Supreme Court.<sup>3</sup> Forms for the schedules have also been prescribed,<sup>4</sup> and these must be annexed to and accompany the petition, whatever may be the form selected. These forms must always be observed and used, but the petitioner is allowed to make such alterations as may be necessary to suit the circumstances of his particular case.<sup>5</sup> Printed blanks are commonly used, and may

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<sup>1</sup> In re W. S. Walker, 1 B. R. 386; s. c. Lowell, 237; s. c. 1 L. T. B. 38; in re Goodfellow, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

<sup>2</sup> In re Little, 2 B. R. 294; s. c. 3 Ben. 25.

<sup>3</sup> Forms Nos. 1, 2 and 3.

<sup>4</sup> Form No. 1.

<sup>5</sup> Rule XXXIII.

usually be obtained from dealers in law stationery. The preparation of the petition is a work that requires both clerical and legal skill. The petition and the schedules must be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.<sup>1</sup> Abbreviations and interlineations are not absolutely prohibited, but, on the contrary, are clearly permitted. Their use, however, is confined to reference only. When that is their sole purpose they are allowed. It has, however been decided that dots can not be used to indicate anything which is necessary to be stated,<sup>2</sup> and the practice has ever since conformed to that decision, and all matters necessary to be inserted in the appropriate blanks, are written out in full. These must be written out in a legible manner, or the petition can not be filed.<sup>3</sup> The petition and the schedules must be prepared in duplicate, one for the court and the other for the register.<sup>4</sup> The petition and schedules should be on sheets of uniform size, so that they may be bound together at the termination of the proceedings.<sup>5</sup>

The petition itself should always contain those averments which are necessary to give the court jurisdiction, and should also set forth the petitioner's place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of the statute. It should be addressed to the judge of the judicial district in which the application is made, and the name of the judge must be correctly stated. Where the petitioner has resided or carried on business within the district for more than six months, the petition need not set forth the full time, but may simply aver that he has resided or carried on business within the district for six months. The object

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<sup>1</sup> Rule XIV.

<sup>2</sup> In re Orne, 1 B. R. 79; s. c. 1 Ben. 420.

<sup>3</sup> Anon. 1 B. R. 216; in re Robert Malcolm, 4 Law Rep. 488.

<sup>4</sup> Rule IV.

<sup>5</sup> Rule VII.

of the averment is to show that the court has jurisdiction in the premises, and the averment need only be such as is requisite for that purpose. The petition must also be accompanied by an oath, and both the petition and the oath must be signed by the petitioner. If the petitioner is a citizen of the United States, he must also take the oath of allegiance, which is usually incorporated in the oath to the petition.<sup>1</sup> The oath of allegiance, however, may be taken and filed after the petition has been filed, and before any proceedings have been had thereon, with the same effect as if annexed to the petition.<sup>2</sup> It is not necessary that there should be an averment that the petitioner is or is not a citizen of the United States,<sup>3</sup> but, if he is not a citizen, it is advisable to set that fact forth, in the oath to the petition.

The schedule of liabilities required to be annexed to the petition is called Schedule A, and consists of five separate divisions, by means of which the debts are divided into as many distinct classes. Each class is usually placed upon a separate sheet. When the matters belonging to any class require more than one sheet for their proper statement, the several sheets should be placed together so as to form a book, and not attached to each other so as to form a roll. Under the provisions of the statute and the rules, the petitioner was only required to use those forms which were necessary to set forth his affairs correctly;<sup>4</sup> but the rules of the various district courts now commonly require the use of all the separate divisions, whether there is anything to be stated under them or not. He may, however, use additional divisions and marks, whenever he deems it necessary, in order to set forth the condition of his affairs clearly and lucidly.<sup>5</sup> In Schedule A he must

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<sup>1</sup> Section 5018; Form No. 1.

<sup>2</sup> *U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

<sup>3</sup> *U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

<sup>4</sup> Rule XXXII; *Anon.* 1 B. R. 123.

<sup>5</sup> *In re Sallee*, 2 B. R. 228.

set forth a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact that it is not known, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral, or other security given for the payment of the same (§ 5015). The statement of the debts should be full and accurate, as the petitioner may not otherwise be able to obtain his discharge.<sup>1</sup> It has, however, been held that the omission of the name of a creditor may be made with his consent, where it is not fraudulent or injurious to others.<sup>2</sup> An omission that arises from mistake or inadvertence may be corrected at any time before the discharge is granted.<sup>3</sup> Debts that are barred by the statutes of limitation should be placed upon the schedule.<sup>4</sup>

A statement of the sum and date of the debts is sufficient, without a computation of the interest, for the exact amount can be ascertained at any stage of the proceedings by means of such a description.<sup>5</sup> If a note has been given or a judgment rendered on the debt, or if any person is liable with the petitioner as partner or joint contractor, the fact should be stated.<sup>6</sup> When the debt is due to a firm, the name of the firm, and not of the partners, should be given.<sup>7</sup> When a debt is due to a newspaper, the names of the proprietors should be given.<sup>8</sup>

<sup>1</sup> In re Redfield, 2 Ben. 72; in re John H. H. Cushman, 7 Ben. 482.

<sup>2</sup> In re Needham, 2 B. R. 387; s. c. Lowell, 309; s. c. 2 L. T. B. 39.

<sup>3</sup> Rule VII.

<sup>4</sup> In re Ray, 1 B. R. 203; s. c. 2 Ben. 53; in re Kingsley, 1 B. R. 329; s. c. Lowell, 216; in re Harden, 1 B. R. 395; s. c. 1 L. T. B. 48; in re John H. H. Cushman, 7 Ben. 482.

<sup>5</sup> In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321.

<sup>6</sup> In re Orne, 1 B. R. 79; s. c. 1 Ben. 420.

<sup>7</sup> Anon. 1 B. R. 123.

<sup>8</sup> Anon. 2 B. R. 141.

Whenever the petitioner states that the residence of a creditor is not known, he should show in the schedule, or in a separate affidavit, what efforts he has made to ascertain the present residence of the creditor. He must make efforts to ascertain it, and can not satisfy the law by reposing on the information at hand, and the belief which he may possess without making any efforts to ascertain such residence.<sup>1</sup>

In classifying the debts, the notes and instructions placed on each division of the forms should be carefully attended to. Thus, Schedule A—1 is expressly confined to those debts which are entitled to priority under the provision of the statute, and these consists only of debts due to the United States, and taxes and assessments under the laws thereof; debts due to the State in which the proceedings are instituted, and all taxes and assessments under the laws thereof; wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the publication of the notice of proceedings in bankruptcy; and all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference. Unless the debts are included within this enumeration, they should not be placed under that division. What are commonly known as secured debts should not be placed under this division, but should be put on Schedule A—2. This division is specially designed for those creditors who hold securities either by mortgage, pledge, lien, or collaterals. The securities must consist of the property of the petitioner. Hence the name of a creditor, who is merely, though fully, protected by an indorsement or some similar claim against a third party, for the debt should not be placed under this division. Schedule A—3 is designed for creditors whose claims are unsecured; that

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<sup>1</sup> In re Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

is, creditors who do not hold securities within the meaning of Schedule A—2. It is, moreover, intended only for those claims upon which the petitioner is liable as principal debtor, or which are not included in Schedule A—4 or Schedule A—5. Schedule A—4 is appropriated to liabilities upon notes or bills discounted, which ought to be paid by the drawers, makers, or acceptors; and Schedule A—5 to accommodation paper. If a liability clearly falls within any one division, it ought not to be placed under any other, for it is not the intention of the form that any debt should be scheduled more than once. It is apparent, however, that the excess above fifty dollars of wages due to an operative, clerk or house servant, should be placed upon Schedule A—2 or Schedule A—3, according to whether it is secured or unsecured. The oath to Schedule A should be placed after the sheets containing these five divisions.

The inventory of the property is called Schedule B. In the mode prescribed by this form, the petitioner must give an inventory of all his estate, both real and personal, assignable under the statute, describing the same, and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon (§ 5016). The property which is assignable under the statute consists of all the estate, real and personal, of the petitioner, with all his deeds, books and papers relating thereto (§ 5044); all property conveyed by the petitioner in fraud of creditors; all rights in equity, *choses in action*, patents and patent rights and copyrights; all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he has against any person arising from contract, or from the unlawful taking or detention, or of injury to his property, and all his rights of redeeming such property or estate (§ 5046). No property held by the petitioner in trust should be placed upon



the schedules (§ 5053). Property which is exempted under the statute should be described in the appropriate place and specially claimed.

The inventory in Schedule B should also include a claim for unliquidated damages,<sup>1</sup> money advanced as security for the fees of the register, marshal, and clerk,<sup>2</sup> a policy of insurance on his life for the benefit of his wife, whereon premiums have been paid by him after his insolvency,<sup>3</sup> a vested interest expectant upon the termination of a life estate,<sup>4</sup> interest under a will in an estate in expectancy,<sup>5</sup> growing crops,<sup>6</sup> property conveyed to him in fraud of the creditors of the grantor,<sup>7</sup> property conveyed by him in fraud of his creditors,<sup>8</sup> property in his possession that belongs to a firm of which he has been a member, and property held *de facto*, though by a defeasible title,<sup>9</sup> property conveyed to him in trust for the sole and separate use of his wife during his life, and after her death to be equally divided between him and her children,<sup>10</sup> and property conveyed by him in trust for the benefit of his creditors.<sup>11</sup> It need not include the right to a share of the net profits of a business conducted in his name, which is allowed as a compensation for his services,<sup>12</sup> money earned by his wife and invested in her name,<sup>13</sup> a *chose in action* which has been assigned in good faith and for a valuable consideration,<sup>14</sup> property held by a trustee for the benefit of his wife, wherein his equitable interest has been sold

<sup>1</sup> In re Orne, 1 B. R. 57; s. c. 1 Ben. 361.

<sup>2</sup> Anon. 1 B. R. 123.

<sup>3</sup> In re Erben, 2 B. R. 181.

<sup>4</sup> In re Bennett, 2 B. R. 181.

<sup>5</sup> In re Connell, 3 B. R. 443.

<sup>6</sup> In re Schumpert, 8 B. R. 415.

<sup>7</sup> In re O'Bannon, 2 B. R. 15.

<sup>8</sup> In re Hussman, 2 B. R. 437; s. c. 2 L. T. B. 53; Ashley v. Robinson, 29 Ala. 112.

<sup>9</sup> In re Beal, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.

<sup>10</sup> In re Myrick, 3 B. R. 154.

<sup>11</sup> In re Pierce & Holbrook, 3 B. R. 258.

<sup>12</sup> In re Beardsley, 1 B. R. 304; in re George Brown, 5 Law Rep. 121.

<sup>13</sup> In re Hummish, 2 B. R. 12.

<sup>14</sup> Valeptine v. Holloman, 63 N. C. 475.

under execution,<sup>1</sup> property vested in a receiver appointed by a State court,<sup>2</sup> property which has been duly assigned under the State insolvent laws when they were in force,<sup>3</sup> or a claim against a person for falsely recommending another as worthy of trust.<sup>4</sup> The statute has reference to some right or interest inherent in the bankrupt. Whatever that may be, however contingent or valueless, he must point it out. He is not permitted to exercise his own judgment as to its worth.<sup>5</sup> The separate items of the estate must be set forth.<sup>6</sup> It is not necessary, however, to give a perfect and complete exhibit of every article, but the schedule must be so explicit that the assignee can find the property if necessary.<sup>7</sup> The schedule of an individual partner need not enumerate the effects of his firm in detail.<sup>8</sup>

In claiming property as exempted in Schedule B—5, all property specifically exempted by the bankrupt law should be claimed under that statute. It is not necessary that every article of clothing shall be set out. The wearing apparel should be so set forth that the assignee can determine whether the debtor can claim it or not.<sup>9</sup> No property should be claimed as exempted under the State laws which is specifically designated as exempt under the bankrupt law.<sup>10</sup> Schedule B contains six general divisions, and twenty-six subordinate divisions, by means of which the petitioner's property is divided into as many different classes. The instructions contained in the form should be

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<sup>1</sup> In re Pomeroy, 2 B. R. 14 ; in re Hummitsh, 2 B. R. 12.

<sup>2</sup> In re Freeman, 4 B. R. 64 ; s. c. 4 Ben. 245.

<sup>3</sup> Day v. Bardwell, 3 B. R. 455 ; s. c. 97 Mass. 246.

<sup>4</sup> Crocket et al. v. Jewett, 2 B. R. 208 ; s. c. 2 Ben. 514 ; s. c. 2 L. T. B. 21.

<sup>5</sup> In re David H. Robertson, 1 N. Y. Leg. Obs. 20.

<sup>6</sup> In re Robert Malcolm, 4 Law Rep. 488 ; in re Horace Plimpton, 4 Law Rep. 488.

<sup>7</sup> In re Nicholas G. Norcross, 1 N. Y. Leg. Obs. 100 ; s. c. 5 Law Rep. 124.

<sup>8</sup> In re Robert Malcolm, 4 Law Rep. 488.

<sup>9</sup> In re W. D. Hill, 1 B. R. 16 ; s. c. 1 Ben. 321.

<sup>10</sup> In re Feely, 3 B. R. 66.

carefully attended to; and the classification of the different kinds of property should be made in the manner thus designated. The oath to Schedule B should be placed after the various sheets which make up Schedule B.

Whenever the petitioner omits to state, in the schedules, any of the facts required to be stated concerning his debts or his property, he must state, either in its appropriate place in the schedules, or in a separate affidavit, to be filed with the petition, the reason for the omission, with such particularity as will enable the court to determine whether to admit the schedules as sufficient, or to require the petitioner to make further efforts to complete the same according to the requirements of the law.<sup>1</sup> After the schedules have been completed, the petitioner must sign each separate division: and where any division consists of more than one sheet, he must sign each separate sheet. The petition, oaths, and schedules should then be fastened neatly and firmly together.

The oaths may be taken before the judge of the district court, or a register, or a commissioner of the circuit court (§ 5017), or a notary public.<sup>2</sup> The petition will be deemed to be sufficient, although the jurat does not specify the particular day on which the oath was taken, if it gives the month and the year.<sup>3</sup> The petition must have indorsed upon it a brief statement of its character.<sup>4</sup> The proceedings in bankruptcy may be conducted by the petitioner in person, on his own behalf, or by his attorney or counsellor, who must be duly authorized to practice in the circuit or district court. All papers offered by an attorney to be filed, must be indorsed with his name, place of residence, and business; and the same entries must be made upon the docket.<sup>5</sup> The petition need not be presented to the court simultaneously with its attestation. The lapse of a

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<sup>1</sup> Rule XXXIII.

<sup>3</sup> In re Chas. P. Houghton, 4 Law Rep. 482.

<sup>5</sup> Rule II.

<sup>2</sup> Act of Aug. 15, 1876.

<sup>4</sup> Rule I.

few days between the taking of the oath and the filing of the petition will not bar the proceedings.<sup>1</sup> At the time of filing the petition, the petitioner must deposit fifty dollars with the clerk as security for the fees of the register (§ 5124). He is also usually required to deposit fifteen dollars at the same time, as security for the fees of the clerk.<sup>2</sup> Parties can not conduct proceedings in *forma pauperis*, for the statute contemplates that they shall discharge all expenses incident to the prosecution of their application.<sup>3</sup>

As soon as the petition is filed, the clerk enters upon it the day, and the hour of the day, upon which it is filed. He also makes a similar note upon every subsequent paper filed with him, except such papers as have been previously filed with the register, and the papers in each case are kept in a file by themselves. The case is then entered in the docket, and numbered according to the order in which it has been filed, and the number of the case must be indorsed upon every paper. The docket must be so arranged that a brief memorandum of every proceeding in each case may be entered therein, in a manner convenient for reference, and is at all times open for public inspection. The clerk must also keep separate minute books for the record of proceedings in bankruptcy, in which he is required to enter a minute of all proceedings in each case, either of the court, or of a register of the court, under their respective dates.<sup>4</sup>

After the petition has been filed, and the proper entries made, it is referred to one of the registers in such manner as the district court directs.<sup>5</sup> There is nothing in the statute that requires the reference to be made to one register rather than another. All are equally officers of

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<sup>1</sup> In re Aaron Abrahams, 5 Law Rep. 328.

<sup>2</sup> Rule XXIX.

<sup>3</sup> In re Alexander Graves, 1 N. Y. Leg. Obs. 213; s. c. 3 Law Rep. 25.

<sup>4</sup> Rule I.

<sup>5</sup> Rule IV.

the court. The selection of a register is regulated entirely by the rules of the district courts; and usually the case is referred to the register for the congressional district in which the petitioner resides. The reference<sup>1</sup> designates the register, and names a day for the petitioner to appear before him. A copy of this order is sent by mail to the register, or delivered to him personally by the clerk or other officer of the court.<sup>2</sup> The requirement of the order is, that the petitioner shall appear on or before a certain day named therein. He may, therefore, appear at any time before the day named; but if he appears at any time subsequent to that day, he should file a written affidavit explaining the delay.<sup>3</sup> As soon as he appears before the register, he must furnish him with a copy of the petition and schedules.<sup>4</sup> This copy may be verified by his own affidavit, or certified by the clerk. After such copy has been filed, all the proceedings required by the statute must be had before the register, except such as are required by the statute, or by a special order of the district judge, to be had in the district court, unless some other register is directed to act in the case.<sup>5</sup> But for improper conduct, a case may be transferred from one register to another;<sup>6</sup> and any register of the court may act for any other register thereof (§ 5007).

From the time of his appearance before the register the petitioner is subject to the orders of the court in all matters relating to his bankruptcy; and may receive from the register a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.<sup>7</sup> The protection, however, is practically worthless, because the register has no power to enforce it.

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<sup>1</sup> Form No. 4.

<sup>2</sup> Rule IV.

<sup>3</sup> *In re Hatcher*, 1 B. R. 390.

<sup>4</sup> Rule IV.

<sup>5</sup> Rule IV.

<sup>6</sup> *In re J. O. Smith*, 1 B. R. 248; s. c. 2 Ben. 113.

<sup>7</sup> Rule IV.

The petitioner usually appears at the office of the register, but the judge of the district court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under the statute as may not be opposed (§ 5001). As there is, generally, no opposition, this power practically extends to all cases. The time when and the place where the register shall act upon the matters arising under the several cases referred to him, must be fixed by the special order of the district court, or by the register acting under the authority of a general order in each case made by the district court.<sup>1</sup> These are usually inserted in the order of reference.<sup>2</sup>

The debtor by filing his petition submits himself personally to the jurisdiction of the court, and becomes bound to obey its orders and directions in the matter of his petition as well before as after an adjudication. The mere filing of a petition in conformity with the statute constitutes him a bankrupt before the adjudication or any action on his petition by the court. This jurisdiction is exercised on the ground that other persons besides the debtor have an interest in the matter at this stage of the proceedings.<sup>3</sup> The creditors have an interest in them from the moment that the petition is filed. Consequently he can not dismiss his petition at his own pleasure, but must show good reasons for doing so. The court may grant the liberty on terms, or refuse it altogether, as justice may require, for it is ordinarily a matter of sound discretion.<sup>4</sup> If good reasons are shown, he may, however, be allowed to dismiss his petition before adjudication,<sup>5</sup> as, for instance, if he effects a compromise with his creditors.<sup>6</sup> On the

<sup>1</sup> Rule V.

<sup>2</sup> Form No. 4.

<sup>3</sup> *In re Samuel Harris*, 3 N. Y. Leg. Obs. 152.

<sup>4</sup> *In re Samuel Harris*, 3 N. Y. Leg. Obs. 152; *in re Randall & Reed*, 5 Law Rep. 115; s. c. 1 N. Y. Leg. Obs. 199.

<sup>5</sup> *In re Randall & Reed*, 5 Law Rep. 115; s. c. 1 N. Y. Leg. Obs. 199; *in re John Gile*, 1 N. Y. Leg. Obs. 87; s. c. 5 Law Rep. 224; *in re Dudley*, 1 Penn. L. J. 302; *in re Anon.* 1 Penn. L. J. 323; *in re Bennett*, 1 Penn. L. J. 145.

<sup>6</sup> *In re Randall & Reed*, 5 Law Rep. 115; s. c. 1 N. Y. Leg. Obs. 199.

other hand, if he does not choose to proceed with the petition, but allows it to remain in suspense, the creditors may intervene by a motion for an adjudication, or for any other matter necessary for the protection of their rights.<sup>1</sup>

As soon as a copy of the petition and schedules is filed, the petitioner should be adjudged bankrupt. This adjudication<sup>2</sup> may be made by the register (§ 4998) or by the court, but the register has no power to hear a disputed adjudication.<sup>3</sup> The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The statute contemplates that voluntary petitions may sometimes be contested. But it is not the intent of the statute that the district court shall inquire whether the petitioner is insolvent or not. When a debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy. His act is for the benefit of all persons interested, and can not be retracted on the application of only one of them, either with or without the debtor's consent.<sup>4</sup> Generally, there is no opposing party, and the register passes the order of adjudication. This order should not be postponed until the register has examined the petition and schedules, and certified to their correctness.<sup>5</sup> No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes three hundred dollars.<sup>6</sup> The adjudication is merely a certificate or order, made by an authorized officer, to the effect that the petitioner has become a bankrupt—a judicial finding of the fact that an act of bankruptcy was committed at some period prior to the time it is made.<sup>7</sup> It is made *ex parte*, without notice

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<sup>1</sup> In re Samuel Harris, 3 N. Y. Leg. Obs. 152.

<sup>2</sup> Form No. 5.

<sup>3</sup> Section 4999; Rule V.

<sup>4</sup> In re James L. Fowler, 1 B. R. 681; s. c. Lowell, 161.

<sup>5</sup> In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508.

<sup>6</sup> In re James L. Fowler, 1 B. R. 681; s. c. Lowell, 161.

<sup>7</sup> In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508.

to creditors, and is entirely under the control of the court, in a case where it is shown that it ought not to be made. It is conclusive upon the insolvency of the petitioner, his willingness to surrender his property, and his desire to take the benefit of the statute;<sup>1</sup> but it is not conclusive upon any other fact which goes to defeat the jurisdiction of the court.<sup>2</sup>

It is the duty of the register to examine the petition and schedules, and to certify whether the same are correct in form, or if deficient, in what respect they are so.<sup>3</sup> If they are found correct, a certificate to that effect is usually indorsed upon them, and a memorandum thereof is duly forwarded to the clerk. But this certificate is not conclusive. If defects are subsequently discovered, an amendment may be ordered.<sup>4</sup>

If, however, they are found deficient, then they must be amended. A register may order an amendment,<sup>5</sup> either of his own motion,<sup>6</sup> or upon the suggestion of a creditor.<sup>7</sup> Amendments may be made at any time prior to the discharge of the bankrupt.<sup>8</sup> The court also has a co-ordinate power of ordering or allowing amendments. The order directing an amendment ought to specify particularly the points in which the petition and schedules are deficient.<sup>9</sup> If the petitioner is of the opinion that his petition and schedules are correct, he may have the point adjourned into court, for in all matters where an issue of fact or law is raised, and contested by any party to the proceedings, it is the duty of the register to cause the question or issue to be stated in writing, and he must ad-

<sup>1</sup> In re James L. Fowler, 1 B. R. 681; s. c. Lowell, 161.

<sup>2</sup> In re Goodfellow, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

<sup>3</sup> Rule VII.

<sup>4</sup> In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321.

<sup>5</sup> Rule V.

<sup>6</sup> In re Orne, 1 B. R. 79; s. c. 1 Ben. 420.

<sup>7</sup> In re Jones, 2 B. R. 59.

<sup>8</sup> Rule VII.

<sup>9</sup> In re Orne, 1 B. R. 79; s. c. 1 Ben. 420; in re Horace Plimpton, 4 Law Rep. 488.



journal the same into court for decision by the judge.<sup>1</sup> 'The ground of the objection should be stated, otherwise no point or question or issue is raised.'<sup>2</sup> It is the duty of the register to adjourn the issue into court without any request to that effect. But the adjournment is a proceeding that may be waived, and a party who waives it by submitting the issue to the decision of the register, can not ask to have it adjourned after he finds that the point is decided against him.<sup>3</sup>

On the other hand, the petitioner, after a careful examination of the petition and schedules, may come to the conclusion that they are defective, or may find that he has omitted something by mistake or inadvertence. In such case he may apply to the register for leave to amend.<sup>4</sup> The application must state, under oath, the substance of the matters proposed to be included in the amendment, and the reasons why the same were not incorporated in the schedules as originally filed; or, if there has been an amendment, as previously amended.<sup>5</sup> Such statement must show a proper cause for allowing the amendment.<sup>6</sup> This application is *ex parte*, and no notice thereof need be given to any creditor, nor has any creditor the right to oppose it.<sup>7</sup> The register may refuse to allow the amendment,<sup>8</sup> and in such case the petitioner has the same right to have the issue adjourned into court, as when he is ordered to make an amendment.<sup>9</sup>

Whenever amendments are allowed or ordered, they must be written and signed by the petitioner on a sepa-

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<sup>1</sup> Section 5009; Rule XI.

<sup>2</sup> In re Levy et al. 1 B. R. 136; s. c. 1 Ben. 496.

<sup>3</sup> In re Patterson, 1 B. R. 100; s. c. 1 Ben. 448.

<sup>4</sup> In re Morford, 1 B. R. 211; s. c. 1 Ben. 264.

<sup>5</sup> Rule XXXIII.

<sup>6</sup> Rule VII.

<sup>7</sup> In re Watts, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74; in re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213.

<sup>8</sup> In re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213.

<sup>9</sup> In re Watts, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.

rate paper in the same manner as the original schedules were signed and verified; and, if the amendments are made to different schedules, the amendment to each schedule must be made separately, with proper reference to the schedules proposed to be amended, and each amendment must be verified by the oath of the petitioner in the same manner as the original schedules.<sup>1</sup> The purport of this requirement is that where an amendment, or several amendments, are made to the same schedule, only the oath appropriate to that schedule need be used; but where the amendments are to different schedules, both oaths must be used. Of course the oaths must be modified to suit the circumstances of the amendments,<sup>2</sup> for the petitioner can not swear that the amendments contain all his liabilities, or all his property.

The title to the property remains in the debtor until an assignee is appointed and qualified, and an assignment made to him.<sup>3</sup> The bankrupt is also made responsible for the care, custody and delivery of the property to the assignee (§ 5110); but he can not sell any of it without authority from the court.<sup>4</sup>

If the property is likely to be sacrificed or injured by a hostile claimant, or a sale under an execution, he can and should apply to the court for an injunction, or take other proper measures to protect it.<sup>5</sup> On the application of any creditor, and on good cause shown by affidavit, the court may order the property to be taken possession of by the marshal, directions for which may be inserted in the original warrant or in a special warrant to be issued for that purpose.<sup>6</sup>

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<sup>1</sup> Rule XIV.

<sup>2</sup> Rule XXXII.

<sup>3</sup> *Hampton v. Rouse*, 11 B. R. 472; s. c. 22 Wall. 263; *Sutherland v. Davis*, 10 B. R. 424; s. c. 42 Ind. 26.

<sup>4</sup> *In re Richard Pryor*, 4 Biss. 262.

<sup>5</sup> *Jones v. Leach et al.* 1 B. R. 595; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433.

<sup>6</sup> Rule XIII.

The next step in the proceedings is to issue the warrant.<sup>1</sup> This may be issued by the judge or the register (§ 5019). As there is not generally any opposing party, it is usually issued by the register having charge of the case. This must issue out of the court, under the seal thereof, and be tested by the clerk. Blanks, with the signature of the clerk and seal of the court, will upon application, be furnished to the registers.<sup>2</sup> The warrant must be signed by the judge or register as the case may be, and directed to the marshal of the district, authorizing him as messenger to publish notices in such newspapers as he may select, not exceeding two,<sup>3</sup> to serve written or printed notices, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any person concerned as the warrant specifies (§ 5019); but whenever the creditors are so numerous as to make any notice to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.<sup>4</sup>

The register has the power to give the requisite directions for notices and advertisements<sup>5</sup> in those cases where the court may select the newspapers. The newspapers are generally designated by the rules of the court, and, where such is the case, the register can not substitute other papers for those thus designated; but in the exercise of a wise discretion, he may add to them other papers not published in the district.<sup>6</sup> This power is exercised

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<sup>1</sup> Form No. 6.

<sup>2</sup> Rule II.

<sup>3</sup> Act of 22 June, 1874, § 5.

<sup>4</sup> Act of 22 June, 1874, § 5.

<sup>5</sup> Rule V.

<sup>6</sup> In re J. H. Robinson, 1 B. R. 8; s. c. 1 Ben. 270.

rarely, and only in cases where a large number of the creditors reside in some other district. A complete list of the creditors, with their respective places of residence, and the amount of their debts, must be inserted in the warrant.<sup>1</sup> This is an essential part of it, and must be prepared by the register himself. There is no authority in the law for calling upon the bankrupt to furnish it. It is the duty of the register to issue the warrant, and that is not complete without it.

The time and place where the first meeting of creditors will be held must be designated in the warrant, and the time must be not less than ten, nor more than ninety, days after the issuing of the same (§ 5032). The fixing of this time is a matter resting entirely in the discretion of the register.<sup>2</sup> The interval should be neither too brief, nor too long; but should be sufficient to enable the marshal to serve and publish the notices properly. If the time is too brief, the service of the warrant may be defective. Twenty days will usually be found ample. If it is desired that personal service should be made upon any creditors, special directions to that effect should be inserted. If personal service is not desired, the register should omit the word "personal," and direct the service to be made by mail only.<sup>3</sup> The issuing of the warrant, the certificate of correctness, and the order of adjudication, are all generally made and performed on the same day; and one memorandum only is sent to the clerk, of the whole proceeding. This memorandum should state the day appointed for the meeting of the creditors.

As soon as the warrant is completed, it should be placed in the hands of the marshal. The fees of this officer must be paid or secured before he can be compelled to perform the duties required of him.<sup>4</sup> This is usually

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<sup>1</sup> In re Hall, 2 B. R. 192.

<sup>2</sup> In re Heys, 1 B. R. 21; s. c. 1 Ben. 333; s. c. 36 How. Pr. 249.

<sup>3</sup> Anon. 1 B. R. 216.

<sup>4</sup> Rule XXIX.

done by making a deposit with him, varying from fifteen to thirty dollars, according to the number of creditors. When his fees are properly secured, it is his duty to publish and serve the notices, as required by the warrant. Both the notice to be published and the notice to be served upon the creditors, should state that a warrant in bankruptcy has been issued against the estate of the debtor; that the payment of any debts, and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him, are forbidden by law; and that a meeting of the creditors of the debtor to prove their debts, and choose one or more assignees, will be held at a court of bankruptcy, to be holden at a certain time and place designated therein.<sup>1</sup> These notices should follow the exact language of the warrant, but an immaterial variance will be disregarded.<sup>2</sup> The omission to publish the notice in one of the newspapers designated by the warrant, will make the proceedings defective, irregular, and voidable.<sup>3</sup> The publication must be made twice in each newspaper.<sup>4</sup> The notices to be served upon the creditors are usually printed. Each notice should contain a complete list of all the names of the creditors, together with their respective places of residence, and the amounts of their respective debts.<sup>5</sup> This seems to be the plain requirement of the statute (§ 5032), the rules,<sup>6</sup> and the form.<sup>7</sup> It is sufficient if the notice contains the names, residence, and the amount of the debts (in figures) due the several creditors, so far as known, and no more.<sup>8</sup> This notice should be served upon foreign creditors, as well as on those who reside in the United States.<sup>9</sup>

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<sup>1</sup> Section 5032 ; Form No. 6.

<sup>2</sup> In re Pulver, 1 B. R. 46 ; s. c. 1 Ben. 381 ; in re W. D. Hill, 1 B. R. 16 ; s. c. 1 Ben. 321.

<sup>3</sup> In re Hall, 2 B. R. 192.

<sup>4</sup> Form No. 6.

<sup>5</sup> In re Jones, 2 B. R. 59 ; in re Perry, 1 B. R. 220 ; s. c. 1 L. T. B. 4 ; in re Hall, 2 B. R. 192.

<sup>6</sup> Rule XIII.

<sup>7</sup> Form No. 6.

<sup>8</sup> Rule XIII.

<sup>9</sup> In re Heys, 1 B. R. 21 ; s. c. 1 Ben. 333 ; s. c. 36 How. Pr. 249.

It should also, as has been before stated, be served on all creditors whose names may be handed to the marshal, in addition to those contained in the schedules (§ 5019). Every envelope containing a notice must have printed on it a direction to the postmaster at the place to which it is sent, to return the same within ten days, unless called for.<sup>1</sup> This direction is generally printed upon the back of the notice, and no envelope is used.

In cases of voluntary bankruptcy, the marshal may appoint special deputies, to act as he may designate, in one or more cases, as messengers for the purpose of causing the notices to be published and served as required by the statute, and for no other purpose.<sup>2</sup> And the word "marshal" includes the marshal's deputies; and the word "messenger" includes his assistant or assistants (§ 5013), wherever they are used in the statute. Where a notice has been duly mailed, the fact that the creditor did not receive it will not affect the regularity of the proceedings.<sup>3</sup> A notice not addressed to a creditor by his name, does not amount to a notice;<sup>4</sup> but an immaterial variance will be disregarded. The publication and the service of the notices must be completed before the commencement of the period of ten days immediately preceding the return day of the warrant.<sup>5</sup>

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<sup>1</sup> Rule XXIII.

<sup>2</sup> Rule XIII.

<sup>3</sup> *In re Stetson*, 3 B. R. 726; s. c. 4 Ben. 127.

<sup>4</sup> *Anon.* 1 B. R. 123.

<sup>5</sup> *In re Develin et al.* 1 B. R. 35; s. c. 1 Ben. 335; *in re Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.

## CHAPTER II.

### COMMENCEMENT OF PROCEEDINGS IN INVOLUNTARY BANKRUPTCY.

IN order to institute proceedings in involuntary bankruptcy, the debts of the petitioning creditors must constitute at least one-fourth in number, and one third in value of all the provable debts of the party against whom the proceedings are commenced. Subject to this requirement, the proceedings may be instituted by one creditor alone, or by several creditors jointly.<sup>1</sup> The debts held by the persons who institute such proceedings, must be debts provable under the bankrupt law. They need not be due.<sup>2</sup> It is not necessary that they should have been in existence at the time the alleged act of bankruptcy was committed.<sup>3</sup> They may be secured debts,<sup>4</sup> or be a fixed liability as an indorser,<sup>5</sup> or a partnership debt, where the proceeding is against one partner alone.<sup>6</sup> When the proceedings are against partners, it is clear that they must consist of partnership debts; but they must, under all circumstances,

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<sup>1</sup> Act of 22 June, 1874, § 12.

<sup>2</sup> *Linn et al. v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 229; s. c. 3 L. T. B. 218; in re *Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47; in re *W. B. Alexander*, 4 B. R. 178; s. c. *Lowell*, 470; s. c. 2 L. T. B. 238; in re *Samuel King*, 1 N. Y. Leg. Obs. 276; in re *Tower*, 1 N. Y. Leg. Obs. 8; s. c. 5 Law Rep. 214; 1 Penn. L. J. 209.

<sup>3</sup> *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204.

<sup>4</sup> In re *Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126; *Rankin & Pullan v. Florida, Atlantic & G. C. R. R. Co.* 1 B. R. 647; s. c. 1 L. T. B. 85; in re *Stansell*, 6 B. R. 183; in re *Daniel Sheehan*, 8 B. R. 345; *Ecfort v. Greely*, 6 B. R. 433; in re *California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240; in re *W. B. Alexander*, 4 B. R. 178; s. c. *Lowell*, 470; s. c. 2 L. T. B. 238; in re *Hugo Broich*, 15 B. R. 11; contra, in re *Jacob Frost*, 11 B. R. 69; s. c. 6 Biss. 213; in re *Johann*, 3 B. R. 144; s. c. 4 B. R. 434; s. c. 2 Biss. 139; s. c. 2 L. T. B. 92; in re *Green Pond R. R. Co.* 13 B. R. 118.

<sup>5</sup> In re *Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140.

<sup>6</sup> In re *Melick*, 4 B. R. 97.

be provable debts. A debt so purely contingent that it may never become a real debt, will not be sufficient.<sup>1</sup> A debt which is secured by the property of some third person is sufficient.<sup>2</sup> The debt must also be one that can be enforced, and must not be barred by the statute of limitations.<sup>3</sup> If the creditor has received a preference, he may make a voluntary surrender of it, and prosecute his petition upon his original debt;<sup>4</sup> but without such a surrender he can not maintain a petition.<sup>5</sup>

In computing the number of creditors who must join in a petition, creditors whose debts do not exceed two hundred and fifty dollars are not reckoned. But if there are no creditors whose debts exceed the sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, creditors having debts of a less amount are reckoned.<sup>6</sup> The creditors have the right to elect to obtain one-fourth in number of the chief creditors, or one-fourth of all the creditors without regard to the amount of their respective debts, provided that one-third in amount of all the debts is represented in the petition.<sup>7</sup> It is not necessary that the chief creditors shall be requested to sign and refuse before the minor creditors can join in the petition, for a failure to sign may arise from any cause, such as sickness, or absence, and is plainly shown by not signing. The intent of the statute is that the petitioning creditors shall represent the requisite proportion of all the creditors, or, if more convenient in any particular case, of the larger creditors. The joining of a due proportion of all the creditors is therefore sufficient,

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<sup>1</sup> *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.

<sup>2</sup> *In re W. B. Alexander*, 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *Fox v. Eckstein*, 4 B. R. 373.

<sup>3</sup> *In re Cornwall*, 4 B. R. 400; s. c. 6 B. R. 305; s. c. 9 Blatch. 114.

<sup>4</sup> *In re Hunt & Hornell*, 5 B. R. 433; *in re Marcer*, 6 B. R. 351.

<sup>5</sup> *In re Peter Rado*, 6 Ben. 230.

<sup>6</sup> Act of 22 June, 1874, ch. 390, § 12; 18 Stat. 180.

<sup>7</sup> *In re J. R. Currier*, 13 B. R. 68; *in re Robert L. Hall*, 15 B. R. 31; *in re Wm. M. Lloyd*, 15 B. R. 257.



and the failure of the larger creditors to join constitutes no defense.<sup>1</sup> If the chief creditors join in the petition, the minor creditors are not to be counted in estimating the number, but if they do not join then the minor creditors may be counted, in order to obtain the necessary number.<sup>2</sup> In computing the value, the aggregate of the debts of the petitioning creditors must be equal to one-third of all the debts, irrespective of amount, for the minor creditors are only excluded in certain cases in estimating the proportion in number who must join in the petition.<sup>3</sup> If the debtor is a member of a firm, one-fourth in number of all his creditors, both individual and partnership, must unite in the petition, and the aggregate of their debts must amount to at least one-third of all the debts both partnership and individual.<sup>4</sup> The debt of a creditor who has issued an attachment within four months before the filing of the petition cannot be counted in computing the number and amount.<sup>5</sup>

The amount at which the debt of a secured creditor is to be reckoned is merely the balance that remains after deducting the value of the security.<sup>6</sup> The debt of a creditor who has received a preference is not counted in computing either the number of creditors or the value of the debts,<sup>7</sup> nor will a surrender of the preference to the debtor render the debt provable so that it may be

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<sup>1</sup> In re J. R. Currier, 13 B. R. 68.

<sup>2</sup> In re Woodford & Chamberlain, 13 B. R. 575; in re J. R. Currier, 13 B. R. 68; in re John B. Bergeron, 12 B. R. 385; in re Reiman & Friedlander, 11 B. R. 21; s. c. 7 Ben. 455; s. c. 13 B. R. 128; s. c. 12 Blatch. 562; in re Philadelphia Axle Works, 1 W. N. 126.

<sup>3</sup> In re Joseph S. Hadley, 12 B. R. 366; in re John B. Bergeron, 12 B. R. 385; in re J. R. Currier, 13 B. R. 68; in re Woodford & Chamberlain, 13 B. R. 575; in re Hugo Broich, 15 B. R. 11; in re Wm. M. Lloyd, 15 B. R. 257; contra, in re Hynes, 10 B. R. 433; s. c. 7 Ben. 427.

<sup>4</sup> In re Wm. M. Lloyd, 15 B. R. 257.

<sup>5</sup> In re C. G. Scrafford, 14 B. R. 184; s. c. 15 B. R. 104; contra, in re Hugo Broich, 15 B. R. 11.

<sup>6</sup> In re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240; in re Stansell, 6 B. R. 183; in re W. B. Alexander, 4 B. R. 178; s. c. Lowell, 470; 2 L. T. B. 238; Eckfort v. Greely, 6 B. R. 433; in re Daniel Sheehan, 8 B. R. 345.

<sup>7</sup> In re M. C. Israel, 12 B. R. 204; s. c. 3 Dillon, 511; Clinton v. Mayo, 12 B. R. 39; in re J. R. Currier, 13 B. R. 68.

counted.<sup>1</sup> A creditor may purchase claims against the debtor in good faith, and thus enable himself to unite in the petition.<sup>2</sup>

Any person residing and owing debts, as required in a case of voluntary bankruptcy, may be subjected to proceedings in involuntary bankruptcy.<sup>3</sup> The term person includes corporations (§§ 5122, 5013), and the provisions of the act are extended to partnerships (§ 5121). The same proportion of creditors must join in a proceeding to put a corporation into bankruptcy as is required in the case of an individual.<sup>4</sup> The remarks that have already been made in regard to the amount and character of the debts, and the residence within the jurisdiction of the United States, apply equally to proceedings in involuntary bankruptcy.

To warrant or justify the institution of such proceedings, the debtor must have done, or allowed to be done, something which the statute defines to be an act of bankruptcy. The statute was not intended to cover all cases of insolvency.<sup>5</sup> It makes a discrimination between voluntary bankruptcy and involuntary bankruptcy. The debtor upon filing a voluntary petition setting forth his inability to pay his debts and his willingness to surrender all his estate, is declared a bankrupt by the court. The allegation can not be traversed, nor is any issue or inquiry as to its truth permitted. But while the debtor may on this broad basis call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which are

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<sup>1</sup> In re J. R. Currier, 13 B. R. 68.

<sup>2</sup> In re J. A. & H. W. Shouse, Crabbe, 482; in re Woodford & Chamberlain, 13 B. R. 575.

<sup>3</sup> Act of 22 June, 1874, § 12; in re Nickodemus, 3 B. R. 230; s. c. 1 L. T. B. 140.

<sup>4</sup> In re Leavenworth Savings Bank, 14 B. R. 82, 92; in re Detroit Car Works, 14 B. R. 243; in re Oregon B. & P. Co. 13 B. R. 199; s. c. 14 B. R. 405; s. c. 3 Saw. 614.

<sup>5</sup> Wilson v. City Bank, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 17 Wall. 473; s. c. 1 Dillon, 476; Dean v. Compton & Doan, 2 B. R. 607.

essential to his right to appeal to the court. The reason for this wide difference in the proceedings in the two cases is obvious enough. When a man is himself willing to refer his embarrassed condition to the proper court, with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues. But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, the precise circumstances on which he is authorized to do this should be well defined in the law.<sup>1</sup> An act of bankruptcy is accordingly the special creature of statute law, and nothing is an act of bankruptcy unless it is expressly made so by the statute itself.

No person commits an act of bankruptcy unless he departs from the State, district, or territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, with such intent remains absent; or conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under the statute; or conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or is arrested and held in custody under or by virtue of *mesne* process or execution, issued out of any court of the United States or of any State, district, or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under the statute, and for a sum exceeding one hundred dollars, and such process remains in force and is not discharged by payment, or in any other manner provided by the law of the United

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<sup>1</sup> *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 17 Wall. 473; s. c. 1 Dillon, 476.

States or of such State, district, or territory applicable thereto, for a period of twenty days; or is actually imprisoned for more than twenty days in a civil action, founded on contract, for the sum of one hundred dollars or upward; or, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money, or other property, estate, rights, or credits, or confesses judgment, or gives any warrant to confess judgment, or procures his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of the statute, or being a bank, banker, broker, merchant, trader, manufacturer, or miner, fraudulently stops payment, or being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended, and not resumed payment within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or being a bank or banker, fails for forty days to pay any depositor upon demand of payment lawfully made.<sup>1</sup>

These are the only acts committed by a debtor that are acts of bankruptcy. Unless the act complained of by the creditor comes within this enumeration, it is not an act of bankruptcy, and can not be made the ground for instituting involuntary proceedings. If, however, the act is one of those enumerated, and the debtor is subject, under the statute, to proceedings in bankruptcy, then any creditor or creditors who may be a party or parties to such proceedings may apply to have him declared a bankrupt, provided that the application is made within six months after it was committed, and the requisite number join in the petition.

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<sup>1</sup> Act of 22 June, 1874, § 12.

This application must be by a petition in the prescribed form,<sup>1</sup> printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.<sup>2</sup> This petition should set forth all those matters that are requisite to give jurisdiction to the court over the case, especially that the act of bankruptcy was committed within the period of six months, and must be addressed to the judge of the district court of the United States in which it is to be filed. The name of the judge must be correctly given, or it can not be filed.<sup>3</sup> It should set forth the names and residences of both the creditor and debtor. It must also describe the debt of the petitioning creditor sufficiently to show that it is provable.<sup>4</sup> Where the debt consists of a note, a copy thereof may be inserted. Not unfrequently the note, bond, account, agreement, or whatever else may happen to constitute the basis of the creditor's claim, is annexed to the petition as an exhibit, and a proper reference to it is made in that part of the petition which is designed to describe the debt. The petition must also affirmatively show that the requisite number of creditors have united therein. This allegation need not necessarily be so positive that the petitioner can be prosecuted for perjury on it, but it may be made on information and belief,<sup>5</sup> or on belief merely, without charging either knowledge or information.<sup>6</sup>

The allegations in regard to the act of bankruptcy must be positive and unqualified. There is nothing in the statute or rules or forms or the nature of the proceedings which requires that the allegations should be made on the

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<sup>1</sup> Form No. 54.

<sup>2</sup> Rule XIV.

<sup>3</sup> Anon. 1 B. R. 216.

<sup>4</sup> In re Redmond & Martin, 9 B. R. 408 ; in re Joseph S. Hadley, 12 B. R. 366.

<sup>5</sup> In re J. Young Scammon, 10 B. R. 66 ; s. c. 6 Biss. 130 ; in re Isaac Scull, 10 B. R. 165 ; s. c. 7 Ben. 371 ; Warren Savings Bank v. Palmer, 10 B. R. 239 ; in re James R. Keeler, 10 B. R. 419.

<sup>6</sup> In re Henry A. Mann, 14 B. R. 572 ; s. c. 13 Blatch. 401 ; s. c. 51 How. Pr. 174.

personal knowledge of the petitioner. The petition must be made by the creditor generally, and in most instances can only be made upon information and belief.<sup>1</sup> The allegations, however, should be positive, and the information and belief set forth only in the affidavit to the petition. It has accordingly been held, in a case where the petition was filed by a firm, that an averment upon the information and belief of only the partner who executed the papers was insufficient.<sup>2</sup>

The petition should also state facts with certainty and detail, so as to inform the debtor of what he must meet and resist. The various statements of acts of bankruptcy given in Form No. 54, are mere outlines or skeleton statements to be filled in with the particular circumstances of each case.<sup>3</sup> Thus, where the act charged is a suspension of commercial paper, the allegation should state as nearly as possible the date of the paper of which the payment has been suspended, to whom made, for what amount, when payable, whether the debtor is liable thereon as maker or indorser, and by whom the same was held when payment was neglected or refused.<sup>4</sup> But if the description is sufficient to identify the paper, it will not be deemed defective although the date is not given.<sup>5</sup> Where the act charged is a fraudulent stopping of payment of commercial paper, the petition need not set forth the facts that constitute the fraud.<sup>6</sup> Where the proceedings are instituted against a partnership, the allegations should set forth an act of bankruptcy on the part of the firm. An averment of an act of bankruptcy on the part of one of the members is

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<sup>1</sup> *In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

<sup>2</sup> *Orem & Son v. Harley*, 3-B. R. 263.

<sup>3</sup> *In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.

<sup>4</sup> *In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.

<sup>5</sup> *In re Joseph S. Hadley*, 12 B. R. 366.

<sup>6</sup> *In re Joseph S. Hadley*, 12 B. R. 366.

not sufficient.<sup>1</sup> Where the alleged act of bankruptcy on the part of a firm consists in the transfer of property, the allegations should charge that the property so transferred belonged to the partnership.<sup>2</sup>

When several acts of bankruptcy are charged in the same petition, they should be alleged conjunctively.<sup>3</sup> This rule will apply not only to those cases where the acts charged are declared to be acts of bankruptcy by different clauses of the statute, but also to those cases where the acts charged are different from each other in their nature, but are declared to be acts of bankruptcy by the same clause. It will also apply to a case where the same act may be an act of bankruptcy under different clauses, according to the intention of the party who committed it. Thus, an assignment may be made to defraud creditors, and to defeat the operation of the bankrupt law. In all such cases a description of the act complained of may be set forth only once in the petition, and the various intents alleged conjunctively.<sup>4</sup> It has, however, never been decided that, where the act is charged only under one clause containing several intents, the several intents may not be averred disjunctively in the very language of the statute. There is no express decision upon this point, and in numerous cases they are alleged conjunctively.<sup>5</sup> It has been said, however, that an averment in regard to a fraudulent conveyance may charge that it was made by the debtor "with intent to defraud or hinder his creditors," though this point does not seem to have been directly before the court.<sup>6</sup> When the act of bankruptcy consists in procuring property to be taken on execution issued upon a judgment confessed under a warrant of attorney, the

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<sup>1</sup> In re Waite & Crocker, 1 B. R. 373; s. c. Lowell, 207; in re Redmond & Martin, 9 B. R. 408.

<sup>2</sup> In re Williams & Co. 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.

<sup>3</sup> In re Drummond, 1 B. R. 231; s. c. 1 L. T. B. 7.

<sup>4</sup> In re S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.

<sup>5</sup> Irving v. Hughes, 2 B. R. 62; s. c. 7 A. L. Reg. 209.

<sup>6</sup> In re Nickodemus, 3 B. R. 280; s. c. 1 L. T. B. 140.

petition should aver that the property was taken on the day of the levy, and not on the day of the giving of the warrant of attorney.<sup>1</sup> If the alleged act of bankruptcy consists of a fraudulent conveyance, no averment of the insolvency of the debtor is necessary.<sup>2</sup>

When the act charged is a preference or a conveyance made with the intent to defeat or delay the operation of the bankrupt law, the petition should aver that the debtor at the time of the transfer was bankrupt or insolvent, or in contemplation of bankruptcy or insolvency.<sup>3</sup> The meaning of these terms should be carefully considered, and only those should be selected and used which apply to the facts in the case. Insolvency means an inability to pay debts in the ordinary course of business.<sup>4</sup> Bankruptcy means a legal *status* to be ascertained and declared by judicial decree.<sup>5</sup> In contemplation of bankruptcy means in contemplation of committing what is made by the statute an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt.<sup>6</sup> In contemplation of insolvency means in contemplation of not being, or not continuing to be, able to pay debts in the ordinary course of business as they mature.<sup>7</sup> When the facts merely show insolvency, or contemplation of insolvency, an averment that the debtor was in contemplation of bankruptcy would not be sufficient;<sup>8</sup> nor would an averment that the debtor was in contemplation of bankruptcy and insolvency be correct.<sup>9</sup> An allegation that the debtor was insolvent or in contemplation of bankruptcy is insufficient, on account of its

<sup>1</sup> In re Diblee et al. 2 B. R. 617; s. c. 3 Ben. 283.

<sup>2</sup> In re Randall & Sunderland, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; in re Nickodemus, 3 B. R. 230; s. c. 1 L. T. B. 140.

<sup>3</sup> In re Craft, 1 B. R. 378; s. c. 2 Ben. 214.

<sup>4</sup> Toof v. Martin, 6 B. R. 49; s. c. 13 Wall. 40.

<sup>5</sup> In re Black & Secor, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39.

<sup>6</sup> In re Craft, 1 B. R. 378; s. c. 2 Ben. 214.

<sup>7</sup> In re Diblee et al. 2 B. R. 617; s. c. 3 Ben. 283.

<sup>8</sup> In re Craft, 1 B. R. 378; s. c. 2 Ben. 214.

<sup>9</sup> In re Haughton, 1 B. R. 460.



uncertainty.<sup>1</sup> The allegation may, however, be that he was "insolvent or in contemplation of insolvency,"<sup>2</sup> and this is the safest, and the one that is usually made. Where the act of bankruptcy consists of a preference, the petition should state the name of the preferred creditor, but need not allege that the preference was in fraud of the provisions of the bankrupt law.<sup>3</sup>

When the petition is completed, it must be subscribed and sworn to by the petitioning creditor or creditors. The petition may be sufficiently verified by the oaths of the first five signers, if there are so many.<sup>4</sup> If there are five or less signers, all must verify the petition by oath; but if there are more than five signers, it is sufficient if the first five of them so verify it.<sup>5</sup> It will thus be seen that there may be more signers than those who verify the petition, and that all those who are petitioners must sign the petition.<sup>6</sup> Where several petitioners join in separate and distinct rights, it is necessary that there should be a verification by or on behalf of each petitioner.<sup>7</sup> If they join in the same right, a verification by one is sufficient.<sup>8</sup> A partner may execute the papers on behalf of his firm.<sup>9</sup> If any of the first five signers do not reside in the district in which it is to be filed, it may be signed and verified by the attorney or agent of such signers.<sup>10</sup> This phraseology is peculiar, but it seems to be the design of the statute to allow all creditors who are absent from the district to sign

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<sup>1</sup> In re John R. Hanibel, 15 B. R. 233.

<sup>2</sup> In re Haughton, 1 B. R. 460; in re Diblee et al. 2 B. R. 617; s. c. 3 Ben. 283.

<sup>3</sup> In re Joseph S. Hadley, 12 B. R. 366.

<sup>4</sup> Act of 22 June, 1874, § 12.

<sup>5</sup> In re Isaac Scull, 10 B. R. 165; s. c. 7 Ben. 371; in re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240.

<sup>6</sup> In re Isaac Scull, 10 B. R. 165; s. c. 7 Ben. 371.

<sup>7</sup> In re Solomon Simmons, 10 B. R. 253.

<sup>8</sup> In re Solomon Simmons, 10 B. R. 253.

<sup>9</sup> In re Morris, 11 B. R. 413; Hunt v. Pooke, 5 B. R. 161; in re D. C. Butterfield, 6 B. R. 257.

<sup>10</sup> Act of 22 June, 1874, § 12.

the petition by attorney or agent.<sup>1</sup> In no other case, unless the creditor is a corporation, can it be subscribed and sworn to by an agent or special attorney of the creditor, and if it is, the proceedings will be defective and irregular.<sup>2</sup> The verification on behalf of a corporation may be made by an agent whether the corporation is a resident of the district or not, and such agent need not be an officer of the corporation.<sup>3</sup> No officer of a corporation has authority, by virtue of his office, to sign and verify a petition, unless specially authorized by some statute, by-law or resolution of the board of directors.<sup>4</sup> Wherever a person acts on behalf of another, his authority should be made to appear in the proceedings, either by his own oath or other competent evidence.<sup>5</sup> If an agent acts for a non-resident creditor, the fact of non-residence should be stated and sworn to in the affidavit.<sup>6</sup> If a partner executes the papers on behalf of his firm, he may sign either the firm name or the names of the members of the firm to the petition, but the papers should show that he signed them on behalf of his firm. The affidavit should be changed so as to state that one only of the petitioners, being a member of the firm, took the required oath. An agent should verify the petition on behalf of his principal,<sup>7</sup> and the verification should state that the allegations are true to the best of the knowledge and belief of the principal, and not to the best of his own knowledge and belief.<sup>8</sup> The name of the party who verifies

<sup>1</sup> *In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.

<sup>2</sup> *Hunt v. Pooke*, 5 B. R. 161; in *re D. C. Butterfield*, 6 B. R. 257; *contra*, in *re Jacob Raynor*, 7 B. R. 527; s. c. 11 Blatch. 43.

<sup>3</sup> *In re John R. Hanibel*, 15 B. R. 233.

<sup>4</sup> *In re Moses A. McNaughton*, 8 B. R. 44; in *re Ralph Johnson*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313.

<sup>5</sup> *In re Moses A. McNaughton*, 8 B. R. 44; in *re Rosenfields*, 11 B. R. 86; in *re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240; in *re Joseph S. Hadley*, 12 B. R. 366; in *re Edward Sargent*, 13 B. R. 144; in *re John R. Hanibel*, 15 B. R. 233.

<sup>6</sup> *In re Solomon Simmons*, 10 B. R. 253; in *re Joseph S. Hadley*, 12 B. R. 366.

<sup>7</sup> *In re Solomon Simmons*, 10 B. R. 253.

<sup>8</sup> *In re John Brown*, 15 B. R. 416.

the petition should be contained in the body of the verification. It is not sufficient that the name be merely appended to it.<sup>1</sup> The affidavit may be taken before any register or commissioner of the circuit court, or notary public.

In addition to the petition, there must be a deposition to the debt<sup>2</sup> and to the act of bankruptcy.<sup>3</sup> In these it may be proper that the affiant should speak from his own knowledge, or at least disclose the grounds of his belief, or the sources of his information.<sup>4</sup> If any fact in a deposition to an act of bankruptcy is stated on information and belief, the information should be stated with such particularity and detail that the court may see from whom it was derived, the circumstances under which it was acquired, and the weight that should be attached to it.<sup>5</sup> The purpose of these depositions is merely to evince the good faith of the parties who file the petition, protect the court against issuing an order to show cause improvidently, and to establish a *prima facie* case.<sup>6</sup> At the trial the petitioning creditor will have to prove his debt and the alleged acts of bankruptcy the same as if they had not been filed.

The statute does not expressly state in what district the petition may or must be filed. In this particular it is not as minute and precise as in the provisions relating to voluntary bankruptcy. The averment in the prescribed form is, that the debtor has resided in the district for six months. From this it would appear that it must be filed in the district in which he resides. It has been decided that it could not be filed in a district where he neither resided nor carried on business.<sup>7</sup> It has also been decided that it could not be filed in a district in which he had not

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<sup>1</sup> Form No. 55.

<sup>2</sup> In re Rosenfields, 11 B. R. 86.

<sup>3</sup> Form No. 56.

<sup>4</sup> In re Muller & Bretano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; in re Rosenfields, 11 B. R. 86; in re Joseph S. Hadley, 12 B. R. 366.

<sup>5</sup> In re Joseph S. Hadley, 12 B. R. 366.

<sup>6</sup> In re Leonard, 4 B. R. 563; s. c. 2 L. T. B. 177.

<sup>7</sup> In re Palmer, 1 B. R. 213; in re Fogarty & Gerrity, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174.

resided for the greater portion of the six months next immediately preceding the time of filing,<sup>1</sup> and the tendency of the authorities is, that it may be filed in any district where the debtor could file a voluntary petition, but upon this point there is some doubt.<sup>2</sup> Where the members of a firm reside in different districts, the only court that has jurisdiction of a petition against the firm is the district court of the district where the firm carries on business.<sup>3</sup> The petition must be filed in the district court, and not the circuit court.<sup>4</sup> When the debtor resides in the District of Columbia, or any of the territories, it must be filed in the supreme court for the district or the district court for the territory, as the case may be (§§ 4997, 4998).<sup>5</sup> The papers must be properly indorsed, and the same entries made upon filing as in a case of voluntary bankruptcy.<sup>6</sup> At the time of filing the petition a deposit of fifty dollars must be made with the clerk, to secure the register's fees (§ 5124); and the fees of the clerk and the marshal must also be secured before they can be compelled to perform any of the duties required of them.<sup>7</sup>

If, upon an examination of the petition and the depositions, the court finds that sufficient grounds exist therefor, it directs the entry of an order<sup>8</sup> requiring the debtor to appear and show cause, at a court of bankruptcy, to be holden at a time specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted (§ 5024), but such order can not be made until the petition is filed.<sup>9</sup> In case of a vacancy in the office of the district judge in any district, or in case any district judge shall, from sickness, absence,

<sup>1</sup> In re Leighton, 5 B. R. 95; contra, in re Johnson, 1 Cent. L. J. 223.

<sup>2</sup> In re Ala. & Chat. R. R. Co. 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.

<sup>3</sup> Cameron v. Canieo, 9 B. R. 527; in re Horace Hall, 5 Law Rep. 269.

<sup>4</sup> In re Binninger et al. 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.

<sup>5</sup> Act of 22 June, 1874, § 16.

<sup>6</sup> Rule I.

<sup>7</sup> Rule XXIX.

<sup>8</sup> Form No. 57.

<sup>9</sup> Ala. & Chat. R. R. Co. v. Jones, 7 B. R. 145.

or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court (§ 4976).

After the order to show cause is issued, a copy of the same and of the petition are delivered to the marshal to be served upon the debtor. This service may be made by the marshal or any of his deputies (§ 5013), and consists merely of delivering the copies to him, or leaving them at his last or usual place of abode. Service may be made on a corporation by delivering the copies to its principal officer.<sup>1</sup> The service can not be made out of the district.<sup>2</sup> If the debtor can not be found, or his place of residence ascertained, then service may be made by publication, in such manner as the judge shall direct (§ 5025). If the president of a corporation can not be found, a new order may be issued directing the service to be made on its cashier.<sup>3</sup> If a corporation has been dissolved, so that it has no longer a legal existence, the proper mode of serving the process is by publication.<sup>4</sup> No further proceedings can be had upon the petition,<sup>5</sup> unless the debtor appear and consent thereto, until proof is given to the satisfaction of the court of such service or publication (§ 5025). If the process has been served, the only proof required is the return of the marshal. If the service has been by publication, the publication must be in the newspapers designated by the rules of court, and the proof consists of the marshal's return, accompanied by a copy of the publication

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<sup>1</sup> In re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240.

<sup>2</sup> In re Ala. & Chat. R. R. Co. 5 B. R. 97; Stuart v. Aumuller, 8 B. R. 541; contra, Stuart v. Hines, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

<sup>3</sup> Platt v. Archer, 6 B. R. 465; s. c. 9 Blatch. 559.

<sup>4</sup> In re Washington Marine Insurance Co. 2 B. R. 648; s. c. 2 Ben. 292.

<sup>5</sup> In re Muller & Bretano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

cut from each newspaper, with a certificate as to the particulars of publishing. If the required proof is not given on the return day, the proceedings should be adjourned, and an order made that the copies be forthwith so served, or the publication so made (§ 5025).

There are collateral proceedings, however, that may be instituted, although proper service has not been made on the petition.<sup>1</sup> The court may restrain the debtor, and any other person, from making any transfer or disposition of any part of the debtor's property not excepted by the statute from the operation thereof, and from any interference therewith (§ 5024). The mode of applying for this injunction is usually by a separate petition, so that the proceedings upon the injunction need not be complicated with the proceedings in bankruptcy.<sup>2</sup> It is immaterial whether the order to show cause, issued in the bankruptcy proceedings, is in the proper form, for the jurisdiction of the court to issue an injunction is not dependent upon the service of a proper order on the debtor. The petition should be positive in its averments, and may be accompanied by affidavits to support it.<sup>3</sup> It should also contain a description of the property. A mere allegation that it is personal estate is not sufficient.<sup>4</sup> It is always verified by the oath of the petitioner or his agent.<sup>5</sup> It is usually filed as a part of the proceedings in bankruptcy; but a bill in equity in the district court<sup>6</sup> may also be used. A bill in equity must be used when an injunction is sought against a person who claims the property adversely to the proceedings in bankruptcy, although his title may be void as against the assignee.<sup>7</sup>

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<sup>1</sup> In *re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

<sup>2</sup> *Irving v. Hughes*, 2 B. R. 62; *Creditors v. Cozzens*, 3 B. R. 281.

<sup>3</sup> In *re Bloss*, 4 R. B. 147; s. c. 2 L. T. B. 126.

<sup>4</sup> *Blackburn v. Stannard*, 5 Law Rep. 250.

<sup>5</sup> In *re Fendley*, 10 B. R. 250.

<sup>6</sup> In *re Fendley*, 10 B. R. 250.

<sup>7</sup> In *re Charles J. Marter*, 12 B. R. 185.

The injunction may be issued without notice to the adverse party; notice, however, may be required, and security for damages demanded, whenever the ends of justice require it.<sup>1</sup> The injunction is merely temporary, and is intended to restrain the disposition of the goods and property of the debtor until an order of adjudication can be passed. The restraining power of the court upon a summary petition is limited to the period of time between the entering of the order to show cause and the hearing and adjudication upon the creditor's petition,<sup>2</sup> but no such limitation applies where the proceeding is by a bill in equity.<sup>3</sup> It is questionable whether it extends to a case where the property has been sold under legal process, although the proceeds have not been paid over, because there is nothing left to the assignee but a mere right of action.<sup>4</sup>

Any party having an interest in the property covered by the injunction may appear and move for a dissolution, and at the hearing affidavits and counter affidavits may be read by either party.<sup>5</sup> But when the grounds set forth in the motion for a dissolution go to the merits of the case in bankruptcy, the court will not grant the dissolution, and thus, on affidavits, dispose of what are really all the issues involved in the case.<sup>6</sup> The claimant can not urge, as grounds for dissolving the injunction, that the order to show cause is irregular, or that the petition does not show at what time the act of bankruptcy was committed, or that there is no positive charge of an act of bankruptcy. These are all matters that may be corrected or amended. Nor will the court decide the question of

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<sup>1</sup> *In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *in re John Harper Smith*, 1 N. Y. Leg. Obs. 249.

<sup>2</sup> *In re Moses*, 6 B. R. 181; *in re Kintzing*, 3 B. R. 217; *in re Mary Irving et al.* 14 B. R. 289.

<sup>3</sup> *In re Fendley*, 10 B. R. 250.

<sup>4</sup> *In re Fuller*, 4 B. R. 115; s. c. 1 Saw. 243.

<sup>5</sup> *In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>6</sup> *In re Metzler et al.* 1 B. R. 38; s. c. 1 Ben. 356.

title to the property.<sup>1</sup> In order to obtain a dissolution, the *prima facie* case made out by the petition must be rebutted.<sup>2</sup> When it appears at the hearing that the injunction can not be sustained upon the grounds set forth in the petition, but that there is another valid cause for which an injunction might issue, the petition may be amended so as to cover the new ground, and the injunction will thereupon be continued.<sup>3</sup>

If it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove and conceal his goods and chattels, or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district commanding him to arrest the alleged bankrupt, and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition, or the further order of the court; and forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court (§ 5024).

This warrant is only a provisional warrant, and should properly be applied for by a petition duly verified and supported by affidavits, so as to show a probable cause to the court for granting it.<sup>4</sup> The exercise of this power is one of great delicacy, and should not be called into action, unless the court is satisfied that it is necessary. It rests in the discretion of the court, but this is a legal discretion.<sup>5</sup> A misrecital in the order allowing it of the date of the bankrupt law is immaterial. The order need not re-

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<sup>1</sup> In re Muller & Bretano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

<sup>2</sup> In re Dean & Garrett, 2 B. R. 89; in re Binns, 4 Ben. 152.

<sup>3</sup> In re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>4</sup> In re James A. McKibben, 12 B. R. 97; in re Joseph S. Hadley, 12 B. R. 366.

<sup>5</sup> Bank v. Iron Co. 5 B. R. 491; s. c. 1 L. T. B. 272.



quire the arrest of the debtor. The warrant may issue against the person and goods, or either of them. When the warrant is for the seizure of both the person and the goods, it may be executed against both or either, as the petitioning creditor may direct.<sup>1</sup> It can not authorize the marshal to seize any property except that of the debtor himself. If property has been purchased from the debtor, it can not be taken.<sup>2</sup>

The arrest of the debtor is in no manner for the security or satisfaction of the petitioning creditor's debt. It is simply to secure the attendance of the debtor from time to time as the court may order, until there is an adjudication in the bankruptcy proceedings, or the court further directs, and it is for this purpose and no other that bail is required of him.<sup>3</sup>

It is the duty of the marshal, under the warrant, to take possession of all the property and effects of the debtor, in whosoever hands he may find them. He may hold possession of property claimed by other persons, and take possession of property not in the possession of the bankrupt whether indemnified or not. If indemnified, it is made his duty to retain possession in the one case, and to take possession in the other; and he would be liable if he did not. If not indemnified, he is merely released from liability if he does not do it. His authority is derived from the warrant, and is as complete in the one case as in the other. With indemnity, he is bound to exercise his authority; without it, he may exercise his authority or not.<sup>4</sup> Whether the property belongs to the debtor or not, is a question of fact that he must determine for himself; and if, by mistake or otherwise, he takes the goods of another, he is liable to the party injured, upon his official

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<sup>1</sup> In re Muller & Bretano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

<sup>2</sup> In re Harthill, 4 B. R. 392; s. c. 4 Ben. 448; s. c. 2 L. T. B. 181; in re Geo. B. Holland, Jr. 12 B. R. 403.

<sup>3</sup> In re Daniel Sheehan, 8 B. R. 345.

<sup>4</sup> In re Briggs, 3 B. R. 638.

bond.<sup>1</sup> If he has taken possession of property claimed by another, he may notify the petitioning creditor of such claim, and return the property to the claimant, unless indemnified by a sufficient bond for the taking, detention, and liability, within five days after such notice; and may refuse to take any property not in the possession of the debtor, unless indemnified in like manner.<sup>2</sup>

The injunction and the provisional warrant are merely intended to protect the debtor's property until a trial can be had upon the petition in bankruptcy. If the petition fails, they are dissolved: if it is sustained, other means are provided for the custody of the property. No trial can be had unless there has been due service of the process, or the debtor appears and consents to the proceedings (§ 5026). This appearance may be by an attorney and not in person, even where he has not been duly served.<sup>3</sup> If the process has not been properly served, and the debtor does not appear and consent, the creditor, if he desires to prosecute the case, should have the proceedings adjourned, and obtain an order for the due service of the process (§ 5025).

The petitioning creditor to a certain extent has the control of the proceedings, and hence may, if he sees proper, discontinue them.<sup>4</sup> The statute, however, has provided that if the petitioning creditor does not appear and proceed upon the return day or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate upon such petition (§ 5026). It follows from this right of other creditors to appear and prosecute the case that no petition can be dismissed except upon a return day or an adjourned day.<sup>5</sup>

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<sup>1</sup> In re Muller & Bretano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; Marsh v. Armstrong, 11 B. R. 125; s. c. 20 Minn. 81; in re Marks, 2 B. R. 575.

<sup>2</sup> Rule XIII.

<sup>3</sup> In re Weyhausen et al. 1 Ben. 397; in re Moses A. McNaughton, 8 B. R. 44.

<sup>4</sup> In re Camden Rolling Mill Co. 3 B. R. 590; s. c. 2 L. T. B. 112; Hastings v. Belknap, 1 Denio, 190.

<sup>5</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

If the proceedings are formally adjourned on the return day, the proceedings can not be discontinued until the adjourned day.<sup>1</sup> If there is no formal adjournment, the proceedings are considered to be pending from day to day, and each subsequent day is an adjourned day.<sup>2</sup> Upon the return day or adjourned day the petitioning creditor may dismiss the petition without giving other creditors any notice of his intention to dismiss. It is their duty to appear in court, watch the proceedings and protect their own rights.<sup>3</sup> The proceedings can be discontinued only by an order of court on special application.<sup>4</sup> If a creditor has already intervened, the proceedings can not be discontinued without notice to him.<sup>5</sup> The petitioning creditor can not discontinue the proceedings after the debtor has been adjudged bankrupt, for the adjudication vests the other creditors with rights of which he can not deprive them.<sup>6</sup> Where several creditors have joined in a petition, it has been held that one creditor can not be allowed to withdraw without the consent of the others unless he has been induced to join through misrepresentations.<sup>7</sup>

Proceedings in bankruptcy inure to the benefit of all the creditors, and any of them may intervene and prosecute the application if he thinks proper.<sup>8</sup> They may intervene at any time when it becomes necessary for the purpose of preserving and protecting their interests.<sup>9</sup> The mere fact that the debtor has filed a denial that the petitioning creditors constitute the requisite portion in number

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<sup>1</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>2</sup> In re William Buchanan, 10 B. R. 97.

<sup>3</sup> In re Camden Rolling Mill Co. 3 B. R. 590; s. c. 2 L. T. B. 112; in re Freedley & Wood, Crabbe, 544.

<sup>4</sup> In re William Buchanan, 10 B. R. 97.

<sup>5</sup> In re William Buchanan, 10 B. R. 97.

<sup>6</sup> In re Sherburne, 1 B. R. 558; in re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>7</sup> In re P. H. Heffren, 10 B. R. 213; s. c. 6 Biss. 156; in re Edward Sargent, 13 B. R. 144.

<sup>8</sup> In re Freedley & Wood, Crabbe, 544; in re R. & L. Calendar, 1 N. Y. Leg. Obs. 200; s. c. 5 Law Rep. 125.

<sup>9</sup> In re Mendenhall, 9 B. R. 380.

and value, does not prevent them from intervening, if no order has been passed for the purpose of ascertaining whether the denial is true or not.<sup>1</sup> The statute provides that they may intervene on the return day or adjourned day if the petitioning creditor does not appear and proceed. This confers upon them a right which the petitioning creditor and the debtor can not by any arrangement cut off or defeat.<sup>2</sup> It contemplates two possible exigencies; one, that the petitioning creditor may not appear; the other, that the petitioning creditor may not proceed with the petition. In either event other creditors may intervene.<sup>3</sup> If the proceedings are formally adjourned, they may appear on the adjourned day.<sup>4</sup> The adjourned day on which other creditors may intervene is any day to which the proceedings under the order to show cause may be adjourned, whether the adjournment be for the purpose of procuring a proper service of the order on the debtor, or for the purpose of inquiring into the allegations of the act of bankruptcy.<sup>5</sup> A formal adjournment from day to day, where the debtor has been properly summoned, is not necessary to keep the proceedings alive. If neither the petitioning creditor nor the debtor asks for or obtains an adjournment, the matter simply lies along from day to day to be called up and disposed of at any time. The proceedings are considered as pending from day to day until disposed of, and each subsequent day is an adjourned day.<sup>6</sup> The mere right to discontinue does not operate as a discontinuance. The proceedings are pending until there is an actual discontinuance.<sup>7</sup> Other credit-

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<sup>1</sup> In re Frank Frisbie, 15 B. R. 522.

<sup>2</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>3</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322; in re William Buchanan, 10 B. R. 97.

<sup>4</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>5</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>6</sup> In re William Buchanan, 10 B. R. 97.

<sup>7</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

ors may, therefore, intervene even after a petition for leave to discontinue has been filed.<sup>1</sup> Even if the court erroneously refuses to grant such leave, this does not operate as a discontinuance.<sup>2</sup> If the order of discontinuance is not to take effect until the costs are paid, the proceedings are actually pending until the conditions of the order are complied with, whatever may be the hindrance that arises to prevent such compliance.<sup>3</sup> But when the proceedings have been actually discontinued on a return day or an adjourned day, other creditors can not intervene, for the jurisdiction of the court over the cause is at an end.<sup>4</sup> Creditors who desire to intervene, do so by a supplemental petition. If they do intervene, the petitioning creditor can not dismiss the proceedings, although his debt and all the costs have been paid.<sup>5</sup> The intervening creditors have a right to prosecute the original petition in the same manner as the petitioning creditor could have done.<sup>6</sup> If no proper service of the order to show cause has been made on the debtor, it should be ordered. If it has been made, then no new service or publication is required (§ 5026). The intervening creditors have a right to insist on a trial on the return day, although the petitioning creditor consents to a continuance of the case.<sup>7</sup>

If proper service has been made, and the debtor fails to appear upon the return day, a default may be taken (§ 5028). If the proceedings are not dismissed, and he appears, he must prepare his defense. The defense can generally be made only by the debtor himself. The petition by an alleged creditor against his debtor to compel a submission of his estate to the bankrupt court is not however

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<sup>1</sup> In re William Buchanan, 10 B. R. 97.

<sup>2</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>3</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>4</sup> In re Olmsted, 4 B. R. 240; in re Freedley & Wood, Crabbe, 544; in re Camden Rolling Mill Co. 3 B. R. 590; s. c. 2 L. T. B. 112.

<sup>5</sup> In re Mendenhall, 9 B. R. 380; in re R. & L. Calendar, 1 N. Y. Leg. Obs. 200; s. c. 5 Law Rep. 125.

<sup>6</sup> In re Lacey, Downs & Co. 10 B. R. 477; s. c. 12 Blatch. 322.

<sup>7</sup> Knickerbocker Ins. Co. v. Comstock, 9 B. R. 484.

a mere suit *inter partes*. It rather partakes of the nature of a proceeding *in rem*, in which every actual creditor has a direct interest. The proceeding is summary, and in a high degree informal, and it should be free from technical embarrassment. No one is entitled to be heard, however, who has no interest to protect. To justify an intervention, the object or purpose disclosed must be one which, in a legal sense, is meritorious and not purely officious. The court must be able to see that the intervention may serve some useful purpose either in protecting the rights of the applicant or those of the creditors at large.<sup>1</sup> A petitioning creditor who has filed a prior petition in another court, upon which there has been an adjudication,<sup>2</sup> or a creditor who has received a payment or transfer which is liable to be assailed as a preference,<sup>3</sup> or who has issued an attachment within the period of four months next preceding the filing of the petition,<sup>4</sup> may appear and oppose an adjudication. When a creditor is allowed to intervene, he may take advantage of any defense available to the debtor, and may contest an adjudication on the merits,<sup>5</sup> or on the ground that the court has no jurisdiction over the case, or that a due proportion of creditors has not joined in the petition.<sup>6</sup>

If the debtor denies the allegation as to the number or amount of the petitioning creditors, by a statement in writing to that effect, the court may require him to file

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<sup>1</sup> In re Boston R. R. Co. 6 B. R. 209, 222; s. c. 9 Blatch. 101, 409; s. c. 5 B. R. 232; in re James Bennett, 1 N. Y. Leg. Obs. 310; in re Heusted, 5 Law Rep. 510; vide in re Bush, 6 B. R. 179; Dutton v. Freeman, 5 Law Rep. 447.

<sup>2</sup> In re Boston R. R. Co. 6 B. R. 209, 222; s. c. 9 Blatch. 101, 409; s. c. 5 B. R. 232; in re James Bennett, 1 N. Y. Leg. Obs. 310; in re Heusted, 5 Law Rep. 510; vide in re Bush, 6 B. R. 179; Dutton v. Freeman, 5 Law Rep. 447.

<sup>3</sup> Clinton v. Mayo, 12 B. R. 39; in re Heusted, 5 Law Rep. 510; in re Walter S. Derby, 8 B. R. 106; s. c. 6 Ben. 232.

<sup>4</sup> In re S. Mendelsohn, 12 B. R. 533; s. c. 3 Saw. 343; in re Hatje, 12 B. R. 548; s. c. 6 Biss. 436; in re Francis M. Jack, 13 B. R. 236; s. c. 1 Woods, 549; in re C. G. Scrafford, 14 B. R. 184; s. c. 15 B. R. 104.

<sup>5</sup> In re Elias G. Williams, 14 B. R. 132.

<sup>6</sup> In re C. G. Scrafford, 14 B. R. 184; s. c. 15 B. R. 104.

forthwith a full list of his creditors, with their places of residence, and the sums due them respectively. This list should be verified by the oath of the debtor.<sup>1</sup> The court must then ascertain, on reasonable notice to the creditors, whether one-fourth in number and one-third in amount have petitioned that the debtor be adjudged a bankrupt. The object of the notice is to enable the petitioning creditors and others of the named creditors to show that the list is incorrect. It should contain a copy of the list, with its names, places of residence, and amounts, and should be sent to all the creditors named in the list, at the addresses given in the list.<sup>2</sup> If the petitioning creditor denies that the list filed by the debtor is correct, either as to the nature or the amount of the debts, the case may be referred to a register,<sup>3</sup> or to the clerk,<sup>4</sup> to take evidence and report as to the correctness of the list. If it appears that such number and amount have not so petitioned, the court must grant a reasonable time, not exceeding ten days, within which other creditors may join in the petition. If, at the expiration of the time so limited, the requisite number and amount comply with the requirements of the statute, the matter of bankruptcy may proceed; but if at the expiration of such limited time such number and amount do not so comply, the petition must be dismissed with costs. Whether the allegation that the petitioning creditor constitutes the requisite proportion of the creditors is a jurisdictional averment, is a point upon which the authorities are conflicting. In one case it was held that the averment was not jurisdictional.<sup>5</sup> In another it was treated as jurisdictional.<sup>6</sup> One case was dismissed without allowing other

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<sup>1</sup> In *re* Louis E. Steinman, 10 B. R. 214; s. c. 6 Biss. 166; in *re* Hymes, 10 B. R. 433; s. c. 7 Ben. 427; *Barnert v. Hightower*, 10 B. R. 157.

<sup>2</sup> In *re* Hymes, 10 B. R. 433; s. c. 7 Ben. 427.

<sup>3</sup> In *re* Jacob Frost, 11 B. R. 69; s. c. 6 Biss. 213; in *re* Edward Sargent, 13 B. R. 144.

<sup>4</sup> In *re* Hymes, 10 B. R. 433; s. c. 7 Ben. 427.

<sup>5</sup> In *re* Morris, 11 B. R. 443; in *re* James A. McKibben, 12 B. R. 97.

<sup>6</sup> In *re* Reiman & Friedlander, 11 B. R. 21; s. c. 7 Ben. 455; s. c. 13 B. R. 128; s. c. 12 Blatch. 562.

creditors to join in the petition, because the averment was wanting.<sup>1</sup> In another case the petition was dismissed because the petitioners had included the name of one creditor without authority, and alleged that all constituted more than the requisite proportion.<sup>2</sup> In another it was held that the petition would be dismissed if it were shown that the creditor, at the time of filing it, knew that he did not constitute the requisite proportion,<sup>3</sup> for the court would not entertain a fishing petition. If the debtor, on the filing of the petition, admits in writing that the requisite number and amount of creditors have petitioned, the court if satisfied that the admission is made in good faith, may so adjudge, and the matter proceed without further steps on that subject.<sup>4</sup> When the court is satisfied that the requisite amount and number have so petitioned, its judgment is final.<sup>5</sup> The statute makes the question whether the requisite number and amount of creditors have joined in the petition a matter for the determination of the court. This provision is designed to guard against collusive proceedings.<sup>6</sup>

If the allegations are not sufficiently full, precise and distinct, the debtor may file an exception, declining to answer upon that ground, and ask that they be made more definite and certain, or be stricken out.<sup>7</sup> If they are not sufficient in law to sustain the proceedings, he may move to have the petition dismissed,<sup>8</sup> or file a demurrer.<sup>9</sup> In taking these preliminary steps, however, he should consider whether or not he desires a jury trial. This can only

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<sup>1</sup> In re Thomas F. Burch, 10 B. R. 150.

<sup>2</sup> In re Rosenfelds, 11 B. R. 86.

<sup>3</sup> In re Scammon, 11 B. R. 280; s. c. 6 Biss. 145, 195.

<sup>4</sup> Act of 22 June, 1874, § 12.

<sup>5</sup> Act of 22 June, 1874, § 13.

<sup>6</sup> In re J. Young Scammon, 10 B. R. 66; s. c. 6 Biss. 130; in re Isaac Scull, 10 B. R. 165; s. c. 7 Ben. 371; James R. Keeler, 10 B. R. 419.

<sup>7</sup> In re Randall & Sunderland, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.

<sup>8</sup> In re Melick, 4 B. R. 97.

<sup>9</sup> Orem & Son v. Harley, 3 B. R. 263; in re A. Benham, 8 B. R. 94.



be demanded upon the return day;<sup>1</sup> but, by consent of parties, an adjourned day may be held to be the same in all respects as the return day.<sup>2</sup> If the debtor wishes to demur, he may file objections by the way of demurrer and an answer at the same time, and thus obtain a jury trial.<sup>3</sup> He might also, perhaps, file exceptions for want of definiteness in the allegations, and a general denial.<sup>4</sup> Either of these modes will, according to the condition of the case, enable him to take advantage of all defects in the petition, and at the same time preserve all his rights.

If a demurrer or exceptions are filed, they must be set down for hearing and disposed of first.

If they are sustained, or the petitioner without trial concludes that his allegations are defective, he may ask for leave to amend. Leave to amend may also be asked for when he desires to include other and new matter in his petition. Merely formal amendments, which can not take the debtor by surprise, may be asked for in open court, and allowed, when it appears to be due to justice, even at the final hearing, and after all the testimony in the cause has been taken.<sup>5</sup> But when a petitioner seeks to introduce new matter, he must ask for leave to amend by a petition, duly verified, stating the amendments that are desired, and setting forth special reasons therefor. It should be shown that the petitioner and his attorney were not advised of the facts sought to be added by the amendment at the time the original petition was prepared, or that they were omitted from inadvertence, mistake or other reason which might excuse such omission, and that application for leave to amend was made within a reason-

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<sup>1</sup> In re Gebhart, 3 B. R. 268; Clinton v. Mayo, 12 B. R. 39; in re Sherry, 8 B. R. 142.

<sup>2</sup> In re G. & H. Pupke, 1 Ben. 342.

<sup>3</sup> In re Nickodemus, 3 B. R. 230; s. c. 1 L. T. B. 140.

<sup>4</sup> Form No. 61.

<sup>5</sup> In re Craft, 1 B. R. 378; s. c. 2 Ben. 214; in re Waite & Crocker, 1 B. R. 373; s. c. Lowell, 207; in re Houghton, 1 B. R. 460; in re A. B. Gallinger, 4 B. R. 729; s. c. 1 Saw. 224.

able time after the necessity for an amendment was discovered. A copy of this petition should be served upon the debtor or his attorney.

An amendment which introduces new facts, or changes essentially the grounds of the prosecution or the defense, will not be allowed, except for very special reasons, and where it is clearly required in furtherance of justice. When it would introduce into the petition entirely new acts of bankruptcy, founded upon facts not therein referred to, and alleged to have been committed more than six months prior to the application for leave to amend, it will not be allowed.<sup>1</sup> The allegation in regard to the joining of the requisite proportion of the creditors may be amended.<sup>2</sup> The verification of the petition is no part of the petition, and if it is defective, it may be amended.<sup>3</sup> If it is made by an agent, and there is no evidence of his authority, supplemental affidavits may be filed tending to show his authority at the time he signed and verified the petition.<sup>4</sup> An amendment to add a new party will not be allowed after all the evidence has been taken and the case is before the court on final hearing.<sup>5</sup> When leave to amend is granted, the petitioner may be required to pay costs.<sup>6</sup> Merely formal amendments may be made upon the record,<sup>7</sup> but amendments introducing new matters should be upon a separate paper signed and verified in the same manner as the original petition.<sup>8</sup>

So soon as the petition is adjudged to be correct, or is made so by an amendment, the debtor must, if he has not previously done so, put in his real defense. If an amend-

<sup>1</sup> Crowley & Hoblitzell, 1 B. R. 516; s. c. 1 L. T. B. 79.

<sup>2</sup> In re James A. McKibben, 12 B. R. 97; in re Morris, 11 B. R. 443; in re Joseph S. Hadley, 12 B. R. 366.

<sup>3</sup> In re Solomon Simmons, 10 B. R. 253; in re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240; in re Edward Sargent, 13 B. R. 144; contra, Moore & Bro. v. Harley, 4 B. R. 242; s. c. 2 L. T. B. 666.

<sup>4</sup> In re Rosenfields, 11 B. R. 86.

<sup>5</sup> In re Chas. S. Pitt, 14 B. R. 59.

<sup>6</sup> In re Howland, 2 B. R. 357.

<sup>7</sup> In re Houghton, 1 B. R. 460.

<sup>8</sup> Crowley & Hoblitzell, 1 B. R. 516; s. c. 1 L. T. B. 79.

ment introduces new matter after he has made his full defense by an answer, he must of course reply to that,<sup>1</sup> or, if he has not put in his general defense, he may demur or except, the same as before. The general defense should be made by an answer. The pleadings and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in a civil action at common law.<sup>2</sup> A reasonable construction of the statute requires that the debtor's allegations should be reduced to writing, and put in such a form as to raise an issue in analogy to issues in other cases triable by a jury.<sup>3</sup> This answer should be addressed to the court,<sup>4</sup> and may consist either of a general denial, which puts in issue all the facts stated in the petition,<sup>5</sup> or a statement of any matters in avoidance, according to the rules governing pleadings in cases at common law.<sup>6</sup> In the latter case, the answer should be as full, specific, and certain as an answer to a bill in equity.<sup>7</sup> The answer should conclude with a demand for a hearing by the court or a trial by jury, and should be signed by the debtor in person or by attorney.<sup>8</sup> It should also be made under oath, for it is a general rule in all courts to require a petition or pleading to be answered in as solemn a manner as it is required to be made.<sup>9</sup>

To maintain an action to have the party adjudged a bankrupt, it must appear from the petition that he owes debts provable under the bankrupt act to the amount of

<sup>1</sup> *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch, 262.

<sup>2</sup> *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.

<sup>3</sup> *In re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re Alexander Findlay*, 9 B. R. 83; s. c. 5 Biss. 480.

<sup>4</sup> *In re Frank Heydette*, 8 B. R. 333.

<sup>5</sup> *In re Skelley*, 5 B. R. 214; s. c. 3 Biss. 260; *Phelps v. Clasen*, 3 B. R. 87; s. c. 1 Wool. 204; *in re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89; *in re Frank Heydette*, 8 B. R. 333; *in re Hawkeye Smelting Co.* 8 B. R. 385.

<sup>6</sup> *In re Alexander Findlay*, 9 B. R. 83; s. c. 5 Biss. 480; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344.

<sup>7</sup> *In re Frank Heydette*, 8 B. R. 333.

<sup>8</sup> *In re Frank Heydette*, 8 B. R. 333.

<sup>9</sup> *In re Alexander Findlay*, 9 B. R. 83; s. c. 5 Biss. 480; *contra*, *in re Gebhart*, 3 B. R. 268; *in re Frank Heydette*, 8 B. R. 333.

three hundred dollars, and that he has committed an act of bankruptcy. The indebtedness and the act of bankruptcy taken together constitute the cause of action. The defense set up may go to either or both of these matters, and there may be several defenses to each, but they must be separately stated.<sup>1</sup> The statute provides that unless it appears that the facts set forth in the petition are true, the proceedings shall be dismissed. The facts set forth in the petition are all those which are necessary to make it the duty of the court to adjudge the debtor a bankrupt. Unless all these concur, the petitioner has no right to prosecute the petition. The debtor may therefore deny that the petitioner is a creditor, and by proofs maintain such denial. This objection goes not only to the disability of the petitioner, but to the jurisdiction of the cause. If he is not a creditor, he is not by law clothed with the right or power to begin or sustain a prosecution or ask a decree, although he may be able to prove or does prove the commission of acts of bankruptcy. The existence of the debt is a fact that must be established by sufficient evidence, for it is nowhere expressly or impliedly provided that one who can furnish proof which, unexplained and uncontradicted, would show *prima facie* that he is a creditor, may file a petition, or that a party may be adjudged a bankrupt upon such petition.<sup>2</sup> The debtor may, therefore, plead either infancy<sup>3</sup> or coverture.<sup>4</sup>

As the acts of bankruptcy are required to be stated separately, a separate defense should be made to each act charged, and where there are several distinct defenses to the same act, each distinct defense should be pleaded separately, and in such a manner that each will stand or fall by itself without the aid of the others.<sup>5</sup> A plea of tender

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<sup>1</sup> In re Ouimette, 3 B. R. 566; s. c. 1 Saw. 47.

<sup>2</sup> In re Cornwall, 6 B. R. 305; s. c. 9 Blatch. 114.

<sup>3</sup> In re Walter S. Derby, 8 B. R. 106; s. c. 6 Ben. 232.

<sup>4</sup> In re Schlichter, 2 B. R. 336; in re Howland, 2 B. R. 357; in re Rachel Goodman, 8 B. R. 380; s. c. 5 Biss. 401.

<sup>5</sup> In re Ouimette, 3 B. R. 566; s. c. 1 Saw. 47.

is not a good plea, because the action is not a suit to collect money;<sup>1</sup> nor will the debtor be allowed to make a tender into court of the money due to the petitioner.<sup>2</sup> A plea that the debtor was *non compos mentis* at the time when the alleged act of bankruptcy was committed is a good defense.<sup>3</sup>

In any case where the acts of bankruptcy or certain intents have been alleged conjunctively, the answer must be in the disjunctive, otherwise a proper issue will not be made or tendered.<sup>4</sup> The debtor must also take care not to make such a negative allegation as to involve an affirmative implication, and thus in reality confess the acts charged against him, as, for instance, by denying a fraudulent intent to give a fraudulent preference, when he should simply confine himself to a denial of an intent to give any preference.<sup>5</sup>

When the defense is in, the petitioner should proceed to take such steps in relation to it as are proper from the condition of the pleadings. If the defense consists merely of a general denial, no replication is needed.<sup>6</sup> If the defense is made by a formal answer, and any pleas are irrelevant or immaterial, a motion may be made to have them stricken out, or if they are insufficient in law, a demurrer may be filed. When the demurrers and exceptions are disposed of, a replication should be filed, unless the case is to be brought to a hearing on petition and answer. If the answer confesses enough to justify such a course, the case may be brought to a hearing on petition and answer, but denials in the answer of material allegations will, on such hearing, be taken to be true.<sup>7</sup> A de-

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<sup>1</sup> In re Ouimette, 3 B. R. 566; s. c. 1 Saw. 47.

<sup>2</sup> In re Williams & Co. 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.

<sup>3</sup> In re Marvin, 1 Dillon, 178; in re Alonzo Murphy, 10 B. R. 48; in re D. Pratt, 6 B. R. 276; in re Weitzel, 14 B. R. 466; s. c. 3 Cent. L. J. 557.

<sup>4</sup> In re S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.

<sup>5</sup> In re Sutherland, 1 B. R. 531; s. c. 1 Deady, 344.

<sup>6</sup> In re Dunham & Orr, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89; in re Hawkeye Smelting Co. 8 B. R. 385.

<sup>7</sup> In re Wells et al. 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.

nial, however, of that which the law, from the admitted facts, conclusively presumes, will be disregarded.<sup>1</sup>

If several petitions are filed against the same debtor, the order in which they shall be heard should be next determined. Whenever two or more petitions are filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by such debtor on different days within six months prior to the filing of such petition, and the debtor appears and shows cause against an adjudication of bankruptcy against him on the petitions, that petition must be first heard and tried which alleges the commission of the earliest acts of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it will not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.<sup>2</sup>

In case two or more petitions are filed against the same individual in different districts, the first hearing must be had in the district in which the debtor has his domicile; and such petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same firm, in different courts, each having jurisdiction over the case, the petition first filed must be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in

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<sup>1</sup> In re S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; in re Sutherland, 1 B. R. 531; s. c. 1 Deady, 344.

<sup>2</sup> Rule XV.

either of the other petitions; and in either case the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy will retain jurisdiction over all proceedings therein until the same shall be closed.<sup>1</sup>

During the pendency of proceedings in involuntary bankruptcy, the debtor can not be adjudged a bankrupt upon a voluntary petition filed after the commencement of proceedings against him by the creditors, and if an adjudication is so made it will be set aside.<sup>2</sup>

If the case is entitled to precedence, it may be tried upon the return day summarily before the court; or, if a jury trial has been demanded, at the first term at which a jury shall be in attendance; or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal, returnable within ten days before him, for the trial of the facts set forth in the petition, at which time there must be a trial, unless it is adjourned for good cause shown.<sup>3</sup> But the court may, upon good cause shown, adjourn the proceedings from time to time (§ 5026). At the trial the petitioner must proceed to establish the facts alleged in his petition, and the burden of proof rests upon him.<sup>4</sup> The legality and provability of his debts precede the question whether the alleged acts of bankruptcy have been committed, and ought properly to be established first.<sup>5</sup> After he has closed his case, the debtor introduces such testimony as he deems advisable, and then the petitioner offers rebutting evidence, the same as in any other trial. When the evidence is all in, the court passes upon it, or in case of a jury trial, submits it

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<sup>1</sup> Rule XVI.

<sup>2</sup> In re R. R. Stewart, 3 B. R. 108; contra, in re Philemon Canfield, 1 N. Y. Leg. Obs. 234; s. c. 5 Law Rep. 415.

<sup>3</sup> Act of 22 June, 1874, § 14.

<sup>4</sup> Brock v. Hoppock, 2 B. R. 7; s. c. 2 Ben. 478.

<sup>5</sup> Brock v. Hoppock, 2 B. R. 7; s. c. 2 Ben. 478; Moore v. National Exchange Bank of Columbus, 1 B. R. 470; s. c. 2 Bond, 170; s. c. 1 L. T. B. 74; in re Skelley, 5 B. R. 214; s. c. 3 Biss. 260.

to the jury with instructions. If the evidence is all one way, the court may direct the jury to render the verdict for the party who is entitled to it.<sup>1</sup>

If the facts set forth in the petition are found to be true, or if default is made by the debtor to appear pursuant to the order to show cause, the court adjudges<sup>2</sup> the debtor to be a bankrupt (§ 5028). The form of an adjudication is prescribed by Form No. 58. Nothing else is an adjudication. A memorandum, signed with the initials of the judge, directing that an order of adjudication be entered, is not an adjudication. It is not a judgment or entry on the files of the court.<sup>3</sup> Nor is the mere subscription of a decree *per se* an adjudication. There must be something tantamount to promulgation or delivery—something of which the parties to be affected can have or can obtain knowledge before their rights can be said to have received adjudication—something which completes and authenticates the judicial act.<sup>4</sup> After an adjudication has been formally entered, the court has the power, in a proper case, to set it aside and grant a new trial.<sup>5</sup> It may do so even though there has been a trial by jury, and a verdict in favor of the debtor, for the allegations of the petition do not involve a charge of crime, and are to be tried like any other civil case. The power to set aside a verdict in civil cases is a power that is incident to all courts of record.<sup>6</sup> The party desiring to set aside an adjudication must apply within a reasonable time after it is entered.<sup>7</sup> The adjudication may also be set aside when it is void, at the instance of any third person who has an

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<sup>1</sup> Hardy v. Clark et al. 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; in re Jelsh & Dunnebacke, 9 B. R. 412.

<sup>2</sup> Form No. 58.

<sup>3</sup> In re Joseph M. Hill, 10 B. R. 133; s. c. 7 Ben. 378.

<sup>4</sup> In re Boston, Hart. & Erie R. R. Co. 6 B. R. 222; s. c. 9 Blatch, 409.

<sup>5</sup> In re Great West. Tel. Co. 5 Biss. 359.

<sup>6</sup> In re R. A. De Forest, 9 B. R. 278; in re Dunn et al. 9 B. R. 487; s. c. 12 Blatch. 42.

<sup>7</sup> Leiter v. Payson, 8 B. R. 317; s. c. 9 B. R. 205; in re J. Neilson, 7 B. R. 505.



interest in the proceedings. A mere creditor has no such interest.<sup>1</sup> An attaching creditor,<sup>2</sup> and a creditor whose security is impeached as a preference,<sup>3</sup> have such an interest that they may apply. Notice of the motion should be served on the bankrupt.<sup>4</sup> The pendency of a prior petition in another district is no ground for annulling an adjudication.<sup>5</sup> Where the debtor has admitted the commission of the act of bankruptcy, the adjudication will not be set aside although the admission was false.<sup>6</sup> An adjudication will not be set aside at the instance of either the debtor or creditors, on the ground that a due proportion of creditors did not join in the petition, unless there is proof that it was obtained by fraud or bad faith<sup>7</sup> and in this respect it is immaterial whether the adjudication was made on default<sup>8</sup> or after notice by publication only.<sup>9</sup> At the time of making the adjudication of bankruptcy, the court should forthwith issue a warrant to take possession of the debtor's estate (§ 5028). There is never any propriety in delaying the issuing of the warrant after an adjudication.<sup>10</sup> At the time of taking possession of the estate, the marshal should make an inventory of the property and assets by him received.<sup>11</sup> The order of adjudication usually contains a direction that the case be referred to some particular register designated therein,<sup>12</sup> and further proceedings are had before him the same as in a case of voluntary bankruptcy.

The order of adjudication of bankruptcy must also

<sup>1</sup> In re Bush, 6 B. R. 179; Karr v. Whittaker, 5 B. R. 123.

<sup>2</sup> In re Fogarty & Gerrity, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174.

<sup>3</sup> In re Walter S. Derby, 8 B. R. 106; s. c. 6 Ben. 232.

<sup>4</sup> In re Bush, 6 B. R. 179.

<sup>5</sup> In re William Harris et al. 6 Ben. 375.

<sup>6</sup> In re James S. Thomas, 11 B. R. 330.

<sup>7</sup> In re William B. Duncan, 14 B. R. 18; in re John H. McKinley, 7 Ben. 562; in re J. Funkenstein, 14 B. R. 213; s. c. 3 Saw. 605.

<sup>8</sup> In re J. Funkenstein, 14 B. R. 213; s. c. 3 Saw. 605.

<sup>9</sup> In re John H. McKinley, 7 Ben. 562.

<sup>10</sup> In re Howes & Macy, 9 B. R. 423; s. c. 7 Ben. 102.

<sup>11</sup> Rule XIII.

<sup>12</sup> Rule IV.

require the bankrupt forthwith, or within such number of days, not exceeding five, after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate, in the form, and verified in the manner, required in proceedings in voluntary bankruptcy (§ 5030).

If the debtor has failed to appear in person or by attorney, a certified copy of the adjudication must be forthwith served on him, by delivery or publication, in the manner provided for the service of the order to show cause. The service of the order of adjudication is a necessary incident to the duty of serving the warrant, although it is not embodied in the command of the writ.<sup>1</sup> If the bankrupt is absent, or can not be found, such schedule and inventory must be prepared by the messenger and the assignee from the best information they can obtain (§ 5031). These schedules must be prepared from the books or other papers of the bankrupt that may be seized by the marshal under his warrant, and from any other sources of information; but all statements upon which his return shall be made must be in writing, and sworn to by the parties making them, before one of the registers in bankruptcy of the court, or a commissioner of the courts of the United States.<sup>2</sup>

The warrant is issued to the marshal, and directs him to take possession of the property of the bankrupt, and also to make publication and serve notices upon the creditors the same as in a case of voluntary bankruptcy.<sup>3</sup> Under this warrant, it is his duty to take possession of the property of the bankrupt, and to prepare, within three days from the time of taking such possession, a complete inventory of all the property, and to return it as soon as

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<sup>1</sup> In re Kenedy et al. 7 B. R. 337.

<sup>2</sup> Rule XIII.

<sup>3</sup> Form No. 59.

completed. The time for making the inventory and return may be enlarged, under proper circumstances, by special order of the district court. If any goods or effects so taken into possession as the property of the bankrupt are claimed by or in behalf of any other person, the marshal should forthwith notify the petitioning creditor of such claim, and may, within five days after so giving notice of such claim, deliver them to the claimant or his agent, unless the petitioning creditor or party at whose instance possession is taken, shall, by bond, with sufficient sureties to be approved by the marshal, indemnify the marshal for the taking and detention of such goods and effects, and the expense of defending against all claims thereto, and, in case of such indemnity, the marshal must retain possession of such goods and effects, and proceed in relation thereto as if no such claim had been made. In case the petitioning creditor claims that any property not in the possession of the bankrupt belongs to him, and should be taken by the marshal, the marshal is not bound to take possession of the same unless indemnified in like manner.<sup>1</sup> The duties imposed upon the marshal may be performed by himself or his deputies (§ 5013).

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<sup>1</sup> Rule XIII.

## CHAPTER III.

### PROCEEDINGS TO HAVE A PARTNERSHIP DECLARED BANKRUPT.

Two or more persons who are partners in trade may be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners (§ 5121). From this provision of the statute it is manifest that proceedings to have a partnership declared bankrupt are of a mixed character, being sometimes voluntary, sometimes involuntary, and sometimes of a *quasi* involuntary nature.

In some cases it has been held that a member of an insolvent firm could not apply for the benefit of the bankrupt law separately and individually where there are partnership assets, on the ground that the true theory and intent of the law is, that the creditors of a firm shall be required to meet but once and in one bankruptcy forum all questions in regard to the bankruptcy of the firm.<sup>1</sup> But this hardly appears to be correct. In the first place, it will be observed that the language of the statute is permissive, not imperative. The act provides what may be done, but does not make any particular course obligatory upon the debtors, any more than upon the creditors. As the creditors may elect whether they will avail themselves of the privilege conferred by the statute, a just construction would give the debtors a similar option. In the next place, there is no need of protecting the rights of creditors by construction, for they are amply protected by the statute. If they desire to have the partnership assets distrib-

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<sup>1</sup> In re Little, 1 B. R. 341; s. c. 2 Ben. 186; in re Winkens, 2 B. R. 349.

uted in a proceeding wherein the firm is declared bankrupt, they can attain that object in the mode and under the limitations pointed out by the act. The better opinion therefore seems to be that there is nothing in the bankrupt law to prevent one partner from filing a petition separately and individually, without requesting the other members of the firm to join with him,<sup>1</sup> and that a discharge obtained in such a proceeding will release him from all his debts, both individual and partnership, for such is the clear meaning of the provision of the statute (§ 5118), that a discharge shall not release, discharge, or affect any other person liable for the same debt as partner.<sup>2</sup>

The language of the statute is that "two or more persons who are partners in trade are adjudged bankrupt." From this it has been inferred in some cases that the provision only applied to partnerships that are subsisting at the time of the commencement of the proceedings in bankruptcy,<sup>3</sup> but this construction has been questioned.<sup>4</sup> It will be observed that the language is just as applicable to creditors as to the partners, or any one of them, and it manifestly was not the intent of the statute that the partners could by a voluntary act of their own deprive a creditor of his right to put the firm into bankruptcy. It has accordingly been held that the firm may be put into bankruptcy, even after a dissolution, either by the creditors<sup>5</sup> or by the partners, or any one of them.<sup>6</sup> The main controversy has been whether a firm can be put into bankruptcy when there are no partnership assets, but the better opinion seems to be that so long as there are firm

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<sup>1</sup> In re Rufus E. Moore, 5 Biss. 79; in re Mitchell, 3 B. R. 441.

<sup>2</sup> In re Downing, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207.

<sup>3</sup> Crockett et al. v. Jewett, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.

<sup>4</sup> In re Joseph A. Noonan, 10 B. R. 331; s. c. 3 Biss. 491.

<sup>5</sup> In re White & Crocker, 1 B. R. 373; s. c. Lowell, 207; in re Williams et al. 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; in re H. C. McFarland, 10 B. R. 381.

<sup>6</sup> In re Joseph A. Noonan, 10 B. R. 331; s. c. 3 Biss. 491.

assets,<sup>1</sup> or firm debts outstanding and unsettled,<sup>2</sup> the firm may be put into bankruptcy on the petition of the partners themselves, or of one of them, or of the creditors. The firm is deemed to continue for all purposes necessary for the final liquidation of its affairs. It has accordingly been held that one partner may proceed against his copartners, although proceedings have been instituted in a State court for a dissolution of the partnership and a receiver has been appointed therein. It has likewise been held that a partner who has taken the partnership property under an agreement to pay the partnership debts may subsequently petition for the benefit of the statute on behalf of the firm.<sup>3</sup> It has, on the contrary, however, been held that one partner can not proceed against his copartners where there are no assets,<sup>4</sup> or where the assets that belonged to the firm have been disposed of by an assignment,<sup>5</sup> but these cases are of doubtful authority, and can only be sustained, if at all, upon the ground of an estoppel as between the partners. If several persons file a petition in bankruptcy as partners, they can not on the motion of creditors be compelled to bring in others who are alleged to be their copartners.<sup>6</sup>

When all the partners join in the proceedings, the petition must be in the prescribed form,<sup>7</sup> and must be accompanied by separate schedules of the liabilities of each partner, a separate schedule of the partnership liabilities, separate schedules of the assets of each partner, and a separate schedule of the partnership assets, all prepared in the manner required in a case of voluntary bankruptcy.

<sup>1</sup> *In re Foster*, 3 B. R. 236; s. c. 3 Ben. 336; s. c. 1 L. T. B. 127.

<sup>2</sup> *In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; *in re Joseph A. Noonan*, 10 B. R. 331; s. c. 3 Biss. 461; *contra*, *Crockett et al. v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21; *Hartough v. Hayden*, 3 B. R. 422.

<sup>3</sup> *In re J. R. Stowers et al.* Lowell, 528.

<sup>4</sup> *Crockett et al. v. Jewett*, 2 B. R. 203; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.

<sup>5</sup> *Hartough v. Hayden*, 3 B. R. 422.

<sup>6</sup> *In re Harbaugh, Matthias & Co.* 15 B. R. 246; s. c. 24 Pitts. L. J. 100.

<sup>7</sup> Form No. 2.

If one partner proceeds against his copartners, he must use the ordinary form for a partnership petition, modified to suit the exigencies of his case. He must also file schedules of his liabilities and assets, and schedules of the partnership liabilities and assets. The petition should also aver that his copartners are unwilling to join in the proceedings, and pray that the petitioner and his copartners may be adjudged bankrupts, and that he may have a discharge from all his debts.<sup>1</sup> It need not allege the commission of an act of bankruptcy either by the firm or by the copartners.<sup>2</sup> If it does not ask that the partnership be declared bankrupt, his copartners can not come in voluntarily and make themselves parties to the proceedings.<sup>3</sup> All the partners must be made parties to the proceedings, either as petitioners or as parties proceeded against; otherwise the partnership can not be adjudged bankrupt.<sup>4</sup>

The petition may be filed in the district where the partners have resided or carried on business for the six months next immediately preceding the time of filing, or for the longest period during such six months (§ 5014). If all the partners have resided and carried on business in the same district during such six months, it must be filed in the district in which they have so resided and carried on business. If all the partners have resided in one district, and carried on business in another district, during such six months, it may be filed in either district. If the partners have carried on the partnership business in any district during any part of such six months, it may be filed in such district, provided the district is the one in which they have carried on business for the longest period

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<sup>1</sup> *In re Foster*, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127.

<sup>2</sup> *In re Penn et al.* 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190; *in re J. R. Stowers et al.* Lowell, 528; *in re Joseph A. Noonan*, 10 B. R. 331; s. c. 3 Biss. 491.

<sup>3</sup> *In re Boylan*, 1 B. R. 2; s. c. 1 Ben. 266.

<sup>4</sup> *In re Prankard et al.* 1 B. R. 297; *in re Rufus E. Moore*, 5 Biss. 79.

during such six months, even though all the partners reside in other districts.<sup>1</sup>

If the partners have not resided or carried on business in the same district during such six months, they can not unite in a voluntary petition, but must file separate petitions in the several different districts in which they have so resided.<sup>2</sup> One partner may, however, file a petition in the district in which he has resided, asking that he and his copartners may be adjudged bankrupts, and if they appear and consent to such adjudication, after being served with the order to show cause, the court will have jurisdiction to adjudge the firm bankrupt.<sup>3</sup> This is the purport of the decisions, but it is questionable whether the partnership, under such circumstances, can be brought into bankruptcy at all. If a partner should file a petition in his own district, the court would have no jurisdiction over his copartners; for they, in such case, would neither have resided nor carried on business within such district for any part of the required time.<sup>4</sup> If, on the other hand, he should file a petition in the district in which his copartners reside, he would have to ask to be declared bankrupt, and the court would have no jurisdiction over him for the same reason. The law embraces none but subsisting partnerships, and considers that such partnerships will have some district in which they have carried on business during some part of such six months. A petition by a partner against the firm should not be referred to a register, but should be retained in court until an adjudication is made, or the partners come in and consent to the proceedings; for a register can not hear a disputed application (§ 4999).

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<sup>1</sup> In re Foster, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127.

<sup>2</sup> In re Prankard et al. 1 B. R. 297; in re Penn et al. 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.

<sup>3</sup> In re Penn et al. 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190; Stuart v. Hines, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

<sup>4</sup> In re Work, McCough & Co, 30 Leg. Int. 361; in re Henry Martin, 6 Ben. 20.



The partners who refuse to join in the petition are entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition must be given to them in the same manner as provided by law and by the rules in the case of a debtor petitioned against; and they have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if they can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act.<sup>1</sup> If a partner intrusts his copartner with the payment of the debts, he takes the risk of his being both able and willing to do so; and in defense to the petition of such copartner can not set up that he left the firm solvent, and that the act of the petitioner changed the state of affairs.<sup>2</sup>

In case two or more petitions for adjudication of bankruptcy have been filed in different districts by different members of the same copartnership for an adjudication of the bankruptcy of such copartnership, the court in which the petition was first filed, having jurisdiction, takes and retains jurisdiction over all proceedings in such bankruptcy until the same are closed; and if such petitions have been filed in the same district, action must be first had upon the one first filed.<sup>3</sup> Upon the return day, the defendants may demand a jury trial. The rules contemplate that one partner may proceed against his copartners, either on the ground of insolvency, or the commission of an act of bankruptcy on the part of the firm. Either of these will be sufficient to enable the petitioner to maintain his action.<sup>4</sup> The defendants may also come in at any time

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<sup>1</sup> Rule XVIII.

<sup>2</sup> In re J. R. Stowers et al. Lowell, 528.

<sup>3</sup> Rule XVI.

<sup>4</sup> In re Grady, 3 B. R. 227; in re Penn et al. 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.

and consent to an adjudication.<sup>1</sup> If an adjudication of bankruptcy is made upon the petition, the copartners should be required to furnish to the marshal, as messenger, a schedule of their debts and an inventory of their property, in the same manner as is required by the statute in cases of debtors against whom adjudication of bankruptcy is made.<sup>2</sup>

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<sup>1</sup> In re Lewis, 1 B. R. 239; s. c. 2 Ben. 96.

<sup>2</sup> Rule XVIII.

## CHAPTER IV.

### THE POWERS OF REGISTERS IN BANKRUPTCY, AND THE MODE OF REVISING PROCEEDINGS BEFORE THEM.

REGISTERS are officers of the district court appointed for the purpose of assisting the judge in the performance of his duties under the statute, by attending to matters of detail and routine, and matters that are purely administrative in their character. They are appointed by the district judge upon the nomination of the Chief Justice of the Supreme Court (§ 4993), and are at all times subject to removal by the judge of the district court (§ 4997). All vacancies should be filled, unless the district judge deems the continuance of the particular office unnecessary (§ 4993).

No person is eligible to such appointment unless he is a counsellor of the district court for the district for which he is appointed, or of some one of the courts of record of the State in which he resides. Before entering upon the duties of his office, he must give a bond<sup>1</sup> in a sum of not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge, for the faithful discharge of his duties (§ 4995), and must also take an oath<sup>2</sup> of office. No register, or any partner or clerk of such register, or any person having any interest with him in any fees or emoluments in bankruptcy, or with whom such register has any interest in respect to any matter in bankruptcy, can be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district

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<sup>1</sup> Form No. 9.

<sup>2</sup> Form No. 7.

court of his district, or in an appeal therefrom. Nor can they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of, or upon, any estate within the jurisdiction of either of such courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of such trusts.<sup>1</sup> No register, during his continuance in office, can be either directly or indirectly interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the district or circuit court in his district, except those fees which are allowed him by law (§ 4495). His fees must be paid by the parties for whom the services are rendered (§ 5008).

The powers of registers are of a limited character. As soon as a voluntary petition is filed, or there is an adjudication upon an involuntary petition, the case is referred to a register, and the proceedings thereafter are mainly conducted before him.<sup>2</sup>

The time when and place where the registers shall act upon the matters arising under the several cases referred to them, must be fixed by special order of the district court, or by the register acting under the authority of a general order, in each case, made by the district court; and at such times and places the registers may perform the acts which they are empowered to do by the statute.<sup>3</sup> They must indorse the time of filing upon each paper filed with them.<sup>4</sup>

In all cases pending before them, they have the power to make adjudications of bankruptcy; to receive the surrender of any bankrupt; to administer oaths in all proceedings before them; to hold and preside at meetings of creditors; to take proof of debts; to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders,

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<sup>1</sup> Act of 22 June, 1874, § 18.

<sup>2</sup> Rule IV.

<sup>3</sup> Rule V.

<sup>4</sup> Rule VII.

and of the schedules of creditors and assets filed in each case; to audit and pass accounts of assignees; to grant protection; to pass the last examination of any bankrupt, in cases whenever the assignee or creditor do not oppose (§ 4998); to give requisite direction for notices, advertisements, and other ministerial proceedings; to order payment of rates and taxes, and salary or wages of persons in the employment of the assignee; to order amendments, or inspection, or copies, or extracts, of any proceedings; to take accounts of proceeds of securities held by any creditor; to take evidence concerning expenses and charges against the bankrupt's estate; to conduct proceedings for the declaration and payment of dividends, to dispatch all administrative business of the court in matters of bankruptcy, and to make all requisite uncontested orders and directions therein which are not by the statute required to be made, done or performed by the district court itself;<sup>1</sup> to exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and requiring the production of books, papers, and documents (§ 5002); and to sit in chambers, and dispatch there such part of the administrative business of the court and such uncontested matters as are defined in the general rules and orders, or as the district judge may in any particular matter direct (§ 4998). They have no power to commit for contempt, or to make adjudication of bankruptcy when opposed, or to decide upon the allowance or suspension of an order of discharge (§ 4999).

They must also make short memoranda of their proceedings in each case in which they act, in a docket to be kept by them for that purpose, and they must forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of such memoranda, which must be entered by the clerk in the proper minute book

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<sup>1</sup> Rule V.

to be kept in his office (§ 5000). These memoranda must be in suitable form to be entered upon the minute book of the court, and must be forwarded to the clerk of the court not later than by mail the next day after the act has been performed.<sup>1</sup> All depositions of persons and witnesses taken before registers, and all acts done by them, must be reduced to writing, and be signed by them, and must be filed (§ 5004) in the clerk's office as part of the proceedings.

Every register in performing the duties required of him must use all reasonable dispatch, and can not adjourn the business but for good cause shown. Six hours' session constitutes a day's sitting, if the business requires; and when there is time to complete the proceedings in progress within the day, the party obtaining any adjournment or postponement thereof may be charged, if the court or register think proper, with all the costs incurred in consequence of the delay.<sup>2</sup> He must also keep an accurate account of his traveling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties, in any case or number of cases which may be referred to him; and must make return of the same under oath, with proper vouchers (when vouchers can be procured), on the first Tuesday in each month.<sup>3</sup> Any register may act in the place of any other register appointed by and for the same district court (§ 5007). The proceedings before the registers are to be conducted with the exercise of a proper legal discretion, and, subject to that rule, are entirely within their control.<sup>4</sup>

In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before them, it is their duty to cause the question or issue to be stated by the opposing parties in writing, and they must adjourn the same into court for decision by the judge (§ 5009). The issue may be one of fact or one of law, but it must be

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<sup>1</sup> Rule XI.

<sup>2</sup> Rule VI.

<sup>3</sup> Rule XII.

<sup>4</sup> In re Hyman, 2 B. R. 333; s. c. 36 How. Pr. 282; s. c. 3 Ben. 28.

one which has actually arisen out of proceedings which have taken place, and not one likely to arise, or which may be raised, at some future time.<sup>1</sup> The ground of the objection must also be stated, otherwise no point or question or issue is raised.<sup>2</sup> The issue must also be contested, and the person contesting it must be a party to the proceedings. As soon as it is raised, it is the duty of the register to adjourn it into court without any request to that effect by a contesting party. Such an adjournment, however, is a proceeding that may be waived, and when a party does waive it by submitting the issue to the decision of the register, he can not, after finding that the decision is against him, ask to have it then adjourned into court.<sup>3</sup> The proper mode of making up the question or issue for the judge is, to cause the opposing parties to state it in writing, and when so stated to transmit it into court, with a certificate of the facts which show that the issue is one that ought properly to be adjourned under the statute. An objection to a question or answer in the course of an examination, or to an application by a bankrupt for leave to amend his schedule does not raise such an issue as can be adjourned;<sup>4</sup> but an objection to an application for an examination of a bankrupt,<sup>5</sup> or to the allowance or rejection of a proof of debt,<sup>6</sup> does raise an issue which must be adjourned.

Any party, during the proceedings before a register, is at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which must be stated by the register in the shape of a short certificate to

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<sup>1</sup> *In re Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.

<sup>2</sup> *In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.

<sup>3</sup> *In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 448.

<sup>4</sup> *In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re Watts*, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.

<sup>5</sup> *In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 448.

<sup>6</sup> *In re Clark & Binninger*, 6 B. R. 202.

the judge who will sign the same if he approves thereof; and such certificate, so signed, will be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court (§ 5010).

In any bankruptcy, or in any other proceedings within the jurisdiction of the court, under the statute, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court will be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by the act. The parties may also, if they think fit, agree that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs (§ 5011).

These certificates can only be taken or demanded by a person who is a party to the proceedings. No one but a creditor or a bankrupt can be a party. A mere witness can not be a party.<sup>1</sup> The person, moreover, who asks for a certificate must have taken the proper steps to make himself a party to the proceedings. Unless this has been done, he is not in a proper position to participate in them. The questions that may be certified are clearly defined and strictly limited. They are: 1. Any point or matter arising in the course of the proceedings, or upon the result of the proceedings; but it must be a point or matter which has arisen in the course of the proceedings which have taken place, or a point or matter which has arisen upon

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<sup>1</sup> In re Fredenberg, 1 B. R. 268; s. c. 2 Ben. 133; in re Comstock & Co. 13 B. R. 193; s. c. 3 Saw. 517.



and after the result of the proceedings which have taken place, and not a point or matter likely to arise, or which may be raised thereafter, or after a result shall have been arrived at. 2. Any question stated by consent of the parties concerned in a special case; but it must be a question to which there are two parties, and one which has arisen out of the proceedings which have taken place. Nothing should be certified except what is necessary to be decided to enable the case to progress properly. Questions which thus necessarily arise should be certified only and as and when they arise, and ought not to be anticipated.<sup>1</sup> The same principles apply to the statement of a question in a special case.<sup>2</sup>

The usual mode of settling and determining disputed questions arising in proceedings before a register is by taking such certificates. It is short, simple and expeditious. It is always adopted when there is but one party interested in the issue, and the point certified is commonly a question of law or of practice. Registers also adopt this mode whenever they desire to obtain the instructions of the court on matters in which they alone are interested.<sup>3</sup> But when there are two adverse parties interested in the question, and the question is an issue of law or of fact, then the point must always be stated in writing by the opposing parties before it is certified. All points or matters arising in the course of the proceedings may be certified at the request of any party. All issues of law or of fact must be adjourned, but such issues must be stated in writing by the opposing parties, where there are such, before they can be certified (§ 5009). In one case there is a privilege conferred; in the other case there is a duty imposed. An objection to a question in the course of an

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<sup>1</sup> In re Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

<sup>2</sup> In re Haskell, 4 B. R. 558.

<sup>3</sup> In re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461; in re Loder Brothers, 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.

examination, or a question as to the right of a bankrupt to amend his schedule, are points that may be certified.<sup>1</sup> But questions concerning the right of a bankrupt to a discharge,<sup>2</sup> or the effect of a discharge upon a particular debt,<sup>3</sup> or the disposition that an assignee ought to make of certain property prior to his application for a settlement of his final account,<sup>4</sup> or the title to property when the point does not arise in a proceeding concerning such property to which the assignee is a party,<sup>5</sup> or the duty of a secured creditor who has proved his claim as unsecured,<sup>6</sup> when the point does not arise upon any motion or proceeding, can not be certified.

The certificate should be in the prescribed form,<sup>7</sup> and properly entitled in the cause, and should state the name of the party at whose instance it is made. All the facts bearing upon the matter should be fully set forth, so that it will appear upon the face of the proceedings that the certificate is one that may be properly transmitted; and the point to be decided should be clearly and distinctly stated. The register also generally states his own opinion upon the point when the certificate is one that is made to obtain the opinion of the judge, and is not for the purpose of submitting a question by consent of parties for the opinion of the court. When completed, the certificate is signed by the register and transmitted to court. When the certificate is made for the purpose of obtaining the opinion of the judge, he must sign it if he approves thereof, and it is only the certificate so signed that is declared to be binding on all parties to the proceedings. The statute does not state what the judge shall do if he does not approve of the certificate.<sup>8</sup> The practice is for him to give

<sup>1</sup> In re Levy et al. 1 B. R. 136; s. c. 1 Ben. 496; in re Watts, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.

<sup>2</sup> In re Mawson, 1 B. R. 265; s. c. 2 Ben. 122.

<sup>3</sup> In re Bray, 2 B. R. 139.

<sup>4</sup> In re Sturgeon, 1 B. R. 498.

<sup>5</sup> In re J. W. Wright, 1 B. R. 393.

<sup>6</sup> In re Peck, 3 B. R. 757.

<sup>7</sup> Form No. 50.

<sup>8</sup> In re Levy et al. 1 B. R. 136; s. c. 1 Ben. 496.

his opinion upon the point, and this is accepted as decisive by the parties. If the question is certified improperly, no opinion will be given.<sup>1</sup> The pendency of the issue undecided before a judge does not necessarily suspend or delay other proceedings before the register or court in the case.<sup>2</sup>

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<sup>1</sup> In re Sturgeon, 1 B. R. 498; in re J. W. Wright, 1 B. R. 393.

<sup>2</sup> Rule XI.

## CHAPTER V.

### PROOF OF DEBTS.

SINCE proceedings in bankruptcy are the creatures of statutory law, no debt can be proved against the bankrupt's estate, unless it is included among those which the statute makes provable (§ 5072). If it is included among those, it may be proved, and always must be proved, if the creditor wishes to become a party to the proceedings in bankruptcy. No matter what may be its form, whether it consists of a note, contract, account, bond, or judgment; no matter whether secured or unsecured; it must be established by the oath of the creditor in the manner pointed out by the statute. The mere statement upon the schedule is not proof, nor sufficient to entitle a party to participate in the proceedings. It may be stated in fraud, or may not exist. There may be payments or counter-claims, or offsets.<sup>1</sup> Other creditors and the assignee have a right to demand that all the statements required by the statute shall be fully set forth as an evidence of the validity of the claim and the good faith of the claimant. The purpose of requiring proof is not merely to give the claimant a standing in court, but to protect the estate against fraud. A creditor need not wait until the first meeting of creditors to prove his debt, but may prove it at any time after the proceedings are commenced.<sup>2</sup>

It may be stated, generally, that all debts owed by the bankrupt at the time of the filing of the petition, whether payable then or at some future day, and all demands against him for any goods or chattels wrongfully taken,

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<sup>1</sup> Davis, Assign. of Bittel et al. 2 B. R. 392.

<sup>2</sup> In re Patterson, 1 B. R. 125; s. c. 1 Ben. 448.

converted or withheld by him, are provable (§ 5067). The debt, however, must have existed at the time of the commencement of proceedings in bankruptcy, or it can not be proved. If it existed before that time, and bore interest, the principal and the interest thereon up to that time may be proved. If it did not bear interest, and was not payable until after that time, then there must be a rebate from its amount of the interest thereon for the interval between such commencement of proceedings in bankruptcy and the time when it would be payable.<sup>1</sup> Interest may also be allowed on a demand for any goods or chattels wrongfully taken, converted, or withheld by the bankrupt (§ 5067). Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the filing of the petition (§ 5071).

If a judgment was recovered before the commencement of the proceedings in bankruptcy, the costs constitute a part of the debt and may be proved.<sup>2</sup> When a debt, existing before the commencement of the proceedings, has been merged in a judgment rendered since such time, it may be proved; but it is not settled whether the debt or the judgment must be proved.<sup>3</sup> The costs that have been incurred since the filing of the petition can not be included in the proof.<sup>4</sup> Costs incurred in an attachment suit which was dissolved by the commencement of the proceedings in bankruptcy can not be allowed.<sup>5</sup> No cost in-

<sup>1</sup> In re Orne, 1 B. R. 57; s. c. 1 Ben. 361.

<sup>2</sup> Ex parte O'Neil, 1 B. R. 677; s. c. Lowell, 163; *Graham v. Pierson*, 6 Hill, 247.

<sup>3</sup> In re S. Brown, 3 B. R. 584; s. c. 5 Ben. 1; in re Vickery, 3 B. R. 696; in re Crawford, 3 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; in re Stevens, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121; in re Gallison et al. 5 B. R. 353; s. c. 2 L. T. B. 195; *Bradford v. Rice*, 102 Mass. 472; *Monroe v. Upton*, 50 N. Y. 593; s. c. 6 Lans. 255; in re Louis H. Rosey, 8 B. R. 509; s. c. 6 Ben. 507.

<sup>4</sup> In re Crawford, 3 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; *Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.

<sup>5</sup> In re Fortune, 2 B. R. 662; s. c. Lowell, 306; in re C. H. Preston, 6 B. R. 545; *Gardner v. Cook*, 7 B. R. 346.

curred after the filing of the petition, or in seizing property which was not liable to attachment, can be proved.<sup>1</sup>

If the bankrupt, at the time of his adjudication, was liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts, as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are, in whole or in part, composed of the same individuals, or that the sole contractor is also one of the joint contractors, does not prevent proof and receipt of dividend in respect to such distinct contracts against the estates respectively liable upon such contracts (§ 5074). Considered separately, the first part of this provision would afford strong support to the proposition that the term sole trader is used in a technical sense, but the whole clause must be construed together, and the last part provides that the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent such proof, and thus shows that the term sole trader is not used in a technical sense, and that its meaning was intended to be enlarged by the latter part of the clause.<sup>2</sup>

The proof should, if possible, be made by the claimant testifying of his own knowledge. If the claim has been assigned in good faith, and for a valuable consideration, the assignee may prove it, whether the assignment was made before or after the commencement of proceedings in bankruptcy, and the proof, when the assignment was made before the commencement of the proceedings, need not be accompanied by an affidavit of the assignor.<sup>3</sup> The indorsee

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<sup>1</sup> In re C. H. Preston, 5 B. R. 293.

<sup>2</sup> Emery v. Canal Nat'l Bank, 7 B. R. 217; s. c. 5 L. T. B. 419.

<sup>3</sup> In re Murdock, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; in re Fortune, 3 B. R. 312; s. c. Lowell, 384; in re Frank, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188; in re Strachan, 3 Biss. 181.

of a negotiable note may prove it, although the indorsement was made after the bankruptcy of the maker.<sup>1</sup> The true mode of proving an assigned claim is for the holder himself to make the affidavit.<sup>2</sup> Administrators, executors, receivers, and other persons who are assignees by mere operation of law, may prove in the same manner as the parties whom they represent could have done.<sup>3</sup> If the assignment occurred after the commencement of proceedings in bankruptcy, the usual forms should be changed to suit the circumstances of the case.<sup>4</sup> The claim in such case must also be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, stating the security, as is required in proving secured claims.<sup>5</sup> The proof for a corporation may be made by its president, cashier, or treasurer (§ 5078). If its officers are not known by these names, the deposition may be made by the officer whose duties most nearly correspond to those of cashier or treasurer.<sup>6</sup> The proof of a claim by a State should be made by the State treasurer, or by some officer holding a relation to the State similar to the relation which a president, cashier, or treasurer bears to a corporation.<sup>7</sup> In cases where the claimant is absent from the United States, or is prevented by some other good cause from testifying, the proof may be made by his attorney or duly authorized agent, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge (§ 5078). Proof can only be made by an agent in two cases; first, when the claimant is absent; second, when he is prevented by some good cause from testifying. In

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<sup>1</sup> *Humphries v. Blight*, 4 Dall. 370; s. c. 1 Wash. 44.

<sup>2</sup> *In re Pease et al.* 6 B. R. 173.

<sup>3</sup> *In re Republic Ins. Co.* 8 B. R. 197; s. c. 3 Eiss. 504.

<sup>4</sup> *In re Murdock*, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97.

<sup>5</sup> Rule XXXIV.

<sup>6</sup> Rule XXXIV.

<sup>7</sup> *In re Corn Exchange Bank*, 15 B. R. 216; s. c. 9 C. L. N. 254, 431.

all other cases, the proof must be made by the claimant himself. This cause is to be proved to the satisfaction of the judge or register before whom the debt is offered for proof. The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it; and unless he is absent or in some way prevented from testifying, no one can do so for him.<sup>1</sup> The reason why the deposition is not made by the claimant in person must be stated.<sup>2</sup> Sickness is a sufficient excuse,<sup>3</sup> but not mere absence from the State.<sup>4</sup> Where the claim is held by a firm, an agent can not make the proof, although one partner is sick and the other is out of the State.<sup>5</sup> If an agent has personal knowledge of all the facts necessary to make the proof, and the creditor has no knowledge of the matter at all, the former may prove the debt.<sup>6</sup> One partner may make the proof on behalf of his firm,<sup>7</sup> but it must appear in the deposition on oath that the deponent is a member of the firm.<sup>8</sup> The court may in all cases, if it shall see fit, require or receive further pertinent evidence, either for or against the admission of a claim (§ 5078).

When partners are adjudged bankrupt, the result is or may be that several distinct estates are to be administered in that proceeding. Thus there may be the estate and debts of the partnership and the separate estate and debts of each individual included in the partnership. Proof of a debt against either of these estates ought not to include or be joined with the proof of a debt against either of the others. Two distinct debts against different estates can not be included in one proof or deposition.<sup>9</sup>

The statute contains conflicting provisions in regard to

<sup>1</sup> In re H. F. Barnes, Lowell, 560; McKinsey v. Harding, 4 B. R. 39; in re William Whyte, 9 B. R. 267; in re W. A. Saunders, 13 B. R. 164.

<sup>2</sup> Rule XXXIV.

<sup>3</sup> In re William Whyte, 9 B. R. 267.

<sup>4</sup> In re George Jackson et al. 14 B. R. 449.

<sup>5</sup> In re William Whyte, 9 B. R. 267.

<sup>6</sup> In re Martin Watrous et al. 14 B. R. 258.

<sup>7</sup> In re Barrett, 2 B. R. 533; s. c. 1 L. T. B. 144.

<sup>8</sup> Rule XXXIV.

<sup>9</sup> In re Walton et al. 1 Deady, 510.



the power of registers to take proofs. Among the general powers granted to them, is the power to take proof of debts (§ 4998). The statute then provides, that creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court within said district, and that creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court in the judicial district where such creditor or either one of joint creditors resides (§ 5076). It also further provides, that the oath to a proof of debt may be taken in any district, before any register, or before any commissioner of the circuit court, authorized to administer oaths (§ 5079). As this provision is the last expression of the legislative intent, it will probably be deemed to be paramount, and to overrule the others so far as it conflicts with them. A notary public may also take proof of debts,<sup>1</sup> but a justice of the peace can not.<sup>2</sup> If the creditor is in a foreign country, the proof may be taken before any minister, consul or vice-consul of the United States (§ 5079). Proofs taken before a notary, must be certified by him, and attested by his signature and official seal.<sup>3</sup> The requisites of a notarial seal are determined by the law of the locality from which he derives his authority. In the absence of legislation an official seal need not contain the name of the official whose seal it purports to be. An impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat, and the presumption is that the seal is his official seal.<sup>4</sup> Proofs taken before a commissioner are subject to revision by the register of the court (§ 5076).

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<sup>1</sup> Act of 22 June, 1874, § 20.

<sup>2</sup> *In re Strauss*, 2 B. R. 48.

<sup>3</sup> Act of 22 June, 1874, § 20.

<sup>4</sup> *In re Wm. W. Phillips*, 14 B. R. 219; *vide in re Henry Nebe*, 11 B. R. 289.

In no case can the proof be taken by the creditor before an officer who acts as his attorney in the matter.<sup>1</sup>

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation, before the proper register or commissioner or other officer, setting forth the demand; the consideration thereof; whether any and what securities are held therefor; and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever, other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced, or controlled. And no claim can be allowed unless all the statements set forth in such deposition appear to be true (§ 5077).<sup>2</sup>

The deposition must be in accordance with the prescribed form as adapted to the character of the claimant.<sup>3</sup> The proof is neither a deposition nor an affidavit, as known in the ordinary practice of the law. It is the result of an examination made by a duly authorized officer. In no other court of justice is such testimony required for the due proof of any debt; and it is evident that Congress intended that the court and its officers should, by a careful examination of the creditor, purge his conscience and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, exists.<sup>4</sup>

<sup>1</sup> In re Henry Nebe, 11 B. R. 289.

<sup>2</sup> In re Strauss, 2 B. R. 48.

<sup>3</sup> Forms Nos. 21, 22, 23, 24 and 25.

<sup>4</sup> In re Strauss, 2 B. R. 48.

The proof should be made without protest, qualification or reservation.<sup>1</sup> It should set forth the name and residence of the affiant, and the place at which it is taken. It must also give at least one full Christian name of the creditor as well as his surname.<sup>2</sup> At the time of making the proof the creditor should produce the proper evidence of his debt, or a copy thereof, whether the same consists of a note, agreement, bond, or account.<sup>3</sup> If it is an account, an itemized bill should be produced. If a note is merged in a judgment it need not be produced.<sup>4</sup> These evidences of debt are commonly marked as exhibits, identified by the signature of the officer taking the proof, and affixed to the deposition. The deposition to prove a debt existing in open account must also state when the debt became or will become due, and if it consists of items maturing at different dates, the average due date must be stated, in default of which it is not necessary to compute interest upon it. All such depositions must contain an averment that no note has been received for such account, nor any judgment rendered thereon.<sup>5</sup> If the claim has been assigned, the proof should set forth the date and facts of the transfer, and the name of the original creditor.<sup>6</sup> The defense of the statute of limitations need not be anticipated, for the defense must be set up affirmatively by the party relying on it.<sup>7</sup> The claimant can not determine the amount of interest for himself, but must furnish the *data*, so that the computation may be made by the register.<sup>8</sup>

The consideration of the demand must be set forth (§ 5077), but what statement of the consideration is sufficient to meet the requirements of the law can hardly be

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<sup>1</sup> Dutton v. Freeman, 5 Law Rep. 447.

<sup>2</sup> In re William H. Valentine, 12 B. R. 389; s. c. 4 Biss. 317.

<sup>3</sup> In re Northern Iron Company, 14 B. R. 356.

<sup>4</sup> In re Knoepfel, 1 B. R. 70; s. c. 1 Ben. 398.

<sup>5</sup> Rule XXXIV.

<sup>6</sup> In re Fortune, 3 B. R. 312; s. c. Lowell, 384; s. c. 2 L. T. B. 99.

<sup>7</sup> In re Knoepfel, 1 B. R. 70; s. c. 1 Ben. 398.

<sup>8</sup> In re Port Huron Dry Dock Co. 14 B. R. 253

considered a settled question yet. There is a consideration in law, and a consideration in fact. Thus, a judgment duly rendered in a State court can not be impeached collaterally, nor can the consideration upon which it is founded be inquired into in the absence of fraud.<sup>1</sup> An instrument under seal always imports a consideration, and a promissory note is always *prima facie* evidence of a consideration. How far the statute intended to set aside and reject these general principles of law is a question of no little importance. It is true that it purges the conscience of the claimant, and requires full disclosures; but, in regard to the consideration, it simply says that it shall be set forth, without declaring what statement shall be deemed a compliance with the statute. The whole question turns upon the meaning and definition of the term consideration, as used in the statute. It has, however, been held that a proof of a note which did not state the consideration was defective,<sup>2</sup> and that a statement that the consideration was goods sold and delivered, without setting forth date, items, and kind of goods, was insufficient.<sup>3</sup> The proof of a claim for contribution by a partner must set forth the amount paid by him for the debt on account of which the claim is made.<sup>4</sup> The assignee of a *chose in action* must state the consideration that passed between the original parties.<sup>5</sup> But the holder of a promissory note who took it for value in good faith before the maturity thereof, need only state the consideration which he gave for it.<sup>6</sup>

In all cases of mutual debts or mutual credits be-

<sup>1</sup> McKinsey et al. v. Harding, 4 B. R. 39; ex parte O'Neil, 1 B. R. 677; s. c. Lowell, 163; Shaffer v. Fritchery & Thomas, 4 B. R. 548.

<sup>2</sup> In re Loder, 3 B. R. 655; s. c. 4 Ben. 125; in re Jaycox & Green, 7 B. R. 303; in re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376.

<sup>3</sup> In re Elder, 3 B. R. 670; s. c. 1 Saw. 73; in re Port Huron Dry Dock Co. 14 B. R. 253; in re Northern Iron Co. 14 B. R. 356.

<sup>4</sup> In re E. R. Stephens, 6 B. R. 533; s. c. 3 Biss. 387.

<sup>5</sup> In re Lake Superior S. C., R. R., & I. Co. 10 B. R. 373.

<sup>6</sup> In re Lake Superior S. C., R. R., & I. Co. 10 B. R. 376.

tween the parties, the account between them must be stated, and one debt set off against the other, and the balance only can be allowed or paid; but no set-off can be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate; or of a claim purchased by or transferred to him after the filing of the petition (§ 5073); or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.<sup>1</sup> The term mutual credits is more comprehensive than the term mutual debts in the statutes relating to set-off. The term credit is synonymous with trust, and the trust or credit need not be of money on both sides; but if one party intrusts another with goods or value, it will be a case of mutual credit. Therefore, a creditor who at the time of the bankruptcy had in his hands goods or chattels with a power of sale, or *choses in action* with a power of collection, may sell the goods or collect the claims, and set them off against the debt the bankrupt owes him.<sup>2</sup> An acceptor of a bill of exchange who has received goods from the drawer after the acceptance, and converted them into money before his bankruptcy, is entitled to set off the amount so received against the bill of exchange, although it did not become due until after the bankruptcy. The term "credits," however, are only such as must, in their very nature, terminate in cross-debts; as, where a debt is due from one party, and credit given by him to the other, for a sum of money payable at a future day, and which will then become a debt; or when there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other. But where there is a mere deposit of property, without authority to turn it into money, no debt can ever arise

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<sup>1</sup> Act of 22 June, 1874, § 6.

<sup>2</sup> In re Dow et al. 14 B. R. 307; in re Farnsworth, Brown & Co. 14 B. R. 148; s. c. 5 Biss, 224.

out of it, and, therefore, it is not a credit within the meaning of the statute.<sup>1</sup> The debt must be mutual and existing in the same right. Thus a claim by a firm against the bankrupt can not be set off against a demand of the bankrupt upon one of the partners.<sup>2</sup> A joint obligation of all the partners can not be set off against a demand of the firm against the creditor.<sup>3</sup> A debt which is not yet due may be set off against one which is already due.<sup>4</sup> A mere claim for unliquidated damages can not be set off against the demand of a creditor until it has been put into the shape of a debt.<sup>5</sup> A loss upon a policy of insurance may be set off against an indebtedness for money borrowed from the insurance company,<sup>6</sup> or for money deposited with the holder as a banker.<sup>7</sup> A party has the right to have his credit for a deposit in a bankrupt bank set off against his indebtedness as indorser upon a note held by the bank and duly protested.<sup>8</sup> A stockholder in an insurance company can not set off a claim upon a policy held by him against his liability for a subscription to its stock.<sup>9</sup> Nor can the treasurer of the company set off a claim upon a policy held by him against his liability for the funds in his hands.<sup>10</sup> A provable debt, transferred before the filing of the petition in a voluntary case, or before notice of the act of bankruptcy in respect to which the adjudication

<sup>1</sup> *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192; *ex parte Caylus et al.* Lowell, 550; *Murray v. Riggs*, 15 Johns. 571.

<sup>2</sup> *Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276; *Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629.

<sup>3</sup> *Forsyth v. Woods*, 5 B. R. 78; s. c. 11 Wall. 484.

<sup>4</sup> *In re City Bank*, 6 B. R. 71; *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.

<sup>5</sup> *In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.

<sup>6</sup> *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.

<sup>7</sup> *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424.

<sup>8</sup> *Winslow v. Bliss*, 3 Lans. 220; *Marks v. Barker*, 1 Wash. 178.

<sup>9</sup> *Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610; *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424; *Jenkins v. Armour*, 14 B. R. 276; s. c. 6 Biss. 312.

<sup>10</sup> *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424.

was made in an involuntary case, may be set off, although the object and effect of the transfer is to defeat the operation of the statute by enabling a creditor to obtain full satisfaction of his demand by selling his claim to a debtor of the bankrupt, to be used as a set-off.<sup>1</sup> If the transfer is merely nominal, the holder is deemed to be a trustee for the owner, and can not set the claim off against a debt due by him.<sup>2</sup> If the assignment of a *chose in action*, which is not negotiable, does not enable the holder to sue thereon in his own name, it is not a mutual debt or credit in his hands, so as to be a matter of set-off.<sup>3</sup>

If the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damage to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate (§ 5067). But the claim can not be proved until the damages are assessed, and it is incumbent upon the creditor to make a special application for such assessment.<sup>4</sup>

If the bankrupt is bound as a drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability has not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability has become fixed, and before the final dividend has been declared (§ 5069).

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not otherwise pro-

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<sup>1</sup> In re City Bank, 6 B. R. 71; Hovey v. Home Ins. Co. 10 B. R. 224; s. c. 13 A. L. Reg. 511; contra, Hitchcock v. Rollo, 4 B. R. 690; s. c. 3 Biss. 276.

<sup>2</sup> In re Lane, Brett & Co. 13 B. R. 43.

<sup>3</sup> Rollins v. Twitchell, 14 B. R. 201.

<sup>4</sup> In re Clough, 2 B. R. 151; s. c. 2 Ben. 508; in re W. Fleming Smith, 6 Ben. 187.

vided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which must then be done in such manner as the court shall order, and he will be allowed to prove for the amount so ascertained (§ 5068). Any person liable as bail, surety, guarantor, or otherwise, for the bankrupt, who has paid the debt or any part thereof in discharge of the whole, is entitled to prove such debt, or to stand in place of the creditor if he has proved the same, although such payments were made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules (§ 5070). The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claims may be proved in the name of the party contingently liable, but no dividend can be paid upon such claim except upon satisfactory proof that it will diminish *pro tanto* the original debt.<sup>1</sup>

When a claim is presented for proof before the election of an assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen (§ 5083). The

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<sup>1</sup> Rule XXXIV.



register has full power to administer oaths in all proceedings before him (§ 4998), and should not allow any claim unless it is satisfactory. He may, therefore, take testimony in regard to any claim that is tendered for proof, and should investigate it if it is disputed. He ought not to allow it simply because the creditor swears to it.<sup>1</sup> Any creditor may serve a notice upon him protesting against the proof of any claims by certain persons, and requesting to be notified if such persons should tender their claims for proof.<sup>2</sup> The bankrupt may also object to the proof of a claim, and may offer to be sworn in regard to it.<sup>3</sup> In order to justify the postponement of the proof of a claim, it is not necessary that the register shall be satisfied, or have before him positive evidence that the claim is invalid or that the creditor has no right to prove it. It is sufficient if he has a reasonable substantial doubt upon the question, but this doubt must result from a judicial consideration of it. He therefore can not postpone a claim upon a mere objection, but must give the creditor an opportunity to explain any suspicion that may be excited.<sup>4</sup> A reasonable doubt arises within the meaning of the statute when the claim is not susceptible of a ready and simple explanation.<sup>5</sup> Claims of a questionable character and in dispute;<sup>6</sup> the claim of a creditor who has accepted a preference which he does not offer to surrender;<sup>7</sup> a claim which is not stated in items and does not appear upon the bankrupt's schedules;<sup>8</sup> the claim of a stock-

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<sup>1</sup> In re Orne, 1 B. R. 57; s. c. 1 Ben. 361; in re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376; in re Herman et al. 3 B. R. 618; s. c. 4 Ben. 126; in re Noble, 3 B. R. 96; s. c. 3 Ben. 332; in re Bartusch, 9 B. R. 478.

<sup>2</sup> In re J. O. Smith, 1 B. R. 243; s. c. 2 Ben. 113.

<sup>3</sup> In re Orne, 1 B. R. 57; s. c. 1 Ben. 361.

<sup>4</sup> In re George Jackson, 14 B. R. 449; in re Northern Iron Company, 14 B. R. 356.

<sup>5</sup> In re Northern Iron Company, 14 B. R. 356.

<sup>6</sup> In re Jones, 2 B. R. 59.

<sup>7</sup> In re Herman et al. 3 B. R. 618; s. c. 4 Ben. 126; in re Stevens, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121; in re Walton et al. 1 Dedy, 442.

<sup>8</sup> In re Elijah Milwain, 12 B. R. 358.

holder when the corporation is bankrupt, if it is suspicious;<sup>1</sup> and of a creditor who has accepted a conveyance contrary to the bankrupt law, which he does not abandon,<sup>2</sup> should be postponed. But the claim of a creditor who has merely declared verbally that he was satisfied with a conveyance made for the benefit of himself and others, without any knowledge, at the time of such declaration, of any facts that made the conveyance a fraud upon the statute, may be allowed to be proved.<sup>3</sup> A claim which has been postponed may be proved after the election of an assignee, in the same manner as if it had not been previously tendered for proof.<sup>4</sup> The power to postpone a claim must always be exercised in subordination to the provision of the statute which requires that any issue of law or fact raised and contested by a party to the proceedings before him, shall be adjourned into court for decision.<sup>5</sup> When a creditor objects to the postponement of a claim, he should have the objection entered and the question certified before any further action transpires before the register.<sup>6</sup>

There are two clauses in regard to the proof of the claims of parties who have received a preference contrary to the provisions of the statute. The first is, that any person who has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of the statute, can not prove the debt or claim on account of which the preference was made or given, nor can he receive any dividend therefrom until he has first surrendered to the

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<sup>1</sup> In re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376; in re Northern Iron Co. 14 B. R. 356.

<sup>2</sup> In re Chamberlain et al. 3 B. R. 710.

<sup>3</sup> In re Chamberlain et al. 3 B. R. 710.

<sup>4</sup> In re Herman et al. 3 B. R. 649.

<sup>5</sup> In re George Jackson, 14 B. R. 449; in re Bogert et al. 2 B. R. 435; s. c. 38 How. Pr. 111; in re Clark & Binninger, 6 B. R. 202.

<sup>6</sup> In re George Jackson, 14 B. R. 449.

assignee all property, money, benefit, or advantage received by him under such preference (§ 5084). The second is, that when any person receiving a payment or conveyance has reasonable cause to believe that the debtor is insolvent, and knows that a fraud on the statute is intended, he shall not, if a creditor, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy.<sup>1</sup> As this last act repeals all acts inconsistent therewith, this second clause will prevail over the first, so far as there is any conflict between them. Both clauses relate to a penalty for a particular act, and the character of the penalty and the circumstances under which it may be imposed, must be determined by the last clause. . By that, the penalty is limited to cases of actual fraud, but as the law now requires that a creditor shall know that a payment or conveyance is intended as a fraud on the statute in order to render it void, every preference which is liable to be set aside will be a case of actual fraud. The act may therefore be construed to mean that a creditor who has received a payment or conveyance, having reasonable cause to believe that the debtor was insolvent, and knowing that a fraud on the statute was intended, shall not be allowed to prove for more than a moiety of his debt unless he surrenders such payment or conveyance.<sup>2</sup> He can not prove for even a moiety of his debt so long as he retains his preference;<sup>3</sup> but the intent of the statute seems to be that he may surrender and prove

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<sup>1</sup> Act of 22 June, 1874, § 12.

<sup>2</sup> In *re* Princeton, 1 B. R. 618; s. c. 2 Biss. 116; s. c. 1 L. T. B. 125; in *re* Colman, 2 B. R. 563; in *re* Walton et al. 4 B. R. 467; s. c. 1 Deady, 598; s. c. 1 L. T. B. 162; *Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; in *re* Scott & McCarty, 4 B. R. 414; in *re* Kipp, 4 B. R. 593; s. c. 1 L. T. B. 246; s. c. 4 L. T. B. 60; in *re* Hunt & Hornell, 5 B. R. 433; *Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; in *re* Reece & Brother, 2 Bond, 359; in *re* E. R. Stephens, 6 B. R. 533; s. c. 3 Biss. 387; in *re* Walton et al. 1 Deady, 442; in *re* John T. Drummond, 4 Biss. 149.

<sup>3</sup> In *re* Cramer, 13 B. R. 225.

for the whole of his debt,<sup>1</sup> or await the result of litigation and prove for a moiety after a recovery against him. It also appears to be the intent of the statute that a preferred creditor in all other cases than those of actual fraud may prove his debt even after a recovery. It has, however, been held that a mere preference is not an actual fraud.<sup>2</sup>

The next question is, when is a preference contrary to the provisions of the statute? There must be a preference in fact, an advantage over other creditors. When there is a preference, the conditions requisite on the part of the creditor are, that he shall have reasonable cause to believe that the debtor is insolvent, and know that the payment or transfer is made in fraud of the provisions of the statute. The requirement in regard to the insolvency of the debtor is not knowledge, but a reasonable cause. A reasonable cause is such a cause as would, under all the circumstances of the case, lead a man of ordinary intelligence to the required belief.<sup>3</sup> Insolvency, in its general and popular sense, denotes the insufficiency of the entire property and assets of an individual to pay his debts, but as applied to traders and merchants it means an inability to pay debts, as they mature in the ordinary course of business, in that which is a legal tender according to law; and a fraud on the statute means a conveyance or payment contrary to its provisions.<sup>4</sup> Of course, every man must be presumed to intend the necessary consequences of his own acts, and when there has been a preference in fact given by a debtor, at a time when he was actually insolvent, and did not honestly believe that he could continue in business, the law conclusively presumes that a preference was intended. Unless all of these requirements of the statute concur, the preference is valid. If, however, they all

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<sup>1</sup> *In re John Riorden*, 14 B. R. 332; s. c. 51 How. 271.

<sup>2</sup> *In re John Riorden*, 14 B. R. 332; s. c. 51 How. 271.

<sup>3</sup> *Scammon v. Cole*, 5 B. R. 257.

<sup>4</sup> *Toof v. Martin*, 6 B. R. 49; s. c. 13 Wall. 40.

concur, there is still another requirement; it must be made within the prescribed time. Independently of the statute, the payment of an honest debt is valid; it is invalid only when it comes within all the requirements of the statute. In many cases, it has simply been assumed, without comment or discussion, that four months was the limit in a case of voluntary bankruptcy, and six months was the limit in a case of involuntary bankruptcy, thus making a distinction between the two cases. The limitation of six months, however, contained in the twelfth section of the act of June 22, 1874, applies only to the period within which petitions may be filed to have the debtor declared bankrupt, and is almost in express terms limited to that subject alone.<sup>1</sup> There is a provision that such property or money, so conveyed or transferred contrary to the act, may be recovered; but the mode and manner of recovery are provided for in the section 5128. In the latter section the whole subject of such recoveries is elaborately provided for, and its terms are applicable equally to all cases in bankruptcy, whether voluntary or involuntary. It is not limited or restricted, either expressly or impliedly, to cases of voluntary bankruptcy. As these sections, in relation to the subject of such recoveries, are *in pari materia*, they should be construed together, and all the conditions, prohibitions, and limitations contained in one may be applied to the other, when not inconsistent with its provisions.<sup>2</sup> Even though the limitation of six months, contained in the latter section, were less clearly limited to the period within which petitions might be filed against a debtor, yet the two sections taken together would show that it had no application to a recovery of the property or money. A mere preference, therefore, which has stood

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<sup>1</sup> In re Tonkin & Trewartha, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; Collins v. Gray, 4 B. R. 631; s. c. 8 Blatch. 483.

<sup>2</sup> In re Tonkin & Trewartha, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221.

for four months in cases of voluntary bankruptcy, or two months in cases of involuntary bankruptcy, will be valid as against all the world.<sup>1</sup>

If the preference has stood for four months or two months, as the case may be, the creditor may prove his debt without making a surrender of his preference in a case either of voluntary or of involuntary bankruptcy. If it has not stood for the required time, and falls within the requirements of the statute, then he can not in case of actual fraud prove for more than a moiety of the claim without surrendering it. But the term surrender implies some voluntary act on the part of the creditor; and when the return of the money or property is compulsory, it is not a surrender. Consequently, there can be no surrender after a recovery in an action brought by the assignee. There may be a surrender at any time before judgment.<sup>2</sup> If the case is tried before the court without the aid of a jury, the creditor may surrender after the announcement of the opinion of the court, and before the entry of the judgment, where there is nothing more than a constructive fraud.<sup>3</sup> After judgment is rendered, there can be no surrender. A compliance with the judgment is simply made by force of the recovery.<sup>4</sup> A creditor who is merely appointed trustee by a voluntary assignment of the debtor's property, is not debarred from proving his claim.<sup>5</sup> The creditor may make the surrender at the first meeting of creditors and prove his claim so as to participate in the

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<sup>1</sup> *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 *Holmes*, 75; in *re Butler*, 4 B. R. 303; s. c. *Lowell*, 506; *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 *Blatch*, 284; *Maurer v. Frantz*, 4 B. R. 431; s. c. 8 *Phila.* 505; *Collins v. Gray*, 4 B. R. 631; s. c. 8 *Blatch*, 483.

<sup>2</sup> In *re Kipp*, 4 B. R. 593; s. c. 1 L. T. B. 246; s. c. 4 L. T. B. 60; *Hood v. Karper*, 5 B. R. 358; s. c. 8 *Phila.* 160; s. c. 2 L. T. B. 201; in *re E. R. Stephens*, 6 B. R. 533; s. c. 3 *Biss.* 387; in *re John Riorden*, 14 B. R. 382; s. c. 51 *How.* 271.

<sup>3</sup> *Burr v. Hopkins*, 12 B. R. 211; s. c. 6 *Biss.* 345.

<sup>4</sup> In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; in *re Cramer*, 13 B. R. 225; in *re John F. Lee*, 14 B. R. 89.

<sup>5</sup> In *re Joseph Horton*, 5 *Ben.* 562.

election of an assignee.<sup>1</sup> The debt which can not be proved is only the debt on account of which the preference was received.<sup>2</sup> If a creditor has separate and disconnected debts, as to which he has received separate and distinct preferences, he may surrender as to some, and prove and receive dividends as to them, without surrendering as to the others.<sup>3</sup> But a creditor can not accept a preference generally, and then some time after it is taken, make an application of it to a portion only of his debt.<sup>4</sup> A continuous running account is presumptively but one debt or claim.<sup>5</sup>

A creditor who has a valid security holds a peculiar relation to the estate in bankruptcy. He is a creditor, and, moreover, has a valid claim upon property in which other creditors have, or may have, an interest. Hence it is not in all cases optional with him whether or not he will prove his claim.<sup>6</sup> The assignee may sell the property subject to his lien. In that case he may prove his claim or not, as he chooses. The assignee, on the other hand, may deem it best to sell the property free from incumbrances. In that case the creditor must prove his debt before he can draw his share of the fund from court. He may also relinquish his security, and prove his whole claim. In such case, he must accompany his proof with a release or conveyance of the security to the assignee; and any attempt to prove without doing this should be disregarded.<sup>7</sup> It has been said that a secured creditor can not prove his claim before an assignee is elected, unless he abandons his security.<sup>8</sup> If by this it is meant

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<sup>1</sup> In re W. A. Saunders, 13 B. R. 164.

<sup>2</sup> In re Arnold, 2 B. R. 160; in re John F. Lee, 14 B. R. 89.

<sup>3</sup> In re D. G. Holland, 8 B. R. 190.

<sup>4</sup> In re Kingsbury et al. 3 B. R. 318.

<sup>5</sup> In re Richter's Estate, 4 B. R. 221; s. c. 1 Dillon, 544.

<sup>6</sup> Markson v. Heany, 4 B. R. 510; s. c. 1 Dillon, 497.

<sup>7</sup> In re Brand, 3 B. R. 324; s. c. 2 L. T. B. 66.

<sup>8</sup> In re High et al. 3 B. R. 192; s. c. 1 L. T. B. 175.

that he can not make a deposition to his claim, it is not in accordance with the general practice, nor with what appear to be the views of the justices of the Supreme Court; for the prescribed form<sup>1</sup> requires a statement of the property held as security, and the estimated value thereof. Such, also, is the requirement of the statute (§ 5077). There is a distinction between making the proof and being admitted as a creditor. The proof of a claim by a secured creditor differs from that of an unsecured creditor in this: the latter at once steps into the column of general creditors who are to be paid out of the assets of the bankrupt *pro rata*, according to the amount of their claims; while the former or secured creditor, halts for a time to have the value of his security determined in such a manner as the court may direct, and then becomes a general creditor, or shares in the bankrupt's assets for the balance, after deducting the value of his securities.<sup>2</sup> The proving of his debt is a necessary preliminary step to his eventually being admitted as a creditor.<sup>3</sup> Such proof is commonly regarded as an election to come into the court of bankruptcy, and submit the property and his rights to its adjudication. He can not, however, be, in strictness, called a creditor until an assignee is appointed, the securities sold, and the balance ascertained.

A proof, according to the prescribed form,<sup>4</sup> may be made at any time after the proceedings are commenced, even though the value of the security is not determined, nor the property sold.<sup>5</sup> The creditor should be careful to set forth his securities, for it has been held that a proof without reference to them, and without apprising the

<sup>1</sup> Form No. 21.

<sup>2</sup> In re Bridgman, 1 B. R. 312; s. c. 2 B. R. 252.

<sup>3</sup> In re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>4</sup> Form No. 21.

<sup>5</sup> In re Bridgman, 1 B. R. 312; s. c. 2 B. R. 252; in re Bigelow et al. 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; in re Ruehle, 2 B. R. 577; s. c. 2 L. T. B. 59.



court of their existence, is a waiver and relinquishment of them to the assignee.<sup>1</sup> It has, on the other hand, been held that such a proof, not accompanied by an express release or conveyance of the securities to the assignee, ought not to be permitted, and should be disregarded;<sup>2</sup> and such appears to be the requirement of the statute (§ 5075). A claim, however, of a lien upon the entire estate, when it only exists upon a portion of it, does not vitiate the lien.<sup>3</sup> The proof should contain a description of the property, and its estimated value. This does not mean the exact value, but merely an estimation of such value.<sup>4</sup> There should also be a description of the lien, its character, the manner in which it was acquired, and all the circumstances that are necessary to make it a valid claim against the property. When there are written evidences of it, these, or duly certified copies, are generally attached as exhibits. It is always prudent to make an express reservation of all rights under the security, so that there may be no risk of incurring a forfeiture. A proof made in this manner will not invalidate the right of the creditor to the securities. He does not prove as against the estate, nor offer to prove the whole indebtedness exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness, in order to arrive at the balance; for which balance alone he seeks to be admitted to share in the distribution of the assets.<sup>5</sup>

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<sup>1</sup> *Stewart v. Isidor et al.* 1 B. R. 485; s. c. 5 Abb. Pr. (N. S.) 68; in *re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126; in *re Stansell*, 6 B. R. 183; in *re Granger & Sabin*, 8 B. R. 30; in *re Jaycox & Green*, 8 B. R. 241; *Hoadley v. Cawood*, 40 Ind. 239; *Briggs v. Stephens*, 7 Law Rep. 281.

<sup>2</sup> In *re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.

<sup>3</sup> *McKinsey et al. v. Harding*, 4 B. R. 39.

<sup>4</sup> In *re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95.

<sup>5</sup> In *re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; in *re Snedaker*, 3 B. R. 629; *King v. Bowman*, 24 La. An. 506.

The proof should be entitled properly in the court and in the cause in which it is to be used,<sup>1</sup> and should show the district in which it is taken, and the name and official title of the officer taking it. When the creditor consists of a firm, it must state the names of all the partners. It must be signed by the affiant, and by the officer who takes it. The officer also usually appends to it a certificate that it is satisfactory to him, and the proof will not be allowed when it is taken before any other officer than the register who has charge of the case unless such certificate is attached.<sup>2</sup> It must also have indorsed on it a brief statement of its character.<sup>3</sup> An indorsement of the title of the case and the court in which it is pending is also usually made. When the proof is not taken before the register who has charge of the case, it should be transmitted to him (§ 5079); and he has the power to reject it if, on its face, it does not show a compliance with the law, and return it to the officer who took it for amendment.<sup>4</sup> In examining proofs for admission, he acts not only as a judicial officer, who is to decide all questions according to law, but as an administrative officer, who, in the interest of all the creditors, is to take care that a defective or insufficient proof is not allowed to pass either through partiality or inattention.<sup>5</sup> He may decline to file it until the fee for filing is paid. When the proof is sent by mail to the register, and is accompanied by the fee for filing and a fee for sending a notice to a creditor, the register must acknowledge the receipt of it, and state the amount at which he has entered it, and if it shall be insufficient or unsatisfactory to him he must state the reason.<sup>6</sup>

In order to become recognized as a creditor, it is not

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<sup>1</sup> Rule XXXIV. In re Pius Walther, 14 B. R. 273.

<sup>2</sup> In re Belden & Hooker, 4 B. R. 191.

<sup>3</sup> Rule I.

<sup>4</sup> In re Loder, 2 B. R. 515.

<sup>5</sup> In re Port Huron Dry Dock Co. 14 B. R. 253.

<sup>6</sup> Rule XXXIV.

sufficient to make the proof alone. The claimant must put it on file in the proceedings. If he retains the proof in his own hands, he cannot be considered a creditor who has proved his debt within the technical meaning of the bankrupt law.<sup>1</sup> After it has been placed upon file, it may be found to be defective, either through the omission of some merely formal statement, or of some material matter, by inadvertence or mistake. In all such cases, it should be amended. If the register discovers the defect, he may require an amendment, subject, however, to a revision by the court.<sup>2</sup> When the creditor discovers the defect, he may apply for leave to amend, which ought generally to be granted.<sup>3</sup> This power to amend extends to all matters contained in the proof. The amount of the debt may be enlarged or diminished, as the circumstances may require.<sup>4</sup> Formal defects may be supplied.<sup>5</sup> A proof may be changed in form from unsecured to secured.<sup>6</sup> Amendments may be made as long as the right to prove continues.<sup>7</sup> Participation in the election of an assignee will not preclude a creditor from amending his proof from unsecured to secured, when there is no evidence that he gained any advantage thereby, or that other creditors have been in any wise prejudiced in consequence of it, or that he was influenced by any fraudulent intent.<sup>8</sup> When the amendments are merely formal, or relate simply to additional statements, they may be made in the original proof, but in such case the proof must be sworn to again after such

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<sup>1</sup> In re Sheppard, 1 B. R. 439; s. c. 1 L. T. B. 49.

<sup>2</sup> In re Elder, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

<sup>3</sup> In re Loweree, 1 B. R. 74; s. c. 1 Ben. 406.

<sup>4</sup> In re Montgomery, 3 B. R. 429.

<sup>5</sup> In re Loder, 3 B. R. 655; s. c. 4 Ben. 125.

<sup>6</sup> In re Brand, 3 B. R. 324; s. c. 2 L. T. B. 66; in re Clark & Binninger, 5 B. R. 255; in re Hope Mining Co. 1 Saw. 710; in re Harwood, Crabbe, 496; in re Lapsley, 1 Penn. L. J. 245.

<sup>7</sup> In re Myrick, 3 B. R. 154; in re Montgomery, 3 B. R. 429.

<sup>8</sup> In re William McConnell, 9 B. R. 387; King v. Bowman, 24 La. An. 506.

alteration.<sup>1</sup> It has been held that when a new and different demand has been discovered, the proper mode is to make a separate and independent proof.<sup>2</sup> It would seem to be the better practice, in all cases where the amount of the claim is to be augmented or diminished, to require a separate proof, and let such new proof refer to the old one, and be made as an amendment of it. The ordinary course is to prove all the debt in the first instance; and a new claim excites suspicion. For this reason the two matters should be kept distinct. A party who has willfully and fraudulently made misstatements in his proof can not amend it, but must abide the consequences of his fraud.<sup>3</sup>

There are several decisions to the effect that a party can not take his proof from the file.<sup>4</sup> But where the proof has been made under a mistake of fact or even of law, it may be withdrawn almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. Even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, the proof may be withdrawn, if there has been a mistake, and no want of diligence. The allowance of a withdrawal is, however, a matter of discretion. A creditor can not demand it as a matter of right,<sup>5</sup> nor will it be allowed for the purpose of continuing an arrest which was made before the commencement of the proceedings in bankruptcy.<sup>6</sup> A creditor who has inadvertently used the wrong form may withdraw it.<sup>7</sup> A proof may also be withdrawn for the purpose of proceeding against a dormant partner of

<sup>1</sup> In re Pius Walther, 14 B. R. 273.

<sup>2</sup> In re Montgomery, 3 B. R. 374; s. c. 3 L. T. B. 40.

<sup>3</sup> In re Elder, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

<sup>4</sup> In re Loweree, 1 B. R. 74; s. c. 1 Ben. 406; in re McIntosh, 2 B. R. 506; in re Emison, 2 B. R. 595.

<sup>5</sup> In re Abraham Halle, 7 Ben. 182.

<sup>6</sup> In re Wiener, 14 B. R. 218.

<sup>7</sup> In re Brand, 3 B. R. 324; s. c. 2 L. T. B. 66; in re Clark & Binninger, 5 B. R. 255; Morse v. Lowell, 48 Mass. 152.

the bankrupt.<sup>1</sup> An order allowing the withdrawal of a proof may be passed by the register, if after due notice no opposition is made, otherwise by the court.<sup>2</sup>

The formal proof of the debt merely makes out a *prima facie* case. It is always a question of fact whether the debt has been paid in whole or in part, or whether it is provable, and a question as to which pertinent evidence is always admissible.<sup>3</sup> The court has, at all times, full control of all proofs, and the right to entertain objections to the validity of the debts, or the proofs thereof.<sup>4</sup> It may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and must reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake (§ 5086). After a claim has been once formally allowed by the register, this is the only means by which its validity can be contested. An assignee has no power to reject it, or entertain objections to its validity. The proper mode to set aside a proof is to make an application to the court or the register for that purpose. This application may be made not only by the assignee or the bankrupt, but also by any creditor who has proved, or tendered proof of, his debt.<sup>5</sup> The application should be by a petition, properly entitled in the cause, setting forth the grounds upon which the validity of the debt is contested.<sup>6</sup> Such summary petitions are generally verified by the oath of the petitioner.

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<sup>1</sup> In re E. Hubbard, 1 B. R. 679; s. c. Lowell, 190.

<sup>2</sup> In re E. Hubbard, 1 B. R. 679; s. c. Lowell, 190.

<sup>3</sup> In re Colman, 2 B. R. 563; in re Fortune, 3 B. R. 312; s. c. Lowell, 384.

<sup>4</sup> In re Patterson, 1 B. R. 100; s. c. 1 Ben. 448; in re Jones, 2 B. R. 59; in re S. Paddock, 6 B. R. 132; s. c. 2 L. T. B. 214.

<sup>5</sup> In re Ray, 1 B. R. 203; s. c. 2 Ben. 53.

<sup>6</sup> In re Walton et al. 1 Dedy, 442.

The application may be made to the register<sup>1</sup> to whom the cause is referred. The register thereupon passes an order fixing a time for hearing the petition, of which due notice must be given, by mail, addressed to the creditor. At the time appointed he must take the examination of the creditor, and of any witnesses that may be called by either party.<sup>2</sup> If the creditor is unable to attend in pursuance of the notice, he should take steps to procure a postponement until he can attend. But if he fails to appear and submit to an examination, the claim may be expunged or diminished by default.<sup>3</sup> If the creditor appears, he need only offer himself for cross-examination and the assignee or other adverse party, if he wishes to contest the proof, must offer such opposing evidence as he may have.<sup>4</sup> If it appears from the examination that the claim ought to be expunged or diminished, the register, if no objection is made, may order accordingly. If objection is made, the register must require the parties then, or within a time to be fixed for that purpose, to form an issue to be certified into court for determination. He has no authority to require the parties to form an issue, if either of them objects, until it appears to him that the claim ought to be expunged or diminished and an objection is made to his making an order to that effect.<sup>5</sup> If a party has obtained an order for forming an issue, he can not have it revoked if the other party did not object to the order but objects to the revocation.<sup>6</sup> If the petitioner is in default in making up the issue, the petition must be dismissed. If the creditor whose claim is re-examined is in default in making up the issue, the claim may be diminished or expunged by the register. All orders thus made by the register may be

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<sup>1</sup> Rule XXXIV. Vide *Comstock v. Wheeler*, 2 B. R. 561; s. c. 3 Ben. 236.

<sup>2</sup> Rule XXXIV.

<sup>3</sup> In re *Ira C. Lount*, 11 B. R. 315.

<sup>4</sup> In re *William L. Robinson*, 14 B. R. 130.

<sup>5</sup> In re *James S. Aspinwall*, 7 Ben. 154.

<sup>6</sup> In re *James S. Aspinwall*, 7 Ben. 154.

reviewed by the court on special petition, and upon showing satisfactory cause for such review.<sup>1</sup>

The application may also be made to the court. When the petition is filed, the court usually passes an order to show cause, and directs that a copy of the order and of the petition be served upon the creditor. The creditor may also be required to attend personally for examination. The application may be made either for striking out the proof, or an examination, or both. It is immaterial whether the creditor resides in the district or not. A creditor who has proved his debt becomes subject to the jurisdiction of the court, without regard to his place of residence, and is bound to obey all orders of the court touching his alleged debt. In case of his disobedience of its orders, the court can deprive him of all the benefits of the statute, and can reject and expunge his proof.<sup>2</sup> If the creditor has appeared by attorney, the order may be served upon the attorney; otherwise, it must be served upon him personally.<sup>3</sup> The response to the petition is usually made by an answer.

The testimony may be taken before the court or a register *viva voce*, or in writing before a commissioner, or by affidavit or on commission (§ 5003). The creditor is not entitled to witness' fees for attendance.<sup>4</sup> In case it is made to appear that any creditor whose debt is contested can not personally attend to be examined in the district where the proceedings are pending, without hardship to him, owing to the distance of his residence, or other similar reasons, the court will provide, by order, for the taking of his examination before a register of the district in which he resides.<sup>5</sup> The claim of the petitioning creditor is open to contention. The mere fact that he is a petitioner is not conclusive upon other creditors that he is to be allowed in

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<sup>1</sup> Rule XXXIV.

<sup>2</sup> In re Kyler, 2 Ben. 414.

<sup>3</sup> Rule III.

<sup>4</sup> In re S. Paddock, 6 B. R. 132; s. c. 2 L. T. B. 214.

<sup>5</sup> In re Kyler, 2 Ben. 414; in re Ira C. Lount, 11 B. R. 315.

the distribution of the estate just what he claims in his petition.<sup>1</sup>

In a proper case, a claim may be allowed in part,<sup>2</sup> or allowed or disallowed as a whole;<sup>3</sup> but when a creditor, by a combination with the bankrupt, and in view of the commencement of proceedings in bankruptcy, has fraudulently enlarged his claims, both the real and fictitious claims will be disallowed. Fraud corrupts and destroys the whole debt.<sup>4</sup> Claims which have been purchased with the funds of the bankrupt will be stricken out.<sup>5</sup> A friend of the bankrupt, however, may honestly and in good faith undertake to buy up all the claims, with the intention of stopping the proceeding, and, if he fails in the attempt, may prove the debts which he has so purchased and had assigned to him.<sup>6</sup> A claim which has its origin in a transaction entered into by the claimant with the bankrupt for the purpose of delaying, hindering, or defrauding the creditors of the latter, is not provable.<sup>7</sup> But a claim which is valid independently of a fraudulent transfer is not merged thereby. When the transfer is set aside, the claim is revived and may be proved.<sup>8</sup> A secured creditor whose proof is stricken out on account of usury, will not be compelled to surrender his security.<sup>9</sup> The court will also make an examination of the creditor without any application therefor, and, when it sees, from the testimony before it, that certain claims are improperly proved, it will reject them.<sup>10</sup> If defects in the deposition

<sup>1</sup> In re Cornwall, 6 B. R. 305; s. c. 9 Blatch. 114.

<sup>2</sup> Form No. 66.

<sup>3</sup> Form No. 67.

<sup>4</sup> In re Elder, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140; *Marrett v. Atterbury*, 11 B. R. 225; s. c. 3 Dillon, 444.

<sup>5</sup> In re Lathrop et al. 3 B. R. 413; s. c. 5 B. R. 43; s. c. 3 Ben. 490.

<sup>6</sup> In re Pease et al. 6 B. R. 173; in re Strachan, 3 Biss. 181.

<sup>7</sup> In re E. R. Stephens, 6 B. R. 533; s. c. 3 Biss. 387.

<sup>8</sup> In re E. R. Stephens, 6 B. R. 533; s. c. 3 Biss. 387; *Kappner v. St. Louis & St. J. R. R. Co.* 3 Dillon, 238.

<sup>9</sup> *Dallas v. Flues & Co.* 8 Phila. 150.

<sup>10</sup> In re Lathrop et al. 3 B. R. 413; s. c. 3 Ben. 490.



have justified the application, costs can be imposed upon the party in default.<sup>1</sup>

If the assignee or the creditor is dissatisfied with the decision of the district court, he should take the proper steps to have it revised. Any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district (§ 4980); but no appeal can be allowed in any case from the district to the circuit court, unless it is claimed, and notice<sup>2</sup> given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, within ten days after the entry of the decision appealed from. No appeal can be allowed unless the appellant, at the time of claiming the same, gives bond in the manner required by law in cases of such appeals (§ 4981). The right of appeal can neither be enlarged nor restricted by the district or the circuit court. The regulation of appeals is a regulation of jurisdiction. The circuit court has no jurisdiction of any appeal, in any case under the bankrupt law, from the district court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given within ten days after the entry of the decision appealed from.<sup>3</sup> When an appeal is not properly taken, it may be dismissed upon motion.<sup>4</sup> When an investigation has been had, and a decision as to the validity of a claim has been made by the district court, an objecting creditor can not take an appeal, but may file a petition for review in the circuit court.<sup>5</sup>

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<sup>1</sup> In re Elder, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

<sup>2</sup> Form No. 68.

<sup>3</sup> In re Alexander, 3 B. R. 29; s. c. 2 L. T. B. 81; s. c. Chase, 295.

<sup>4</sup> In re Kyler, 3 B. R. 46; s. c. 6 Blatch. 514; in re Coleman, 2 B. R. 671; s. c. 7 Blatch. 192; in re Place et al. 4 B. R. 541; s. c. 8 Blatch. 302; in re Place & Sparkman, 9 Blatch. 369.

<sup>5</sup> In re Adolph Joseph, 2 Woods, 390; contra, in re Troy Woolen Co. 9 B. R. 329; s. c. 9 Blatch. 191.

The appeal must be entered at the term of the circuit which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same (§ 4982). When a supposed creditor takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, he must, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, and the assignee must plead or answer thereto in like manner, and like proceedings are had in the pleadings, trial, and determination of the cause, as in an action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution can be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court is conclusive, and the list of debts must, if necessary, be altered to conform thereto. The party prevailing in the suit is entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they must be allowed out of the estate (§ 4984). This appeal must be filed in the clerk's office of the circuit court within ten days after it is taken, and the assignee must plead or answer by a defense, in writing, within ten days after the statement is filed. Every issue thereon must be made up in the court, and the cause placed upon the docket thereof, and must be heard and decided in the same manner as other actions at law.<sup>1</sup>

A creditor can not demand payment of his debt until he makes and presents to the assignee the proper proof thereof. This provision is analogous in purpose and proceeding to the probate of debts against the estate of a decedent before being presented to or allowed by the ad-

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<sup>1</sup> Rule XXIV.

ministrator. When this is done, parties interested may object to the claim; and the court—the district judge, without a jury, in a summary manner—may reject the claim as not been duly proved, or as being founded in fraud, illegality, or mistake. Then, and not before, the supposed creditor may bring action in the circuit court against the assignee, and have his right to payment regularly tried. But this action can only be maintained by the creditor's first taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner, and to a particular court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circumstances and conditions.<sup>1</sup> The right of appeal, however, is not limited to those cases where a proof is rejected, or where summary proceedings are instituted for the purpose of setting it aside. When the validity of a claim, or the right of a creditor to prove it, is doubted, the proof of the claim not only may, but should be postponed until an assignee is chosen. Then the proper proceedings may be had in regard to it, and an appeal can then be taken in the prescribed manner; while, if it is summarily rejected before an assignee is chosen, there will be no person to be a defendant in the proceedings in the circuit court. If the appellant, in writing, waives his appeal before a decision, proceedings may be had in the district court the same as if no appeal had been taken (§ 4983).

No creditor proving his debt or claim will be allowed to maintain any suit at law or in equity therefor against the bankrupt, but is deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, are discharged and surrendered thereby (§ 5105). But a creditor proving his debt or claim is not

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<sup>1</sup> Catlin v. Foster, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

held to have waived his right of action or suit against the bankrupt where a discharge is refused or the proceedings are determined without a discharge.<sup>1</sup> This provision, however, does not apply to any debt which is not dischargeable under the statute.<sup>2</sup> The debts that are not discharged are debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity (§ 5117); and the term fiduciary capacity embraces any fiduciary relation,<sup>3</sup> and extends to a claim arising from the sale of goods consigned to the bankrupt to be sold on commission.<sup>4</sup> As no discharge can be granted to a corporation, the proof of a debt against it will not debar the creditor from instituting a suit against it;<sup>5</sup> or against a stockholder, to enforce his contingent liability.<sup>6</sup>

Although the general language of this provision, taken by itself, would call for an absolute surrender forever, yet the other provisions of the statute show that this general language is to be considered as used in reference to the subject-matter of this legislation only, and as only calling for such surrender as is requisite to carry out the objects and ends contemplated by the statute. The bare fact of a creditor's proving his claim does not extinguish his right of action for the recovery and collection of his claim, but merely operates as a waiver of his right to institute any suit or proceedings at law or in equity which are in

<sup>1</sup> Act of June 22, 1874, § 7.

<sup>2</sup> *In re W. E. Robinson*, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18.

<sup>3</sup> *In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.

<sup>4</sup> *In re J. H. Kimball*, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *Whitaker v. Chapman*, 3 Laus. 155; s. c. 1 L. T. B. 249; s. c. 4 L. T. B. 92; *Lemcke v. Booth*, 5 B. R. 351; s. c. 47 Mo. 385.

<sup>5</sup> *Ansonia Brass Co. v. New Lamp Chimney Co.* 10 B. R. 355; s. c. 53 N. Y. 123; s. c. 64 Barb. 435; s. c. 13 B. R. 385; s. c. 91 U. S. 656; *Allen v. Soldiers' Dispatch Co.* 4 B. R. 537; s. c. 2 L. T. B. 158.

<sup>6</sup> *Shellington v. Howland*, 53 N. Y. 371; *Allen v. Ward*, 36 N. Y. Sup. 296.

any way inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings. This is the reasonable construction of the clause, and the only one by which the evident intent of Congress, as gathered from a view of the whole statute, can be carried out; since by it, while a proving creditor is prevented, whether a discharge is granted or refused, from subjecting the already acquired property of the bankrupt to the satisfaction of his debt, otherwise than through the bankruptcy proceedings, yet in the event of his successfully opposing the bankrupt's discharge, he remains at liberty to enforce the collection of his claim out of after-acquired property by suit or action in equity or at law. Thus it becomes material to the bankrupt to obtain his discharge, and a motive is furnished the proving creditor to oppose the discharge; for if a valid discharge is granted, it will afford a complete protection to all after-acquired property.

It is evident that there are some suits and proceedings by a previous creditor, which by the bare act of the proving of a debt, irrespective of the determination of the question as to whether the bankrupt shall have his discharge, are surrendered and given up: as, for instance, those the whole object and purpose of which are to operate on already acquired property, and that alone; while there are other suits and proceedings which are not affected by any express provision of the statute other than that relating to the effect of a discharge when obtained, except that proceedings thereon may be temporarily stayed. Of this class of suits are ordinary actions at law for the recovery of a contract debt, and judgments rendered in such actions. For although the right to enforce any lien obtained by reason of such judgments is surrendered and given up by the act of proving the debt, yet such suits and judgments, so far as they may affect and fasten on after-acquired property in case a discharge is not granted, are not surrendered. The right of action is not extin-

guished, but the creditor is only barred from instituting suits or proceedings inconsistent with his election to obtain satisfaction of his debts under the bankruptcy proceedings; and it is not inconsistent with such election for him, in case a discharge is refused, to reach after-acquired property by actions or suits at law or in equity. The bare retention of a judgment recovered prior to the filing of the petition, and the pendency of an action commenced prior to that time, are not inconsistent with such election until a valid discharge has been obtained. They do not in any way interfere with the bankruptcy proceedings. A surrender of them, prior to such discharge, does not aid, or remove any obstacle to the conduct and effect of the bankruptcy proceedings under the provisions of the statute. A creditor may, therefore, in the event of a valid discharge not being granted, retain a judgment or an action already commenced, and thus save himself from the trouble and expense of instituting a new suit, and be enabled, in some cases, to avoid a plea of the statute of limitations.<sup>1</sup>

At the time of making proof of his claims, the creditor usually executes a letter of attorney, if he wishes to have a voice in the election of an assignee, and can not be personally present at the creditors' meeting. This should be according to the prescribed forms.<sup>2</sup> The forms, however, are largely advisory. Any duly executed writing, which expresses the essential fact of the appointment of the attorney, and the powers confided to him, must be respected by the judge or register.<sup>3</sup> It should be properly entitled in the cause, and addressed to the person selected as agent. If addressed to more than one, care should be taken not to have it joint, for then both agents must unite in acting

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<sup>1</sup> Hoyt v. Freel et al. 4 B. R. 131; s. c. 8 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144; Smith v. Dispatch Co. 37 N. J. 60; Hamlin v. Hamlin, 3 Jones Eq. 191; Haxtun v. Corse, 4 Edw. Ch. 585; s. c. 2 Barb. Ch. 506; contra, Bennett v. Goldthwaite, 109 Mass. 494; Pray v. Toft, 18 N. H. 188; Commercial Bank v. Buckner, 20 How. 108.

<sup>2</sup> Forms Nos. 14, 26.

<sup>3</sup> In re H. F. Barnes, Lowell, 560.

under it.<sup>1</sup> If it is desirable to confer a power of substitution, the power should be specially inserted, for without it an agent can not authorize another to act for him.<sup>2</sup> The ordinary forms confer upon an agent no authority except that to vote, as a careful analysis of their provisions will show, and if other powers are to be exercised, they must be specially conferred.<sup>3</sup> The letter of attorney must be signed by the party executing it. One partner may execute it on behalf of his firm,<sup>4</sup> and as a firm is not an entity known to the law, he should sign the names of his copartners, but the signatures should show that they were signed by him. When an agent executes it, he must produce legal evidence that he is duly authorized to execute it.<sup>5</sup> He should sign the name of his principal, and not his own name; but the signature should be made in such a manner as to show that he signed it. It must be properly attested. It need not be acknowledged,<sup>6</sup> but generally is, and a short certificate of acknowledgment attached. The execution may be proved or acknowledged before a register in bankruptcy, a United States circuit court commissioner,<sup>7</sup> or a notary public.<sup>8</sup> An acknowledgment taken before a clerk of a State court is not sufficient.<sup>9</sup> When executed on behalf of a copartnership or corporation, the person executing the instrument must make oath that he is a member of the firm or duly authorized officer of the corporation on whose behalf he acts. When the party executing is not personally known to the officer taking the proof or acknowledgment, his identity must be established

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<sup>1</sup> In re Frank, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.

<sup>2</sup> In re Eidom, 3 B. R. 106.

<sup>3</sup> Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166.

<sup>4</sup> In re Barrett, 2 B. R. 533; s. c. 1 L. T. B. 141.

<sup>5</sup> In re Knoepfel, 1 B. R. 23; s. c. 1 Ben. 330.

<sup>6</sup> In re Powell, 2 B. R. 45; in re H. F. Barnes, Lowell, 560.

<sup>7</sup> Rule XXXIV.

<sup>8</sup> Act of Aug. 15, 1876; in re Butterfield & Burr, 14 B. R. 165; in re McDuffee, 14 B. R. 336.

<sup>9</sup> In re William C. Christley, 10 B. R. 268; s. c. 6 Eiss. 155.

by satisfactory proof.<sup>1</sup> An agent should acknowledge the letter of attorney to be the act of his principal, and a partner should acknowledge it to be the act of his firm. The certificate of acknowledgment must be signed by the officer taking it.

The execution of an assignment of a claim after proof may be proved or acknowledged in the same manner as a letter of attorney. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the register's docket, the register must immediately give notice by mail to the original claimant of the filing of such proof of assignment. If no objection is entered within ten days, he must make an order subrogating the assignee to the original claimant. If objection is made within the time specified, or within such further time as may be granted for that purpose, the register must certify the objection into court for determination.<sup>2</sup>

Any creditor may file with the register a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint, and thereafter and until some other designation is made by such creditor, all notices must be so addressed; and in other cases notices must be addressed as specified in the proof of debt.<sup>3</sup>

A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who must indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon (§ 5082). No paper can be taken from the files

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<sup>1</sup> Rule XXXIV.

<sup>2</sup> Rule XXXIV.

<sup>3</sup> Rule XXXIV.



for any purpose except by the order of the court.<sup>1</sup> The instrument proven may be withdrawn.<sup>2</sup> A party applying for leave to withdraw exhibits filed with an examination, must show what interest he has in them, and the purpose for which he desires to use them.<sup>3</sup> .

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<sup>1</sup> Rule I.

<sup>2</sup> In re Emison, 2 B. R. 595.

<sup>3</sup> In re McNair, 2 B. R. 341.

## CHAPTER VI.

### FIRST MEETING OF CREDITORS.

UPON the day appointed for the first meeting of creditors, the marshal makes return of the warrant. This return<sup>1</sup> is usually indorsed upon the warrant, and should set forth the newspapers in which the notices were published, the number of publications, the day of the first publication, and the day on which the notices were mailed to the creditors, and be accompanied by a statement, duly verified, of his expenses. The marshal must make his return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, publication of notices, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.<sup>2</sup> This oath may be taken before any register. With the warrant, he also returns certificates of the publications, and one of the printed notices prepared to be served upon the creditors. If the notices have been mailed to creditors other than those named in the printed list, a special return to that effect should be made. All the notices that have been returned, in pursuance of the direction indorsed thereon, should be left with the register, for they constitute a part of the papers in the case. If the marshal lives at a distance from the office of the register, the warrant and return are usually transmitted by mail. He may also make the return personally.<sup>3</sup> The return of the service of the order of adjudication in

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<sup>1</sup> Form No. 7.

<sup>2</sup> Rule XII.

<sup>3</sup> In re Talbot, 2 B. R. 280 ; s. c. 2 L. T. B. 15.

involuntary cases may be made wholly on the warrant or separately on the warrant and order, but the latter course is preferable.<sup>1</sup>

The register should examine the return, and see whether all the proceedings under the warrant have been regular. The return is *prima facie* evidence of the matters set forth therein, but it is not conclusive. Although the return states the due giving of the notice, evidence may be offered to show that due notice has not been given. If, however, the return shows that due notice has been given, and there is no satisfactory evidence to the contrary, the return is *prima facie* evidence of the due giving of the notice, and is conclusive until rebutted.<sup>2</sup> If it appears, either from the return or any other evidence, that due notice has not been given, then the meeting must be adjourned, and a new notice given (§ 5033). The service of the order of adjudication, in cases of involuntary bankruptcy, is mainly a right or privilege personal to the bankrupt, and any delay in such service should not retard the general course of the proceedings.<sup>3</sup> A return by the marshal in an involuntary case, that he has sent written or printed notices to the creditors named on the schedules therewith returned, and that the schedules are made up on the best information that he can obtain, is sufficient, although it does not state the sources of the information, or that the bankrupt has furnished schedules, or refused to furnish them, or that proceedings have been taken ineffectually to compel him to furnish them.<sup>4</sup> But a return that he sent the notices to the creditors whose names were on a schedule handed to him by the attorney for the petitioning creditor, is insufficient.<sup>5</sup>

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<sup>1</sup> In re Kennedy et al. 7 B. R. 337.

<sup>2</sup> In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321; in re Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

<sup>3</sup> In re Kennedy et al. 7 B. R. 337.

<sup>4</sup> In re James M. Adams, 5 Ben. 544.

<sup>5</sup> In re Josiah Ferris, Jr. 6 Ben. 473.

When a new notice is necessary, it need only be given to remedy the defects or irregularities in the first notice. If the defect occurs in the publication, the service on the creditors being regular, a new notice must be published, but no new notices need be served upon the creditors. If the defect occurs in the service of the notice on the creditors, the publication being regular, a new notice must be served upon the creditors, but no new notice need be published.<sup>1</sup> If the defect occurs only in the notice served upon one creditor, he may waive it by appearance.<sup>2</sup> All matters relating to the service of the warrant should be examined carefully; for, if the notices are defective, all proceedings founded thereon are irregular, and may be set aside even on the day appointed for hearing the application for a discharge.<sup>3</sup> The new notices ought to state that the meeting to which the creditor is summoned is an adjourned meeting. If the meeting is not adjourned, a new warrant must be issued.<sup>4</sup>

Sometimes an amendment is made adding new names of creditors, when it is too late to hand them to the marshal so as to have the notices served upon them. In such a case a new warrant should be issued, to be served on all the creditors of the bankrupt. This warrant should briefly recite the proceedings that gave rise to it, and embrace the names contained in the original warrant as well as those added by the amendment. If the newspaper notices have been properly given under the original warrant, they need not be repeated.<sup>5</sup> Upon the return day of the new warrant, the creditors may elect an assignee, and take proceedings to have any assignee that may have been appointed under the original warrant removed. When the

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<sup>1</sup> In re Develin et al. 1 B. R. 35; s. c. 1 Ben. 335; s. c. 1 L. T. B. 32; in re Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

<sup>2</sup> Anon. 1 B. R. 123.

<sup>3</sup> In re Hall, 2 B. R. 192.

<sup>4</sup> In re Schepeler et al. 3 B. R. 170; s. c. 3 Ben. 346.

<sup>5</sup> In re Perry, 1 B. R. 220; s. c. 1 L. T. B. 4; in re Ratcliffe, 1 B. R. 400; in re Morganthal, 1 B. R. 402.

new names, however, are few in number, it is not necessary that a new warrant shall be issued, but the creditors whose names are thus added should be formally informed of the existence and condition of the proceedings, and notified to prove their claims, if they so desire.<sup>1</sup>

If all the proceedings under the warrant have been regular, and no new names are added by an amendment, the first meeting of creditors may be held. The register should attend at the time and place specified in the warrant for holding it. It would be irregular to hold the meeting before that time. If no creditor attends or is represented, the meeting is held as fully and effectually as if creditors had appeared or been represented.<sup>2</sup> If creditors attend, the meeting should be organized at the hour designated in the notice, or as soon thereafter as practicable, and should be kept open until a choice of assignee is made, or it is ascertained that no choice can be made. Where the creditors are so numerous that it is impossible to make the proofs of all the debts on the day designated in the warrant, or where the creditors are unable to agree upon some person as their choice for assignee, the meeting may be adjourned from day to day, so as to furnish a proper opportunity to all creditors to prove their debts, and to come to an agreement in regard to the selection of an assignee if possible. The several adjournments will constitute but one meeting, and will affect the proceedings in no other way than would a necessary postponement of business from one to another hour in the same day. It is still the first meeting within the contemplation of the statute, whether held on the day designated in the warrant, or on a day to which the meeting assembled on that day has been adjourned.<sup>3</sup>

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<sup>1</sup> In re Carson, 5 B. R. 290 ; s. c. 5 Ben. 277 ; s. c. 2 L. T. B. 194.

<sup>2</sup> In re Cogswell, 1 B. R. 62 ; s. c. 1 Ben. 388.

<sup>3</sup> In re Phelps, Caldwell & Co. 1 B. R. 525 ; s. c. 2 L. T. B. 25 ; in re C. H. Norton, 6 B. R. 297.

With the choice of an assignee by the creditors, the register has nothing to do except to preside at the meeting at which the choice is made. He is a part of the court. His duties are of a judicial character, and his action should, under all circumstances, be free from reproach and above all suspicion of interest or partisanship. It is especially incumbent upon him in no manner to interfere with or influence, either directly or indirectly, the choice of an assignee by creditors. His action should in all things be that of strict impartiality, not only in fact but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person as assignee, any more than of being prejudiced for or against the bankrupt, or for or against any creditor, in any proceeding. Any other course will lead, if not to abuses, at least to suspicions of them, and will impair his usefulness and derange the harmonious working of the system. The policy of the bankrupt law is to give to the creditors of a bankrupt, the free, deliberate, unbiased choice, in the first instance, of the person who is to take the assets and manage them.<sup>1</sup>

No creditor can vote unless he has proved his claim.<sup>2</sup> Agents and attorneys at law can not vote without producing a letter of attorney. They must be duly appointed attorneys in fact.<sup>3</sup> The letter of attorney produced by an agent should be received and filed. A partner may cast the whole vote of his firm, but in estimating the number of votes, the firm vote will only count as one vote.<sup>4</sup> One of several joint creditors who are not partners, can not vote without the consent of the others.<sup>5</sup> A creditor who holds a security which consists of property of the bank-

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<sup>1</sup> In re J. O. Smith, 1 B. R. 243; s. c. 2 Ben. 113.

<sup>2</sup> In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321; in re Altenheim, 1 B. R. 85; s. c. 1 Ben. 431.

<sup>3</sup> In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19.

<sup>4</sup> In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19.

<sup>5</sup> In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19.

rupt not liable to exemption, can not vote.<sup>1</sup> The reason for this is very plain. The votes are counted by value as well as number, and the amount of his claim can not be determined until an assignee has been selected. Mere proof alone does not admit him to the rank of a creditor. His lien must first be liquidated. He may, however, abandon his security, and in that case he can vote. If the debt consists of several parts, one only of which is secured, he may vote on the unsecured portion.<sup>2</sup> Where the security consists of the property of a third person,<sup>3</sup> or of exempted property,<sup>4</sup> he may prove the whole claim and vote. When a person who has been a partner in a firm is in bankruptcy alone, the partnership creditors can not vote.<sup>5</sup> When a partnership is in bankruptcy, an individual creditor of one partner can not vote.<sup>6</sup> An officer of a bankrupt corporation, if he is a creditor, has just as much right to vote as any other creditor.<sup>7</sup> If a claim has been assigned after proof, the actual owner alone can vote, and if he holds several claims, he can only cast one vote.<sup>8</sup> No person who has received a preference contrary to the provisions of the statute can vote (§ 5035). The only grounds upon which the vote of any other creditor can be objected to, after he has duly proved his claim, are those that would justify a postponement of the proof till after the election of an assignee. These are simply claims of which there may be doubts as to their validity or the right of the creditor to prove them. The mere fact that the vote is influenced or controlled by the bankrupt, in

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<sup>1</sup> In re Davis & Son, 1 B. R. 120; in re Walton et al. 1 Deady, 442; in re S. Hanna, 7 B. R. 502; s. c. 5 Ben. 5; contra, in re Bolton, 1 B. R. 370; s. c. 2 Ben. 189.

<sup>2</sup> In re S. Hanna, 7 B. R. 502; s. c. 5 Ben. 5; in re J. P. & C. R. Parkes, 10 B. R. 82.

<sup>3</sup> In re Cram, 1 B. R. 504; s. c. 1 L. T. B. 65.

<sup>4</sup> In re J. R. Stillwell, 7 B. R. 226; in re Tertelling, 2 Dillon, 342, note.

<sup>5</sup> In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19.

<sup>6</sup> In re Phelps, Caldwell & Co. 1 B. R. 525; s. c. 2 L. T. B. 25.

<sup>7</sup> In re Northern Iron Co. 14 B. R. 356.

<sup>8</sup> In re Frank, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.

his own interest, is no ground for objecting to it. The only mode of raising such an objection is by opposing the approval of any assignee that may be elected by it.<sup>1</sup>

A vote may be taken while a contest is pending over the postponement of the proof of a claim. The statute nowhere directs nor does it seem to contemplate the postponement of the vote for assignee, where some creditors have proved their debts, in order to enable others to do so. On the contrary, it seems to contemplate the utmost practicable expedition in choosing the assignee, and for a very good reason, because, until there is an assignee there is no one to represent, or whose official duty it is to look after the estate. The creditors who have proved their claims and are entitled to vote may, if they see proper, consent to wait for others to prove before proceeding to choose the assignee. But even this power ought to be exercised sparingly, and the vote ought always to be taken at the earliest practicable moment. If a creditor whose proof of claim has been postponed by the register, is dissatisfied with the result of the vote for assignee, and considers the postponement of his claim erroneous, he may have the proceeding certified to the court, and if the postponement appears to have been erroneous, the court may set aside the result of the vote and refer the matter back for a new vote, unless it appears to a reasonable certainty that the result would not be changed by another vote. The postponement of the proof of a claim affects no right of a creditor except the right to vote for assignee, and where it appears that the exercise of that right would be barren of results, it would be useless to delay the proceedings in order to afford such creditor the opportunity to exercise such right.<sup>2</sup> The register, however, can not postpone a claim merely because it is objected to, or admit

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<sup>1</sup> In re Noble, 3 B. R. 96; s. c. 3 Ben. 332.

<sup>2</sup> In re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376; in re Northern Iron Co. 14 B. R. 356; in re George Jackson, 14 B. R. 449.



it to proof against objection, although he deems it clearly valid and admissible. In such an event the court must be applied to, if the objection is not withdrawn, for the register has no power to proceed to the election of an assignee without the votes of all the creditors who wish to vote, unless he himself considers the claim doubtful.<sup>1</sup>

It has been decided that the manner of choosing or electing an assignee is not similar to that observed in electing civil officers at regular State elections, and that the creditors are not to go to the place designated, and, at or after the hour fixed in the warrant, separately deposit their ballots or votes in the presence of the register.<sup>2</sup> This decision rests entirely upon the construction given to the terms "meeting" and "preside." A meeting, however, need not be an assembly. There may be a meeting, although no creditors assemble. At town meetings the voters are coming and going during the whole of the day. And "preside" does not merely mean to sit as president. It, in this instance, means to regulate, superintend, and control. The meeting is a judicial proceeding; and the register presides at it in exactly the same manner, and in the same sense, that a judge presides over his court. In practice, where the estate is large, and the creditors numerous, it may require a whole day, or several days, to take the proofs and complete the election. Although creditors may prove their claims at any time after the commencement of the proceedings in bankruptcy, they do not generally prove them until the first meeting. This throws a great deal of labor upon the register on that day, involving time and delay and inconvenience to creditors, if they are compelled to wait until the preliminary business of taking proofs is finished before they can cast their votes. Nothing, therefore, but a plain, imperative requirement of the law should impose such delays and in-

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<sup>1</sup> In re Bartusch, 9 B. R. 478.

<sup>2</sup> In re Phelps, Caldwell & Co. 1 R. R. 525; s. c. 2 L. T. B. 25.

conveniences upon them. The policy of the statute is to give the choice of the assignee to them, and that construction should be adopted which will furnish the greatest facilities for carrying that purpose into effect. The manner of proceeding is not prescribed by the statute, and should, therefore, be left to be determined by the creditors themselves. They may either organize into a general meeting, or vote in the same manner as at any other election.

That this is the proper manner of proceeding is shown by the mode of taking the votes. The statute expressly requires that all acts done by the register shall be reduced to writing, and signed by him, and shall be filed in the clerk's office as a part of the proceedings (§ 5004). The act of receiving the votes of creditors is one of those acts. It is done by him in the prosecution of a proceeding in bankruptcy. That it was so considered by the justices of the Supreme Court is shown by the prescribed form of the report of the election.<sup>1</sup> This not only contemplates that the name, residence, and amount of debt of each creditor shall be recorded;<sup>2</sup> but it also contemplates that each creditor shall make the entry upon the appropriate blank for himself. In this respect it differs from all the other memoranda sent by the register to the clerk. In all the others he himself merely forwards a brief memorandum of what is done; in this alone the whole proceeding is made a matter of record. The purpose of this requirement is very clear. If any dispute should arise in regard to the actual result of an election, there would be no satisfactory means for the court to settle the controversy, unless some such record were made for its personal inspection; and the register's opinion would be almost conclusive upon the point. The creditors may ballot and canvass as

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<sup>1</sup> Form No. 15.

<sup>2</sup> In re Phelps, Caldwell & Co. 1 B. R. 525; s. c. 2 L. T. B. 25.

often as they please; but when they come to cast the vote contemplated by the statute and the forms, they must make it a matter of record, clear, accessible, incontrovertible, and capable of preservation. This would seem to be the practice prescribed by the justices of the Supreme Court. The votes may be taken according to either of the two modes. The creditors may, in the first instance, sign their names on the appropriate blanks in the prescribed manner. If the proper practice is for the creditor to sign his own name to the record, there is no reason why he should be detained after that is done. The vote cast is like one judgment rendered; but the court still continues in session to attend to other business. Or, on the other hand, the creditors may organize themselves into a general meeting, and take preliminary ballots and votes, either *viva voce* or on written slips. Such votes will not be informal.<sup>1</sup> But when a final result is reached, it must be made a matter of record, and the creditors who have chosen the assignee must then sign the appropriate certificate.<sup>2</sup> It is not believed that an election conducted in either of these modes would be set aside for irregularity. If, on the first vote, there is no choice made, a second, third, or any number of ballots may be had, until the required concurrence is obtained. If no such concurrence is had, and the meeting adjourns *sine die*, there is then no choice made by the creditors.

The mode of counting the votes is peculiar. The choice can only be made by the greater part in number and in value of the creditors who have proved their debts (§ 5034). All the debts which have been properly proved and placed on file must be included in ascertaining the result. A majority in number and value of the votes cast merely will not be sufficient, unless a vote has been cast on every debt proved. It must also be a majority in

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<sup>1</sup> In re Pearson, 2 B. R. 477; in re Lake Superior S. C., R. R., & I Co. 7 B. R. 376.

<sup>2</sup> In re Pfromm, 8 B. R. 357.

number and value of all the debts proved. By this mode of counting, every debt on which a vote has not been cast in favor of a person must be counted against him. When there are two candidates, all the debts not voted must be counted against both. The count, moreover, is not simply a count of number; it is also a count of value. A person may receive the votes on a majority of the debts proved, yet, unless the majority in number also constitutes a majority in the amount of the claims proved, he will not be elected. A person may likewise receive the votes on a majority in amount of the debts proved, yet, unless that majority in amount also constitutes a majority in number, he will not be elected. The majority must be a joint majority of both the number and the value.<sup>1</sup> The object of this provision of the statute is clear. If the count was of value alone, one large creditor might have the sole choice of assignee, to the detriment of other creditors, and to the oppression of the bankrupt. If, on the other hand, the count was of numbers only, several creditors having insignificant claims might choose an assignee, to the great injury of the only creditor who had a real interest in the proceedings. If the creditors can not combine and work together harmoniously, the law wisely confers the power of appointment upon the register or the court. When only one creditor appears and proves his debt, and there are no other debts proven, the right to choose an assignee belongs to the sole creditor who has proved his claim.<sup>2</sup> A creditor has the right to change his vote at any time during the progress of an election. He may, therefore, refuse to sign the certificate, although he has given a *viva voce* vote in favor of a party.<sup>3</sup> But after a final adjournment no vote can be changed.<sup>4</sup> Proofs which

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<sup>1</sup> In re Scheiffer & Garrett, 2 B. R. 591.

<sup>2</sup> In re Haynes, 2 B. R. 227; s. c. 1 L. T. B. 121.

<sup>3</sup> In re Pfromm, 8 B. R. 357.

<sup>4</sup> In re Scheiffer & Garrett, 2 B. R. 591.

are filed after a vote is taken can not be allowed to come in and change the result.<sup>1</sup>

If no choice is made by the creditors, the judge, or if there is no opposing interest, the register must appoint one or more assignees (§ 5034). No official assignee can be appointed by the court or judge, nor any general assignee to act in any class of cases.<sup>2</sup> It is only when the creditors fail to elect that the register or judge can appoint an assignee. The opposing interest which precludes the register from making an appointment is not merely an interest contending by vote, but an interest in opposition to the exercise of the power by him.<sup>3</sup> When there is a failure on the part of creditors assembled to make a choice, it is the duty of the register to inform the creditors of their rights, and state distinctly that he can not make an appointment if there is an opposing interest. He must ascertain affirmatively that there is no opposition, and can only do so by asking directly if there is any objection to his making the appointment. If he makes such announcement, there should be a distinct disclosure if there is an opposing interest.<sup>4</sup> If there is opposition, an appointment by him will be irregular.<sup>5</sup> If there is an opposing interest at any stage of the meeting, such opposition is to be considered as continuing until the termination of the meeting, whether upon the day first appointed or any other day to which the meeting may be continued, unless it affirmatively appears that such opposition has been withdrawn.<sup>6</sup> When no creditors appear, or are represented, the register may appoint an assignee, and should do so, though no debts have been proved.<sup>7</sup> An assignee should

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<sup>1</sup> In re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376.

<sup>2</sup> Rule IX; in re Wm. Major, 14 B. R. 71.

<sup>3</sup> In re George Jackson, 14 B. R. 449.

<sup>4</sup> In re George Jackson, 14 B. R. 449; vide in re Pearson, 2 B. R. 477.

<sup>5</sup> In re Pearson, 2 B. R. 477.

<sup>6</sup> In re C. H. Norton, 6 B. R. 297.

<sup>7</sup> In re Cogswell, 1 B. R. 62; s. c. 1 Ben. 388.

be appointed, even though there are no apparent assets, for he is designed by the statute to act as trustee on behalf of the creditors, and it is his duty to search for and discover the assets, if there are any.<sup>1</sup>

In making a report to court of the meeting, the register should always send a certificate of the holding of the meeting,<sup>2</sup> and a list of the creditors who have proved their debts,<sup>3</sup> and a certificate of the election,<sup>4</sup> or the failure to elect,<sup>5</sup> as the case may be. In making up the forms, the justices of the Supreme Court evidently contemplated that claims would not be proved at any time before the first meeting; but, as the practice is different, the certificate should be varied, so as to include all the debts which are on file at the time when the meeting is held, or vote taken, whether proved on that day or not. The object of the report is to make the whole proceedings a matter of record, so that any person interested can, by a mere inspection of the papers, see whether the election has been regular. The register has no power to make an election of an assignee valid by his mere approval; but if no objections exist, he should certify to his approval of the choice as a mere preliminary step to the final approval by the judge. As he is personally familiar with the whole proceeding, he ought not to let any election pass without his affirmative and express approval or disapproval.<sup>6</sup> If he is satisfied that any reasons exist why an assignee, elected by the creditors, should not be approved, it is his duty to state such reasons freely in submitting his report of the proceedings.<sup>7</sup>

All elections or appointments of assignees are subject to the approval of the judge, and when, in his judgment,

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<sup>1</sup> In re Alexander Graves, 1 N. Y. Leg. Obs. 213; s. c. 5 Law Rep. 25.

<sup>2</sup> Form No. 15.

<sup>3</sup> Form No. 13.

<sup>4</sup> Form No. 15.

<sup>5</sup> Form No. 11.

<sup>6</sup> Form No. 15.

<sup>7</sup> In re Bliss, 1 B. R. 78; s. c. 1 Ben. 407; in re Scheiffer & Garrett, 2 B. R. 591; in re Clairmont, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

it is for any cause needful or expedient, he may appoint additional assignees, or order a new election (§ 5034). This includes appointments made by registers, as well as selections made by creditors, and no one should enter upon the duties of assignee until such approval is obtained. If the judge disapproves, the election or appointment fails.<sup>1</sup> The only persons who are positively disqualified for the position of assignee are those who have accepted a preference contrary to the provisions of the statute (§ 5035). All other persons may be assignees, if duly elected or appointed, but the judge, in the exercise of a sound discretion, may withhold his approval. This discretion is a legal discretion, and must be controlled not by caprice, prejudice, partiality, likes or dislikes, or any other reason than a due regard to the fitness of the proposed assignee for the position. The creditors alone are interested in the distribution of the estate, and, as they have pecuniary interests at stake, it will be presumed that they have carefully canvassed and inquired into the qualifications of the person to whom they recommend the estate to be intrusted. They are generally commercial men intimately acquainted with the affairs of the bankrupt, and the qualifications essential and proper to fit a man to act as assignee, and unless good and strong reasons are presented, the opinion of the creditors, representing a majority in number and value, is entitled to great weight in determining who is the proper person to administer the estate in which they are interested. The judge, therefore, will always approve of an election made by the creditors, unless something is placed before him to show that the choice is not a proper one.<sup>2</sup> An appointment made by a register is nothing more than the designation of a suitable person for the trust,<sup>3</sup>

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<sup>1</sup> In re Scheiffer & Garrett, 2 B. R. 591.

<sup>2</sup> In re J. O. Smith, 1 B. R. 243; s. c. 2 Ben. 113; in re Clairmont, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

<sup>3</sup> In re Scheiffer & Garrett, 2 B. R. 591.

but is usually approved, unless objections are made. An assignee, duly elected by the creditors, is entitled to the position by virtue of the statute, unless there is an imputation upon his competency or character.<sup>1</sup>

An assignee should reside in the district in which the proceedings are pending;<sup>2</sup> but, if he has a place of business within the district, the judge may appoint a person who resides in the district to act as assignee, in conjunction with him, and will then approve the choice.<sup>3</sup> An attorney for a creditor,<sup>4</sup> or an attorney for the bankrupt,<sup>5</sup> may be chosen; but an attorney for the bankrupt must cease to act as such, for the two positions are manifestly inconsistent and incompatible. A director of a corporation which has received an unlawful preference can not be approved.<sup>6</sup> A relative of the bankrupt is not absolutely disqualified; but if there are any unlawful preferences to be investigated, the choice may be disapproved.<sup>7</sup> The election of the confidential clerk of the bankrupt's attorney is objectionable.<sup>8</sup> A person can not act both as receiver and as assignee and have his acts authorized by the State court and by the bankrupt court. This is a position of incompatibility which the bankrupt court can not permit one of its officers to occupy. If he is to be assignee, he must look to the bankrupt court alone as the source of his authority.<sup>9</sup> A general bias either for or against the bankrupt or his dealings will not disqualify a person of standing and character.<sup>10</sup>

<sup>1</sup> In re Grant, 2 B. R. 106.

<sup>2</sup> In re Havens, 1 B. R. 485; Anon. 1 B. R. (quarto), 29.

<sup>3</sup> In re Loder et al. 2 B. R. 515; in re Jacoby, 1 W. N. 15.

<sup>4</sup> In re Barrett, 2 B. R. 533; s. c. 1 L. T. B. 144; in re Lawson, 2 B. R. 396.

<sup>5</sup> In re Clairmont, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

<sup>6</sup> In re Powell, 2 B. R. 45.

<sup>7</sup> In re Powell, 2 B. R. 45; in re Bogert & Ocklen, 3 B. R. 651.

<sup>8</sup> In re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 130.

<sup>9</sup> In re Stuyvesant Bank, 6 B. R. 272.

<sup>10</sup> In re Clairmont, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.



The solicitation of votes is permissible in all cases, when properly exercised. If the creditors take an interest in the meeting, the whole subject of the election may be thoroughly canvassed and discussed, and all arguments appropriate for conviction and persuasion may be used. The choice must be free and unbiased; but it ought, also, to be the result of deliberation and an enlightened judgment—a choice made with the full knowledge of all the facts and their bearings. Improper means and undue influence can never be permitted. Whether there has been such undue influence or improper means exercised as to invalidate the election, will depend upon the circumstances of each case.<sup>1</sup> A promise to pay the claim of a creditor in full is improper, and an election so procured will not be approved.<sup>2</sup> There are circumstances, also, under which no solicitation can be permitted. There is a manifest difference between soliciting the votes of creditors who are interested in the proceedings and watchful of their rights, and soliciting the votes of those who are entirely indifferent, and merely come in as a matter of accommodation, to enable a certain person to accomplish his purpose. Thus, where the only claims proved were those of two friends of the bankrupt, brought in by him for the sole purpose of selecting an assignee, the choice was disapproved.<sup>3</sup> So, also, the election of a person who made it a business, in cases where there were no assets, to bring in a creditor to prove a claim, and vote for him with a view solely to the pecuniary emoluments that belong to the position, was rejected.<sup>4</sup> The facts, in both of these cases, were peculiar, and in both the manifest policy and object of the statute were defeated by an abuse of its forms and privileges.

All objections should be made, if the facts are known

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<sup>1</sup> *In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.

<sup>2</sup> *In re Haas & Samson*, 8 B. R. 189.

<sup>3</sup> *In re Bliss*, 1 B. R. 78; s. c. 1 Ben. 407.

<sup>4</sup> *In re A. B.* 2 B. R. 306; s. c. 2 Ben. 66.

to the creditors, immediately after the election. If, with full knowledge of the facts, the creditors allow the assignee to go on and exercise his duties, they can not afterward have him removed without showing some misconduct, or that the relation he holds to the creditors or the bankrupt is in some way prejudicial to the rights or interests of the creditors.<sup>1</sup> When the judge withholds his approval of the choice made by the creditors, a new election must be ordered.<sup>2</sup> He may also when, in his judgment, it is for any cause needful or expedient, appoint additional assignees, or order a new election (§ 5034).<sup>3</sup> No additional assignee can be appointed except upon the petition of one-fourth in number and value of the creditors who have proved their debts and upon good and sufficient cause shown.<sup>4</sup> An additional assignee will not, in general, be appointed at the request of the minority of the creditors, for the statute does not appear to intend a minority representation. The creditors have the right to decide upon the number of assignees, as well as to choose them.<sup>5</sup> A new election will not be ordered when it is not apparent that a different result would be thereby attained.<sup>6</sup>

Appended to the usual report of the choice of an assignee is a form for the appointment of a solicitor for the assignee, and the judge's approval thereof.<sup>7</sup> The intent of this clearly is, that such solicitor must be a *quasi* officer of the court, and be duly appointed and regularly approved. He is considered as a minister of the court, and his duty is to attend to the estate. The court uniformly disapprove of the same person acting as attorney for the bankrupt and the assignee, not because the duties are always con-

<sup>1</sup> In re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 180.

<sup>2</sup> In re Scheiffer & Garrett, 2 B. R. 591.

<sup>3</sup> In re Overton, 3 B. R. 866.

<sup>4</sup> Rule IX.

<sup>5</sup> In re Clairmont, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

<sup>6</sup> In re Pfromn, 8 B. R. 357; in re Lake Superior S. C., R. R., & I. Co. 7 B. R. 376; in re George Jackson, 14 B. R. 449.

<sup>7</sup> Form No. 15.

flicting and adverse, but because they may be so. His first duty will be to the estate, and it is considered inconsistent with his duties if he acts also as attorney for the bankrupt.<sup>1</sup>

It is the duty of the register, immediately upon the appointment of an assignee, should he not be present at the meeting, to notify him personally or by mail of his appointment; and in such notification the assignee so appointed must be required to give notice forthwith to the court or register of his acceptance or rejection of the trust.<sup>2</sup> The notification must be entitled in the cause, and should be in the prescribed form.<sup>3</sup> If an assignee, chosen or appointed, fails within five days to express, in writing, his acceptance of the trust, the judge or register may fill the vacancy (§ 5034). When the assignee is present, the acceptance is written upon the certificate of his election; if he is absent, it is made upon the notification, which is then placed on file.

The judge at any time may, and, upon the request in writing of any creditor who has proved his claim, must require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties (§ 5036). No one but the judge can require an assignee to execute a bond,<sup>4</sup> and this should always be done when a creditor demands it.<sup>5</sup> The order should specify the time within which the bond shall be filed, and if it omit to do so, the assignee can not be deemed in default for not filing a bond.<sup>6</sup> There must be a separate and distinct bond for each case in which he is appointed. A general bond, conditioned for the faithful performance of his duties in all cases in which he may be appointed, is not sufficient.<sup>7</sup> The bond must

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<sup>1</sup> In re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 130.

<sup>2</sup> Rule IX.

<sup>3</sup> Form No. 16.

<sup>4</sup> In re Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; contra, in re Binnering & Clark, 9 B. R. 568.

<sup>5</sup> In re Fernberg, 2 B. R. 353.

<sup>6</sup> In re George E. Sands, 7 Ben. 19.

<sup>7</sup> In re McFaden, 3 B. R. 104.

be in the prescribed form.<sup>1</sup> The bond must be approved by the judge or register by his indorsement thereon; and be filed with the record of the case. It inures to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge must remove him and appoint another in his place (§ 5036).

The assignee must immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors reside (§ 5054). The order directing the publication may be made by the register,<sup>2</sup> and the publication should be in the newspapers designated by the rules of the court, if any are so designated. The notice must be published once in every seven days for three successive periods of seven days each; the interval between any two publications must be not less than seven days; the interval between the last publication and any proceeding dependent upon the publication must be not less than seven days; and the publications must be three in number.<sup>3</sup> The publication is not essential to the regularity of the proceeding. It is directory to the assignee and not intended so much for creditors as for persons owing debts to, or otherwise having business with, the estate.<sup>4</sup> This notice must be according to the prescribed form.<sup>5</sup>

As soon as the assignee is appointed and qualified, the judge, or where there is no opposing interest, the register must, by an instrument under his hand, assign and convey

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<sup>1</sup> Form No. 17.

<sup>2</sup> Rule V.

<sup>3</sup> In re Bellamy, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

<sup>4</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>5</sup> Form No. 16.

to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto; and such assignment relates back to the commencement of the proceedings in bankruptcy, and thereupon by operation of law, the title to all such property and estate, both real and personal, vests in the assignee, although the same is then attached on *mesne* process as the property of the bankrupt, and dissolves any such attachment made within four months next preceding the commencement of such proceedings. This assignment should be made according to the prescribed form,<sup>1</sup> and should always be under the seal of the court, whether made by the register or by the judge.<sup>2</sup> The word "is" in the form, before the word "possessed," is probably a misprint, and should be changed to was.<sup>3</sup> The title should be made to vest in the assignee from the time of the filing of the petition in the cause. The assignment should never be made until the judge certifies his approval of the assignee elected or appointed.<sup>4</sup> It should be made, even though the title to the property is in dispute.<sup>5</sup> No acknowledgment is necessary. The title passes by virtue of the bankrupt law, which is the paramount law by force of the power conferred upon Congress by the Constitution to establish a uniform system of bankruptcy, and the only forms that need be observed in the execution are those prescribed by the statute itself.<sup>6</sup>

By the rule of court, in some districts, duplicates are prepared, one of which is left with the clerk and the other delivered to the assignee. Where this is not the practice, the assignment should be first taken to the clerk and recorded, so that he may have a proper record from which he can make the certified copies required by the statute.<sup>7</sup>

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<sup>1</sup> Form No. 18.

<sup>2</sup> *In re Neale*, 2 B. R. 177; s. c. 1 L. T. B. 295.

<sup>3</sup> *In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

<sup>4</sup> *In re Scheiffer & Garrett*, 2 B. R. 591.

<sup>5</sup> *In re Wm. H. Wylie*, 2 B. R. 137.

<sup>6</sup> *In re Neale*, 3 B. R. 177; s. c. 1 L. T. B. 295; *contra*, *Zeigler v. Shomo*, 78 Penn. 357.

<sup>7</sup> *In re A. Alexander*, 3 B. R. (quarto), 20.

The assignee must, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States, where a conveyance of any land owned by the bankrupt ought by law to be recorded (§ 5054). The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title though the assignment may never be recorded. It may also be used as evidence in the courts without being recorded. The object in requiring it to be recorded is, that every purchaser of land at an assignee's sale may have recourse to a certified copy from such record as a link in his claim of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring. Recording is necessary for the safety of such purchaser. There is but one original assignment, and that must be filed eventually in the office of the clerk of the district court. This might be destroyed or lost, and it is often very inconvenient to have recourse to it.<sup>1</sup> The recording of the assignment, however, is not essential to the validity of the transfer, and is not designed to operate as under the State registry acts. The assignment relates back to the commencement of the proceedings, and all subsequent purchasers are affected accordingly, whether they purchase before the assignment is actually made or afterwards. A person who purchases from the bankrupt after the commencement of the proceedings, takes no title although he has no notice thereof. The question of notice can not arise. The purchase being of what the bankrupt had at the time of transfer, the purchaser acquires no title as against the assignee.<sup>2</sup>

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<sup>1</sup> In re Neale, 3 B. R. 177; s. c. 1 L. T. B. 295; Holbrook v. Coney, 25 Ill. 543.

<sup>2</sup> Davis v. Anderson, 6 B. R. 145; in re T. B. Gregg, 3 B. R. 529; s. c. 1 L. T. B. 298; Stuart v. Hines, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; Philips v. Helmbold, 26 N. J. Eq. 202.

## CHAPTER VII.

### DUTIES OF ASSIGNEES AND MODE OF REMOVAL.

THE assignee must, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession, except where an inventory is furnished to him by the marshal; in which case, having verified the same, he must add thereto a certificate that the same is correct, or that the same is correct as modified by a supplemental inventory, to be annexed thereto; in which supplemental inventory he must state any deficiency of assets named in the marshal's inventory, and must add any property or assets not contained therein.<sup>1</sup> Every assignee must keep a regular account of all moneys received or expended by him, to which every creditor may, at reasonable times, have free access.<sup>2</sup> The assignee of a partnership must keep separate accounts of the joint stock or property of the firm, and of the separate estate of each partner (§ 5121). The assignee must report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order.<sup>3</sup>

The assignee must, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and must, as far as practical, keep all goods and effects belonging to the estate separate and apart from all other

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<sup>1</sup> Rule XIX.    <sup>2</sup> Act of 22 June, 1874, § 4.    <sup>3</sup> Act of 22 June, 1874, § 4.

goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property, or for the payment of his debts (§ 5059). The district court in each district designates certain national banks, if there are any within the judicial district, or if there be none, then some other safe depository, in which all moneys received by assignees, or paid into court in the course of any proceedings in bankruptcy, must be deposited; and every assignee, and the clerk of such court, must deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk and assignee must make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. No moneys so deposited can be drawn from such depository unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, must be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts must be entered in the order of time in which they are drawn, and must be numbered in the case of each estate. A copy of Rule XXVIII must be furnished to the depository so designated, and also the name of any register authorized to countersign such checks.<sup>1</sup> The substance of each monthly return of the assignee must be sent by the register to any creditor who shall request it and pay the fee provided for notices to creditors.<sup>2</sup>

When it appears that the distribution of the estate

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<sup>1</sup> Rule XXVIII.

<sup>2</sup> Rule XIX.



may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities, to be approved by the judge or a register of the court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon (§ 5060).

All proofs must be delivered or sent by mail to the assignee whose duty it is to examine the same and compare them with the books and accounts of the bankrupt, and to register in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proofs are received, stating the time of receipt of such proofs, and the amount and nature of the debts, which book must be open to the inspection of all the creditors (§ 5080). Proofs of debt received by any assignee must be delivered to the register to whom the cause is referred.<sup>1</sup>

The assignee may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy; and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors (§ 5061). Whenever an assignee makes application to the court for authority to submit a controversy arising in the settlement of demands against the bankrupt's estate, or of debts due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the subject-matter of the controversy and the reasons why the assignee thinks it proper and most for the interest of the creditors that it should be settled

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<sup>1</sup> Rule XXXIV.

by arbitration or otherwise, must be set forth clearly and distinctly in the application; and the court, upon examination of the same, may immediately proceed to take testimony and make an order thereon, or may direct the assignee to give notice of the application, either by publication or by mail, or both, to the creditors who have proved their claims, to appear and show cause, on a day to be named in the order and notice, why the application should not be granted, and may make such order thereon as may be just and proper.<sup>1</sup>

The assignee must demand and receive, from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of the statute (§ 5055). The debtor must, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings, which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt (§ 5051). No person is entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon (§ 5050). The assignee has the like remedy to recover all the estate, debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made (§ 5047).

If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing, which might or ought to pass to the assignee by the assignment, the assignee may, if he requires it, be admitted to prosecute the action in his own name, and in like manner and with like effect as if it had been originally commenced by him (§ 5047). The bankrupt may continue to prosecute a pending action until the assignee is appointed and an assignment made to him, for he holds the title, and there

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<sup>1</sup> Rule XX.

is no one to take his place 'until that time.<sup>1</sup> If a *chose in action* upon which a suit has been brought was assigned before the commencement of proceedings in bankruptcy, the suit may still be prosecuted in the name of the bankrupt.<sup>2</sup> Whether such a transfer is void under the bankrupt law or not is a question that can not be raised by the defendant, for the assignee is the only party who can contest it.<sup>3</sup> If the suit is on a contract made by the bankrupt as agent for another, the suit may still be continued in his own name.<sup>4</sup> The bankrupt may also continue to prosecute an action of replevin for an article which is set apart to him as exempt.<sup>5</sup> Where the right of action; however, passes to the assignee, he must prosecute the suit in his own name, and not in the name of the bankrupt, for the bankrupt is *civiliter mortuus*, and can not, in such a case, sue either for himself or for another.<sup>6</sup> The bankrupt can not prosecute the action in his own name, although he did not place the right on his schedule.<sup>7</sup> The language of the statute, however, is permissive. It only becomes a duty to prosecute a suit when the interest of the estate demands it, and of this the assignee is in the first instance the judge. He need not proceed unless he sees that it is for the benefit of the estate, and has money in hand sufficient to meet the expenses.<sup>8</sup> If he deems it expedient, he may prosecute the action in his own name, whether it is pending in a State or Federal court.<sup>9</sup> His right to do so is not affected by the circumstance that third persons also have an interest in the claim.<sup>10</sup> If any suit at law or in equity in which

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<sup>1</sup> Sutherland v. Davis, 10 B. R. 424; s. c. 42 Ind. 26.

<sup>2</sup> Valentine v. Holloman, 63 N. C. 475; King v. Morrison, 5 Ark. 519.

<sup>3</sup> Smally v. Taylor, 33 Tex. 668.

<sup>4</sup> Rhoades v. Blackiston, 106 Mass. 334.      <sup>5</sup> Scott v. Wilkie, 65 N. C. 376.

<sup>6</sup> Cannon v. Wellford, 22 Gratt. 195; Lacy v. Rockett, 11 Ala. 1002; contra, Noonan v. Orton, 12 B. R. 405; s. c. 34 Wis. 259.

<sup>7</sup> Planters' Bank v. Conger, 20 Miss. 527.

<sup>8</sup> Read v. Waterhouse, 10 B. R. 277; s. c. 52 N. Y. 587; s. c. 35 N. Y. Sup. 78; s. c. 12 Abb. Pr. (N. S.) 255.

<sup>9</sup> Ames v. Gilman, 51 Mass. 239.

<sup>10</sup> Hammond v. Rice, 18 Vt. 353.

the bankrupt is a party in his own name is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt (5047). The power of State courts to proceed with pending suits is thus, under certain prescribed limitations, recognized by the statute itself. If a creditor prosecuting such pending suit proves his debt, his right to continue it is suspended until a hearing is had upon the application for a discharge; and, if a discharge is granted, is absolutely surrendered. If he does not prove his debt, then the suit can only be stayed temporarily to await the determination of the right of the bankrupt to obtain a discharge. Congress could have made an adjudication in bankruptcy operate *proprio vigore*, to withdraw all cases pending in other courts, at the time of the filing of the petition, to which the bankrupt should be a party, from those tribunals, and transfer them into the district court. It has not, however, done so. It not only has not deprived those courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee. The jurisdiction of other courts is not extinguished, except in those cases where the creditor proves his debt. Nor can the district court determine any of the questions that may arise in actions so pending in those courts. They have authority over such actions, and jurisdiction of the parties and subject-matter, and must determine such questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by those tribunals. In no other way can their decisions be reversed or revised.<sup>1</sup>

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<sup>1</sup> Samson v. Burton, 4 B. R. 1; s. c. 5 Ben. 325; Clark v. Binninger, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 39 How. Pr. 363; s. c. 3 L. T. B. 49; in re Clark et al. 3 B. R. 524; s. c. 4 Ben. 88; Peck v. Jenness, 7 How. 612.

This provision, however, does not oblige the assignee to seek a remedy by becoming a party to a pending suit. He may institute proceedings in the Federal courts in those instances where jurisdiction is expressly conferred upon them by the statute.<sup>1</sup> In making his application to be admitted as a party to a suit, the assignee must show that he has some interest in the controversy. There is no reason for making him a party to a protracted litigation unless it is shown that there is a good reason for supposing that he has some right which may be affected by the suit.<sup>2</sup>

A copy, duly certified by the clerk of the court, under the seal thereof, of the assignment, is conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt (§ 5049). He will be admitted as a party to the suit, on motion, upon the production of such copy duly certified.<sup>3</sup> It is not necessary for him to show all the steps in the proceedings,<sup>4</sup> or the jurisdiction of the court over the proceedings or the person of the bankrupt,<sup>5</sup> for the copy of the assignment is made conclusive evidence of his right to sue. For the same reason, the existence or sufficiency of the debt of the petitioning creditor can not be collaterally drawn in question.<sup>6</sup>

No suit pending in the name of the assignee, or to which he is a party, will be abated by his death or removal; but, upon the motion of the surviving or remaining or new assignee, as the case may be, he will be admitted to prosecute the suit in like manner and with

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<sup>1</sup> *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

<sup>2</sup> *Gunther et al. v. Greenfield et al.* 3 B. R. 730; s. c. 8 Abb. Pr. (N. S.) 191.

<sup>3</sup> *Herndon v. Howard*, 4 B. R. 212; s. c. 9 Wall. 664; s. c. 40 How. Pr. 288; *Knox v. Exchange Bank*, 12 Wall. 379.

<sup>4</sup> *Rogers v. Stevenson*, 16 Minn. 68.

<sup>5</sup> *Cone v. Purcell*, 11 B. R. 490; s. c. 56 N. Y. 649.

<sup>6</sup> *Barstow v. Adams*, 2 Day. 70; *Rugan v. West*, 1 Binn. 263; *Barclay v. Carson*, 2 Hay (N. C.) 243; *Lovett v. Cutler*, 1 Mass. 67; *Livermore v. Swayzey*, 7 Mass. 213; *Den v. Wright*, Pet. C. C. 64.

like effect as if it had been originally commenced by him (§ 5048).

Whenever it may be deemed for the benefit of the estate to compound any debts, or other claims, or securities due or belonging to the estate of the bankrupt, the assignee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor in the office of the clerk of the district court; and thereupon the court will appoint a suitable time and place for the hearing thereof, notice of which must be given in some newspaper, to be designated by the court, at least ten days before the hearing, so that all creditors and other persons interested may appear and show cause, if they any have, why an order should not be passed by the court upon the petition, authorizing such act upon the part of the assignee.<sup>1</sup>

The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient, and at a meeting called for the purpose, by order of the court in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may also, with consent of the court, remove any assignee by such vote as is necessary for the choice of an assignee (§ 5039). Any person interested in the settlement of the estate may file a petition in the prescribed form, asking for such removal,<sup>2</sup> and must set forth in his application the causes for which such removal is requested. This petition must be entitled in the cause, addressed to the judge, and duly verified by the oath of the petitioner. The register can not entertain such a petition. It must be filed in court.<sup>3</sup> Upon the filing of the petition, an order<sup>4</sup> for the assignee to appear and show cause is passed, and served upon him by the marshal.<sup>5</sup> The return of service is made in the

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<sup>1</sup> Rule XVII.

<sup>2</sup> Form No. 40.

<sup>3</sup> In re Stokes, 1 B. R. 489.

<sup>4</sup> Form No. 41.

<sup>5</sup> Rule XXIII.

usual form. Upon the return day the assignee should appear and answer the allegations of the petitions. The motion for removal may be tried on affidavits or testimony taken in open court, or before a register or commissioner (§ 5003).

The court may order a removal,<sup>1</sup> or call a meeting of creditors to consider the question of removal.<sup>2</sup> The removal is a matter in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised when cause is shown rendering such removal expedient or necessary.<sup>3</sup> An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to exercise due diligence in collecting and disposing of the property of the bankrupt, and in distributing the proceeds among the creditors. If he is guilty of gross and culpable negligence of duty in this respect he may be removed.<sup>4</sup> Where there is an irreconcilable difference between the assignee and a large portion of the creditors, an order for his removal will be made. He is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching their interests. They are the beneficiaries, and have a direct interest in the proceedings. The court will not constitute itself the legal adviser of the assignee. He has a right to choose his counsel, subject to the approval of the court, and must proceed with his duties according to his best judgment, being held to no more than a just and reasonable accountability.<sup>5</sup> If the assignee is charged with misconduct in instituting a suit, the question is not whether the suit was without proper legal foundation, but

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<sup>1</sup> Form No. 43.

<sup>2</sup> In re N. Y. Steamship Co. 2 B. R. 423; in re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 130.

<sup>3</sup> In re Blodgett & Sandford, 5 B. R. 472.

<sup>4</sup> In re Morse, 7 B. R. 56.

<sup>5</sup> In re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 130; in re Perkins, 8 B. R. 56; s. c. 5 Biss. 254.

whether its prosecution was fraudulent, malicious, or from unjust motives and not in good faith.<sup>1</sup> Erroneous legal advice, where the errors are so gross and frequent as to be evidence of the incompetency of his legal adviser, may be cause for ordering him to employ other counsel; but does not necessarily constitute a cause for removing the assignee himself.<sup>2</sup> When creditors apply to an assignee to ascertain the condition of the estate, he should communicate all material facts within his knowledge, and the willful suppression of such facts is a ground for removal.<sup>3</sup> He may also be removed if he fails and neglects to well and faithfully discharge his duties in the sale or disposition of property, or in any manner unfairly or wrongfully sells or disposes of, or in any manner fraudulently or corruptly combines, conspires or agrees with any person or persons with intent to unfairly or wrongfully sell or dispose of the property committed to his charge.<sup>4</sup> If a proper case is established upon the hearing of such petition, the court may also, and upon the application of a majority of the creditors in number and value must, call a meeting of the creditors to consider the question of such removal, and may also direct that if the requisite vote at such meeting is in favor of a removal, the creditors may then at the same time choose a successor.<sup>5</sup> The order for the meeting must be in the prescribed form.<sup>6</sup> If it is made upon the petition of a creditor, it should set forth the charges, or if it is made at the request of the majority of the creditors, the fact should be so stated. Notices to the creditors of the time and place of meeting must be given through mail by letter, signed by the clerk of the court. Every envelope containing a notice must have printed upon it a

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<sup>1</sup> In re Sacchi, 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250.

<sup>2</sup> In re Blodgett & Sandford, 5 B. R. 472.

<sup>3</sup> In re Perkins, 8 B. R. 56; s. c. 5 Biss. 254.

<sup>4</sup> Act of 22 June, 1874, § 4.

<sup>5</sup> In re N. Y. Steamship Co. 2 B. R. 423.

<sup>6</sup> Form No. 42.



direction to the postmaster at the place to which it is sent to return the same within ten days unless called for.<sup>1</sup> The form of the vote for a removal is the same as that for an appointment, except that the word remove is substituted for the word appoint; a successor is elected in the same manner as the original assignee was, and the same memorandum of the election should be made.<sup>2</sup> The removal, however, is subject to the approval of the judge, who will exercise a legal discretion.<sup>3</sup> In case the assignee neglects to file any report or statement which it is made his duty to file or make by the bankrupt act, or any general order in bankruptcy, within five days after the same is due, it is the duty of the register to make the order requiring the assignee to show cause before the court, at a time specified in the order, why he should not be removed from office. The register must cause a copy of the order to be served upon the assignee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk.<sup>4</sup>

Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors at a regular meeting or at a meeting called<sup>5</sup> for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court may direct (§ 5041). The vacancies, however, are only those which occur after an assignee has once been regularly elected or appointed, and received the approval of the judge.<sup>6</sup>

An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom (§ 5038). The resignation or removal of an assignee in no way releases him from performing all things requisite on his part for

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<sup>1</sup> Rule XXIII.

<sup>2</sup> Form No. 42.

<sup>3</sup> Form No. 44.

<sup>4</sup> Rule XIX.

<sup>5</sup> In re Dewey, 4 B. R. 412; s. c. Lowell, 493; s. c. 2 L. T. B. 134.

<sup>6</sup> In re Scheiffer & Garrett, 2 B. R. 591.

the proper closing up of his trust and the transmission thereof to his successors, nor does it affect the liability of the principal or surety on the bond given by the assignee (§ 5040). When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of vests in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen (§ 5042). Any former assignee, his executors or administrators, upon request, and at the expense of the estate, must make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate (§ 5043). An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court (§ 5037).

## CHAPTER VIII.

### EXEMPTIONS.

THE assignee must make report to the court, within twenty days after receiving the deed of assignment, of the articles set off to the bankrupt by him, with the estimated value of each article.<sup>1</sup>

The exemptions which may be made are the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee may designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children; and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter may be, exempt from attachment or seizure, or levy on execution by the laws of the United States; and such other property not included in the foregoing exemptions, as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State as existing in the year eighteen hundred and seventy-one (§ 5045). As these provisions are founded upon the humane policy of providing means for the support of the poor man and his family, they are to be liberally rather than strictly construed; they should receive such

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<sup>1</sup> Rule XIX.

fair construction as will best promote the beneficent intention of Congress.

The following property is, according to these provisions, exempt absolutely and independently of the exercise of any discretion on the part of the assignee, viz.: 1st. Necessary household and kitchen furniture to an amount not exceeding \$500; 2d. Wearing apparel of the bankrupt, his wife and children; 3d. Uniform, arms, and equipments, if the bankrupt has been or is in the Federal military service; 4th. Other property, which, at the time of the filing of the petition, is exempt by the laws of the United States; and 5th. Property exempt by State laws other than that already specified.<sup>1</sup>

The provision in regard to household and kitchen furniture is imperative on the assignee, though he must determine what furniture, under the circumstances, is necessary.<sup>2</sup> The furniture, in order to be exempted, must be necessary. It can not be necessary, in the sense of the law, unless the bankrupt is a householder—the head of a family. He need not have a wife. His household may consist of servants, or any persons residing with him, and under his control.<sup>3</sup> If he has an adopted daughter and her children living with him, but hires the servants, he is the head of the family,<sup>4</sup> although he has neither wife nor children. These illustrations are enough to show what is intended when it is said that the bankrupt must keep house, or be the head of a family. It would make no difference whether he has a whole house or only a portion. If he has a wife or children, and furnishes his own rooms, he might still be entitled to the exemption, although he was merely boarding, for he would, even then, be the head of a family. It is not sufficient, however, that he be the head of a family merely. The furniture must also

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<sup>1</sup> In re Feely, 3 B. R. 63.

<sup>2</sup> In re W. H. Thiell, 4 Biss. 241.

<sup>3</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; in re Ruth, 1 B. R. 154; s. c. 6 Phila. 438.

<sup>4</sup> In re Wm. Taylor, 3 B. R. 158.

be necessary to him in his condition and circumstances. Only those articles are exempt which are necessary to enable him to keep house. This necessity need not be a stringent, imperative necessity. The statute does not so limit the exemption, nor declare that the articles must be strictly and indispensably necessary. Those articles may be considered necessary which are commonly used among men of moderate means in that community. The articles and the amount will, of course, both vary, according to the locality and the business of the bankrupt. What would be necessary on a farm would not be necessary in a city, and *vice versa*. If he had furniture to the amount of \$500, it would probably be exempt to that amount. Furniture to the amount of \$355 has been declared little enough.<sup>1</sup> The fact that the bankrupt's wife has furniture which is her separate property does not affect the question, for it is not the policy of the statute to leave him dependent upon her for the means necessary to enable him to keep house.<sup>2</sup>

The practice in the Federal and State courts was, in 1871, generally the same, as to the exemption of the property of debtors.<sup>3</sup> This fact is very important, and should be duly considered in making exemptions under the State laws, for no property can be exempted under the State law which is or can be included in any other exemptions (§5045).<sup>4</sup> An exemption may be allowed under the territorial statute.<sup>5</sup> The exemption under the laws of the United States is not limited to those exemptions which could have been made at the time the bankrupt law was

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<sup>1</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59.

<sup>2</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; in re D. H. Tonne, 13 B. R. 170.

<sup>3</sup> In re Ruth, 1 B. R. 154; s. c. 6 Phila. 438; in re Appold, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83.

<sup>4</sup> In re E. A. Vogler, 8 B. R. 132.

<sup>5</sup> In re McKercher & Pettigrew, 8 B. R. 409.

passed, but extends to those which may be allowed by any other subsequent acts (§ 5045).

There was at one time considerable discussion in regard to the constitutionality of the clause allowing exemptions under the State laws, upon the ground that it was not uniform in its operation; but only a few cases have ever been decided upon that point,<sup>1</sup> and the law is generally acquiesced in. Such exemptions are in addition to all others,<sup>2</sup> but can not embrace any property included in those. Hence the assignee can not set apart to the bankrupt under the State laws any property specifically designated as exempt under the other provisions of the statute, such as household and kitchen furniture, wearing apparel, the uniform, arms, and equipments of a soldier.<sup>3</sup> It has also been decided that there can be no exemption under the State laws, unless those laws exempt by name different kinds of property from those allowed under the other exemptions; as, for instance, that if a bankrupt has \$1,000 worth of furniture, and claims \$500 as exempt under the bankrupt law, he can not claim any of the balance under any State law. But this, clearly, is not the proper construction. It is not requisite that the property shall be different in kind. It must be other property; that is, property not covered by the other exemptions. This very balance comes within the very words of the statute. It is "other property not included in the foregoing exceptions." The only effect of this provision is to compel the bankrupt to claim all that he can under the other exemptions, and then he may make a claim under this clause.<sup>4</sup>

It is a mistake to say that the only exemption that can be made is that which is allowed under the state laws which were in force in 1871. The exemption may be

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<sup>1</sup> In re Beckerford, 4 B. R. 203; s. c. 1 Dillon, 45; s. c. 1 L. T. B. 241; in re Wylie, 5 L. T. B. 330; in re Daniel Deckert, 10 B. R. 1.

<sup>2</sup> In re Ruth, 1 B. R. 154; s. c. 6 Phila. 438; in re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59.

<sup>3</sup> In re Feely, 3 B. R. 66.

<sup>4</sup> In re Edwin Davis, 2 Saw. 255.

allowed under the law that is in force at the time of the exemption, but the amount must not exceed that allowed under the laws in force in 1871.<sup>1</sup> If the State law was changed during the year 1871, the exemption can only be allowed according to the law that was in force at the close of the year.<sup>2</sup> It has also been held that, if the law has been since amended so as to reduce the amount, the exemption may be allowed under the prior law<sup>3</sup>; but this decision is questionable. The language of the statute is that such other property may be excepted as "is exempted" by the laws of the State. It, therefore, can not be exempted unless there is a State law exempting it. If there is such a law, then it may be exempted to the amount allowed by the laws in force in 1871, and no more. The existence of the State law is an indispensable condition, and the provision as to the amount is a limitation.

The exemption, moreover, must be made according to the laws of the State where the bankrupt had his domicile at the time of the commencement of proceedings in bankruptcy, and not according to the laws of the State embracing the district in which the proceedings are pending, or of the State where the property is located.<sup>4</sup> It has been said that the assignee should first ascertain what is exempt under the State laws,<sup>5</sup> but this scarcely seems to be correct. The proper mode is to ascertain first what is exempt absolutely and unconditionally, commencing with the exemptions under the bankrupt law, and then ascertaining what is exempt under the State laws, for otherwise it will, in many cases, be impossible to determine what may be allowed under the State laws. In making exemptions under State laws, the assignee should proceed as

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<sup>1</sup> In re Askew, 3 B. R. 575.

<sup>2</sup> In re Anthony Baer, 14 B. R. 97.

<sup>3</sup> In re Albert Cohen, 3 Dillon, 295.

<sup>4</sup> In re W. S. Stevens, 5 B. R. 298; s. c. 2 Biss. 373.

<sup>5</sup> In re Ruth, 1 B. R. 154; s. c. 6 Phila. 438; in re Noakes, 1 B. R. 592.

conformably to those laws as may be possible.<sup>1</sup> Expectant interests which can not be seized and sold under execution by the State laws are exempted under this provision.<sup>2</sup>

After these exemptions are allowed, the assignee should next consider those exemptions in regard to which he may exercise a discretion. These are necessities and other articles which, in character as well as in amount and value, are suitable to the family, condition, and circumstances of the bankrupt. This allowance is conditional, and is measured with reference not merely to value, but also to subjects and their suitableness to personal requirements.<sup>3</sup> These exemptions, however, together with the household and kitchen furniture, must not exceed the sum of \$500.<sup>4</sup> The discretion must be a sound legal discretion. The assignee must look to the policy and spirit of the law. This allowance is to be made with reference to the family, condition, and circumstances of the bankrupt. In considering the family, he must have regard to the number composing it; in inquiring after the condition, he must ascertain the social *status*, and whether ill health prevails or not; and, in regard to the circumstances, he must inquire how the bankrupt is employed, what his income is, how many of the family earn their own living, whether they contribute to the support of the others, and also how much and what property he is entitled to absolutely and unconditionally.<sup>5</sup> The phrase, "other articles and necessities," is an indefinite expression. It must, however, be construed as limited by the context, and as relating to things not precisely furniture or wearing apparel,

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<sup>1</sup> In re Ruth, 1 B. R. 154; s. c. 6 Phila. 438; in re Kean et al. 8 B. R. 367; in re Feely, 3 B. R. 66.

<sup>2</sup> In re Bennett, 2 B. R. 181.

<sup>3</sup> In re Ruth, 1 B. R. 154; s. c. 6 Phila. 438.

<sup>4</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59.

<sup>5</sup> In re Feely, 3 B. R. 66; in re Ziba Williams, 5 Law Rep. 155; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.



but manifestly useful to the individual or his family in a like sense.<sup>1</sup> It does not include articles of mere fancy, taste or convenience.<sup>2</sup> It may include family pictures, keepsakes, and many other things of small value.<sup>3</sup> It may also include provisions,<sup>4</sup> money,<sup>5</sup> a sewing machine,<sup>6</sup> the tools of a tradesman,<sup>7</sup> the books of a professional man,<sup>8</sup> the auction stand and flag of an auctioneer,<sup>9</sup> a cow,<sup>10</sup> silver spoons,<sup>11</sup> and a moderate quantity of material for carrying on a trade,<sup>12</sup> but not land,<sup>13</sup> or gold watches or pianos or other articles of mere luxury or ornament,<sup>14</sup> or a pew,<sup>15</sup> or clock,<sup>16</sup> or desks,<sup>17</sup> or a fowling-piece, fishing tackle, breast-pin or painting,<sup>18</sup> or manufactured articles kept for sale.<sup>19</sup>

When the property is incapable of division, it may be sold, and the exemption allowed out of the proceeds.<sup>20</sup> If the exempted articles have been sold by the assignee, the

<sup>1</sup> In re E. D. Comstock, 1 N. Y. Leg. Obs. 326; in re Ziba Williams, 5 Law Rep. 155; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>2</sup> In re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>3</sup> In re W. H. Thiell, 4 Biss. 241.

<sup>4</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>5</sup> In re Thornton, 2 B. R. 189; in re Ira Hay, 7 B. R. 344; in re Benjamin B. Grant, 2 Story, 312; in re James Thompson, 13 B. R. 300; contra, in re W. Welch, 5 B. R. 348; s. c. 5 Ben. 230.

<sup>6</sup> In re Graham, 2 Biss. 449.

<sup>7</sup> In re W. H. Thiell, 4 Biss. 241; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>8</sup> In re W. H. Thiell, 4 Biss. 241.

<sup>9</sup> In re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>10</sup> In re Ziba Williams, 5 Law Rep. 155.

<sup>11</sup> In re Ziba Williams, 5 Law Rep. 155.

<sup>12</sup> In re W. H. Thiell, 4 Biss. 241.

<sup>13</sup> In re Thornton, 2 B. R. 189; contra, in re Edwards, 2 B. R. (quarto), 109.

<sup>14</sup> In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; in re Chester S. Kasson, 4 Law Rep. 489; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322; in re W. H. Thiell, 4 Biss. 241.

<sup>15</sup> In re E. D. Comstock, 1 N. Y. Leg. Obs. 326.

<sup>16</sup> In re Ziba Williams, 5 Law Rep. 155; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>17</sup> In re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>18</sup> In re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

<sup>19</sup> In re W. H. Thiell, 4 Biss. 241.

<sup>20</sup> In re Jas. B. Brown, 3 B. R. 250; s. c. 2 L. T. B. 122.

proceeds may be given to the bankrupt.<sup>1</sup> The exemption may be allowed although the property has within four months prior to the filing of the petition been attached on *mesne* process.<sup>2</sup> If the property which would have been exempt has been sold under an attachment on *mesne* process which was dissolved by the commencement of proceedings in bankruptcy, the proceeds belong to the bankrupt.<sup>3</sup> When property, which is exempt under both the State laws and the bankrupt law, is levied upon before and sold after the filing of the petition, the sale will be set aside.<sup>4</sup> An individual partner can not claim an exemption out of the partnership assets, unless it is allowed by the State laws;<sup>5</sup> and he can not claim it under the State laws, unless there is an express provision to that effect.<sup>6</sup> A person who is indebted or even insolvent may apply his property to the acquisition of a homestead, or the discharge of incumbrances thereon, without depriving it of the exemption from forced sale by law.<sup>7</sup> No exemption can be allowed out of property which has been transferred with the intent to delay, hinder or defraud the creditors. The transfer is valid against the bankrupt, and in attempting to place his property beyond the reach of his creditors, he placed his exemptions beyond his own reach.<sup>8</sup>

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<sup>1</sup> In re W. Welch, 5 B. R. 348; s. c. 5 Ben. 230; in re Jones, 2 Dillon, 243.

<sup>2</sup> In re W. S. Stevens, 5 B. R. 298; s. c. 2 Biss. 273.

<sup>3</sup> In re Ellis, 1 B. R. 551; contra, Robinson v. Wilson, 14 B. R. 565; s. c. 15 Kans. 595.

<sup>4</sup> In re Griffin, 2 B. R. 254; s. c. 2 L. T. B. 23.

<sup>5</sup> In re Hafer & Bro. 1 B. R. 547; Anon. 1 B. R. (quarto), 187.

<sup>6</sup> Burns v. Harris, 67 N. C. 140; in re Handlin & Venny, 12 B. R. 49; s. c. 3 Dillon, 290; in re Blodgett & Sanford, 10 B. R. 145; in re J. S. & J. Price, 6 B. R. 400; in re D. H. Tonne, 13 B. R. 170; in re Stewart & Newton, 13 B. R. 295; in re Boothroyd & Gibbs, 14 B. R. 223; contra, in re Ralph, 4 B. R. 95; s. c. 2 L. T. B. 123; in re Young et al. 3 B. R. 440; in re McKercher & Pettigrew, 8 B. R. 409; in re S. H. Richardson & Co. 11 B. R. 114.

<sup>7</sup> In re Henkel, 2 B. R. 546; s. c. 2 Saw. 305.

<sup>8</sup> In re Graham, 2 Biss. 449; Keating v. Keefer, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; in re Dillard, 9 B. R. 8; s. c. 6 L. T. B. 490; contra, Cox v. Wilder, 5 B. R. 443; s. c. 7 B. R. 241; s. c. 2 Dillon, 132; s. c. 5 L. T. B. 500; Bartholomew v. West, 8 B. R. 12; s. c. 2 Dillon, 290.

The question of the rights of a creditor who holds a valid lien upon the exempted property is one which would seem to be clear on principle, but the authorities are not very satisfactory.

There are two classes of exemptions, to wit, those specifically allowed by the statute, and those which are permitted in bankruptcy because they are allowed by the State laws. In regard to the first class, the solution of the question depends upon the construction of the statute. That law both makes exemptions and protects liens, and the question in all such cases is which provision shall prevail. The determination of this question depends entirely upon the construction of the statute itself. If the two provisions were entirely repugnant to each other, it would certainly be most in consonance with justice to give effect to the lien, especially when it has been created by the voluntary act of the bankrupt for a valuable consideration through an instrument which, at the time of its execution, was valid and secure. To allow the subsequent bankruptcy of a debtor to defeat such a security, and restore the property to the bankrupt while the creditor remains unpaid, as would happen in cases where there are no assets, is harsh, destructive of all contracts, and in violation of good faith, and would in many cases lead to and permit positive fraud. A construction which leads to such results should not be adopted, unless rendered necessary by the plainest and most imperative provisions of the law.

The terms of the statute, however, clearly demand a different construction. The section relating to exemptions provides for an assignment of the bankrupt's effects, and merely excepts certain articles from its operation. It is, moreover, expressly provided that such property shall not pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of the statute (§ 5045). In other words, it simply provides that the assignee shall not take such property, and that is its only

effect and purpose. It does not confer any better or different title upon the bankrupt than he had before. If he had a defeasible title then, he will have a defeasible title still. If the title was bad then, it will be bad still. The same course of reasoning leads irresistibly to the conclusion, that if it was subject to liens then, it will be subject to liens still.<sup>1</sup> If the property is not more than sufficient to pay the lien creditor, the assignee should simply set the exempt property apart and leave the lien creditor and the bankrupt to settle their respective rights by themselves.<sup>2</sup> But the lien creditor, on the other hand, may be required to exhaust his lien before he can share in the general estate.<sup>3</sup>

The act of the assignee in designating and setting apart exempted property, is simply a declaration that the court of bankruptcy has no concern with it,<sup>4</sup> and not a judgment *in rem* conclusive against all the world.<sup>5</sup> A creditor who has a valid lien upon such property may enforce it, notwithstanding a discharge,<sup>6</sup> and even controvert the right of the bankrupt to the exemption.<sup>7</sup>

The question whether the exemption allowed by the State laws will prevail over a lien upon the property is to be determined in accordance with the State laws. The statute, it is true, provides that such exemptions shall be

<sup>1</sup> In re Perdue, 2 B. R. 183; in re J. B. Whitehead, 2 B. R. 599; in re Hutto, 3 B. R. 787; s. c. 1 L. T. B. 226; s. c. 3 L. T. B. 197; in re J. B. Brown, 3 B. R. 250; s. c. 2 L. T. B. 122; Haworth v. Travis, 13 B. R. 145; s. c. 67 Ill. 301; Hatcher v. Jones, 14 B. R. 387; s. c. 53 Geo. 208; Cumming v. Clegg, 14 B. R. 49; s. c. 52 Geo. 605; contra, in re Hambright, 2 B. R. 498; s. c. 2 L. T. B. 61; in re Nicholas Martin, 13 B. R. 397; in re John Owens, 12 B. R. 518; s. c. 6 Biss. 432.

<sup>2</sup> In re Lambert, 2 B. R. 426.

<sup>3</sup> In re Sauthoff & Olson, 14 B. R. 364.

<sup>4</sup> In re C. Hunt, 5 B. R. 493; s. c. 2 L. T. B. 197.

<sup>5</sup> Fehley v. Barr, 66 Penn. 196.

<sup>6</sup> Tuesley v. Robinson, 103 Mass. 558; in re C. H. Preston, 6 B. R. 545.

<sup>7</sup> Fehley v. Barr, 66 Penn. 196; in re C. Hunt, 5 B. R. 493; s. c. 2 L. T. B. 197; Haworth v. Travis, 13 B. R. 145; s. c. 67 Ill. 301; Hatcher v. Jones, 14 B. R. 387; s. c. 53 Geo. 208; Cummings v. Clegg, 14 B. R. 49; s. c. 52 Geo. 605.

valid against debts contracted before the adoption and passage of the State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decisions of such State court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding, but this provision is manifestly unconstitutional. A bankrupt law to be constitutional must be uniform, and whatever rule it prescribes for one it must prescribe for all. If it provides that certain kinds of property shall not be assets in one place, it must make the same provision for every other place within which it is to act. So far, therefore, as this provision attempts to give the debtor an exemption which he can not claim under the State laws, it is void.<sup>1</sup> Where the lien is valid by the State law and paramount to the exemption, the lien creditor has a vested interest in the property, and the bankrupt can only be allowed an exemption out of such estate as remains to him after the vested interests of others have been satisfied.<sup>2</sup> This provision tacitly concedes that all liens except those by judgment or decree will prevail over the exemption. It is only necessary, therefore, to consider the effect of the law upon liens by judgment or decree. The question will be made plainer by considering a case belonging to the first class, where the sole debt is due to the lien creditor, and where all the property consists of that which is subject to the lien, and not sufficient to satisfy it. Such a lien constitutes for the person holding it a special property in the thing covered by the lien, and might be the most valuable

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<sup>1</sup> In re Daniel Deckert, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; in re Geo. W. Dillard, 9 B. R. 8; s. c. 6 L. T. B. 490; in re George Duerson, 13 B. R. 183; contra, in re Kean et al. 8 B. R. 367; in re John W. Smith, 8 B. R. 401; s. c. 14 B. R. 295; s. c. 2 Woods, 458.

<sup>2</sup> In re Geo. W. Dillard, 9 B. R. 8; s. c. 1 L. T. B. 490; in re Daniel Deckert, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; in re Kerr & Roach, 9 B. R. 566; contra, in re Jordan, 8 B. R. 180; in re Kean et al. 8 B. R. 367; in re John W. Smith, 8 B. R. 401; s. c. 14 B. R. 295; s. c. 2 Woods, 458; in re Jared Everett, 9 B. R. 90; Penny v. Taylor, 10 B. R. 200; McFarland v. Goodman, 11 B. R. 134; s. c. 6 Biss. 111.

part of his estate.<sup>1</sup> The question, then, where the lien existed before the passing of the law, is simply whether this property can be taken from one man and given to another, whether private property can be taken without compensation. The power conferred upon Congress by the Constitution, is simply the power to pass uniform laws upon the subject of bankruptcies. This is merely a power to distribute the estate of the debtor among his creditors, and to give the debtor a discharge from his debts.<sup>2</sup> That is the full extent and scope of the power. What then is the estate of a debtor in property which is subject to a lien? It is merely his right to the surplus after the lien is discharged. This surplus a bankrupt law may take and distribute, and may, as an incident to the ascertainment whether there is a surplus, provide for the liquidation of the lien, but can not deprive the creditor of his lien without just compensation. Under the guise of a bankrupt law, Congress can not take the property of one man and give it to another. It can not take the farm of A. and give it to B. But there is no distinction between absolute titles and those titles which are merely defeasible, like mortgages, or those which require some process to be enforced, like liens. The inherent rights of property are independent of the character of the title by which they are held, for their sanctity rests in the lack of power in Congress under the Constitution to affect them, and not in the peculiar nature of their origin or tenure. If the exemption overrides the lien by the State law it may of course be allowed.

How a lien upon exempted property may be enforced is a question which the authorities do not make clear. The title to such property does not pass to the assignee, but remains in the debtor. Consequently, the lien creditor may enforce his lien against the property in the State

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<sup>1</sup> In re C. H. Preston, 6 B. R. 545.

<sup>2</sup> In re Silverman, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410.

courts,<sup>1</sup> and the bankrupt courts will not enjoin such proceedings.<sup>2</sup> The bankrupt court, however, has jurisdiction over all the parties and over the bankrupt's estate, and there would seem to be no valid reason why a creditor, if he chooses, may not have his lien enforced in that court.<sup>3</sup> For this purpose, the assignee, as the representative of the creditors, may be deemed to be clothed with the rights of the lien creditors, and the right of the bankrupt in the property will be simply a right to the surplus that may remain after the lien is extinguished.

The question as to the effect of a failure of the assignee to make the exemptions within the required time has never arisen or been discussed, but, as the title to exempted property does not pass to the assignee, the bankrupt's right to all property which he may claim absolutely, would not be affected by such failure.<sup>4</sup> As to those articles which are in the discretion of the assignee, it might be different. It has been held that where the property was in litigation, the twenty days might be computed from the time when the litigation terminated.<sup>5</sup> This report must be made in the prescribed form,<sup>6</sup> setting forth the separate items and the estimated value of each, and must be filed with the court. This exception operates as a limitation upon the conveyance of the property of the bankrupt to his assignee. And in no case will the exempted property pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the

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<sup>1</sup> *Fehley v. Barr*, 66 Penn. 196; *Tuesley v. Robinson*, 103 Mass. 558; *Ha-worth v. Travis*, 13 B. R. 145; s. c. 67 Ill. 301; *Hatcher v. Jones*, 14 B. R. 387; s. c. 53 Geo. 208; *Cummings v. Clegg*, 14 B. R. 49; s. c. 52 Geo. 605; *Robinson v. Wilson*, 14 B. R. 565; s. c. 15 Kans. 595.

<sup>2</sup> *In re C. Hunt*, 5 B. R. 493; s. c. 2 L. T. B. 197; *in re Fetherston*, 5 C. L. N. 193; s. c. 20 Pitts. L. J. 77; *in re Lambert*, 2 B. R. 426; *vide in re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 378.

<sup>3</sup> *In re Wylie*, 5 L. T. B. 330; *Maxwell v. McCune*, 10 B. R. 306; s. c. 37 Tex. 515; *in re Henry May*, 2 C. L. B. 152; *contra*, *in re C. H. Preston*, 6 B. R. 545.

<sup>4</sup> *Rix v. Capitol Bank*, 2 Dillon, 367.

<sup>5</sup> *In re Shields*, 1 B. R. 344.

<sup>6</sup> Form No. 20.

provisions of the act. And the determination of the assignee in the matter is, on exception taken, subject to the final decision of the court (§ 5045).

Any creditor may take exceptions to the determination of the assignee within twenty days after the filing of the report.<sup>1</sup> And this is the only mode in which the decision of the assignee can be reversed.<sup>2</sup> The report may be filed with the register.<sup>3</sup> The register may require the exceptions to be argued before him, and must certify them to court for final determination, at the request of either party.<sup>4</sup>

The Supreme Court intended to leave a discretion with the circuit and district courts, to permit them to repair accidents, correct mistakes, and prevent frauds.<sup>5</sup> But, in the absence of fraud, accident, or mistake, the exceptions must be filed within the required time. When an attempt, however, is made to exempt a species of property that can not be exempted, it is not necessary, in order to defeat the exemption, to file exceptions within the required time. No exceptions need be taken. The title to property so attempted to be exempted passes to the assignee, and remains in him until it is divested in some one of the ways provided by the law. The attempt to exempt is ineffectual. The creditors may except to the account of the assignee, if he omits to account for or charge himself with the value of such property.<sup>6</sup> Where the exceptions are as to articles comprehended by the terms of "household or kitchen furniture, or other articles or necessities," they must be made in the way and also in the time prescribed.<sup>7</sup> Where the exceptions go to the title to the exempted

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<sup>1</sup> Rule XIX.

<sup>2</sup> In re Richard Pryor, 4 Biss. 262; in re W. H. Thiell, 4 Biss. 241.

<sup>3</sup> In re Cordes, 1 Pac. L. R. 165.

<sup>4</sup> Rule XIX.

<sup>5</sup> In re Perdue, 2 B. R. 183.

<sup>6</sup> In re Gainey, 2 B. R. 525; in re Jackson & Pierce, 2 B. R. 508; in re Farish, 2 B. R. 168.

<sup>7</sup> In re Gainey, 2 B. R. 525.



property, they need not be filed within the required time.<sup>1</sup> Where the exemption is one that rests in the discretion of the assignee, the allowance made by him will be deemed to be reasonable and suitable until the contrary is shown by some appropriate facts and proofs,<sup>2</sup> and will not be disturbed unless it plainly appears that he has abused the discretion confided in him.<sup>3</sup>

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<sup>1</sup> In re Perdue, 2 B. R. 183.

<sup>2</sup> In re Ziba Williams, 5 Law Rep. 155.

<sup>3</sup> In re W. H. Thiell, 4 Biss. 241.

## CHAPTER IX.

### SALES.

THE assignee has the same right, title, power, and authority to sell, manage, and dispose of the property and estate, as the bankrupt might or could have had if no assignment had been made (§ 5046). The court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor was declared a bankrupt; but such order can not be made until the court is satisfied that it is approved by a majority in value of the creditors.<sup>1</sup> The court may also authorize him to spend money to put property into a salable condition. He should endeavor to settle and liquidate the estate as rapidly as possible and to the best advantage. It is no part of his ordinary right or duty to carry on a trade; but if in a reasonable time, and at a reasonable expense, he can make property salable, which is not so in the condition in which he finds it, he may do so. He will not be allowed to do so, however, unless it is clearly shown that he can make such a bargain for the necessary work as will, to almost a moral certainty, insure the creditors against loss, and insure them a large gain within a reasonable time.<sup>2</sup> The assignee may sell and assign, under the

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<sup>1</sup> Act of 22 June, 1874, § 1.

<sup>2</sup> Foster et al. v. Ames et al. 2 B. R. 455; s. c. Lowell, 313.

direction of the court, and in such manner as the court may order, any outstanding claims or other property in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense (§ 5064). He may sell all unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors. But upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors (§ 5062). No order from the court is needed to sell unincumbered assets.<sup>1</sup> Unless otherwise ordered by the court, the assignee must sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as may be best calculated to produce the greatest amount with the least expense. All notices of public sales by any assignee or officer of the court must be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge or register,<sup>2</sup> which, in his opinion, shall be best calculated to give general notice of the sale. The court, on the application of any party in interest, has complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold may realize the largest sum. The court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such instalments as the court may direct, bearing interest at the rate of seven *per centum per annum*, and secured by proper mortgage or lien upon the property so sold.<sup>3</sup> Upon application to the court, and for good cause shown,

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<sup>1</sup> In re White & May, 1 B. R. 216; s. c. 2 Ben. 85; Mims v. Swartz, 10 B. R. 305; s. c. 37 Tex. 17.

<sup>2</sup> In re Peter N. Burke, 15 B. R. 40.

<sup>3</sup> Act of 22 June, 1874, ch. 390, § 4; 18 Stat. 178.

the assignee may be authorized to sell any specified portion of the bankrupt's estate at private sale, in which case he must keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he must file with his report, at the first meeting of creditors after the sale.

In making sale of the franchise of a corporation, it may be offered in fractional parts, or in certain numbers of shares, corresponding to the number of shares in the bankrupt corporation.<sup>1</sup>

No title to property, real or personal, sold, transferred, or conveyed by an assignee, is affected or impaired by reason of the ineligibility of any person as assignee (§ 5035). The assignee may sell real estate lying in another State.<sup>2</sup> He may sell the property although it is in the possession of an adverse claimant, for the sale is a judicial sale.<sup>3</sup> He may be vested with a discretion in regard to the time and manner of sale.<sup>4</sup> If the assignee acts under an order, anything which he may do in conflict with, or in violation of such order, is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed to sell to another person for a certain price, and to wait for an answer for a certain time, which period has not expired at the time of receiving a better bid.<sup>5</sup> If his authority is limited to the property set forth in the schedule, he can not convey any other property.<sup>6</sup> The bankrupt may purchase at an assignee's sale.<sup>7</sup> The solicitor of the assignee can not purchase at the assignee's sale.<sup>8</sup> If a sale is fairly

<sup>1</sup> Rule XXI.

<sup>2</sup> *Oakey v. Corry*, 10 La. An. 502.

<sup>3</sup> *Stevens v. Hauser*, 1 Robt. 50; s. c. 39 N. Y. 302; *Stevens v. Palmer*, 10 Bosw. 60.

<sup>4</sup> *Holbrook v. Coney*, 25 Ill. 543.

<sup>5</sup> *In re Ryan & Griffin*, 6 B. R. 235.

<sup>6</sup> *In re O'Fallon*, 2 Dillon, 548.

<sup>7</sup> *Arnold v. Leonard*, 20 Miss. 258.

<sup>8</sup> *Citizens' Bank v. Ober*, 13 B. R. 328; s. c. 1 Woods, 80.

made, and the bids are understood by the bystanders and the auctioneer, it will be valid, although the assignee is present, and in consequence of his negligence and inattention fails to understand the terms thereof.<sup>1</sup> A sale of real estate is subject to the approval of the court.<sup>2</sup> The court, in its discretion, may refuse to confirm a sale for mere inadequacy of price, nor is it necessary that the inadequacy should be so gross as to be evidence of fraud.<sup>3</sup> Although all the technical formal requisites to a regular sale have been complied with, yet if there has been any improper conduct on the part of the purchaser, the court has the power to set the sale aside.<sup>4</sup> If the right to property, and the evidence to establish it, are concealed from the assignee and the creditors, so that the assets are sold for a nominal sum to the bankrupt himself, the sale may be set aside.<sup>5</sup> No sale can be set aside so as to bind the purchaser, unless he is a party to the proceedings.<sup>6</sup>

The assignee has authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrances (§ 5066). The terms of these provisions are so broad that it has been contended that the assignee may redeem even before the debt becomes due.<sup>7</sup> Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, or to relieve such property from any conditional contract, and

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<sup>1</sup> *Ives v. Tregent*, 14 B. R. 60; s. c. 29 Mich. 390.

<sup>2</sup> *Warren v. Homestead*, 33 Me. 256.

<sup>3</sup> *In re O'Fallon*, 2 Dillon, 548.

<sup>4</sup> *In re Troy Woolen Co.* 4 B. R. 629; s. c. 8 Blatch. 465.

<sup>5</sup> *Clark v. Clark*, 17 How. 315; *Booth v. Clark*, 17 How. 315.

<sup>6</sup> *Holbrook v. Brenner*, 31 Ill. 501.

<sup>7</sup> *Foster et al. v. Ames et al.* 2 B. R. 455; s. c. Lowell, 313.

to tender performance of the conditions thereof, the assignee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor in the office of the clerk of the district court; and, thereupon, the court will appoint a suitable time and place for the hearing thereof, notice of which must be given in some newspaper, to be designated by the court, at least ten days before the hearing, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition, authorizing such act on the part of the assignee.<sup>1</sup> This petition should be according to the prescribed form.<sup>2</sup>

The jurisdiction of the district court, sitting as a court of bankruptcy, extends to the collection of all the assets of the bankrupt, the ascertainment and liquidation of the liens and other specific claims thereon, and the adjustment of the various priorities and conflicting interests of all parties (§ 4972). The commencement of proceedings in bankruptcy gives to the district court jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith.<sup>3</sup> The property and estate of the bankrupt, so far as any interference therewith is concerned, is thereby brought *eo instante*, into the court of bankruptcy, and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court.<sup>4</sup> Its jurisdiction is superior and exclusive in all matters arising under the statute. The officer appointed to manage it is accountable to the court appointing him and to that court alone. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition.<sup>5</sup> Claims against the estate, so long as it remains in the

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<sup>1</sup> Rule XVII.

<sup>2</sup> Form No. 34.

<sup>3</sup> Jones v. Leach et al. 1 B. R. 595.

<sup>4</sup> In re Vogel, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154.

<sup>5</sup> In re Barrow et al. 1 B. R. 481; s. c. 1 L. T. B. 63.

possession of the court, can generally be only enforced by proceedings properly instituted therein, or under its authority.<sup>1</sup>

The levy of an execution,<sup>2</sup> the institution of an action to foreclose a mortgage,<sup>3</sup> the filing of a libel *in rem*,<sup>4</sup> the issuing of a distrain warrant,<sup>5</sup> the recording of claims for mechanics' liens under a law which only makes the claim a lien from the time of such filing,<sup>6</sup> after the filing of the petition in bankruptcy, are all proceedings that are irregular and unauthorized. All the rights and all the duties of the bankrupt in respect to whatever property not expressly excluded from the operation of the statute, he may hold, under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. All rights thus acquired are to be enforced by process issuing from the courts of bankruptcy, and all duties thus imposed are to be performed under their superintendence. No lien can be acquired<sup>7</sup> by any proceeding in a State court, commenced after such petition is filed, though jurisdiction which has been previously acquired by State courts, of a suit brought in good faith to enforce a valid lien upon property, will not be divested.<sup>8</sup>

When a creditor has a mortgage or pledge of real or personal property of a bankrupt, or a lien thereon for securing the payment of a debt owing to him from the

<sup>1</sup> *In re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226; *Pennington v. Sale & Phelan*, 1 B. R. 572.

<sup>2</sup> *Davis v. Anderson et al.* 6 B. R. 145.

<sup>3</sup> *In re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79.

<sup>4</sup> *In re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226.

<sup>5</sup> *In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116.

<sup>6</sup> *In re Day*, 3 B. R. 305; s. c. 3 Ben. 450; s. c. 9 Blatch. 285. The law has heretofore been considered to be as stated in the text, but some doubt has been recently raised upon the subject by the decision of the Supreme Court in the case of *Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28.

<sup>7</sup> *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

<sup>8</sup> *In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116.

bankrupt, the value of such property may be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such a manner as the court may direct. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, must execute all deeds and writings necessary or proper to consummate the transaction (§ 5075).

There is no distinction in the bankrupt law between different kinds of liens. Its provisions apply equally to all liens of whatever kind, character, or description.<sup>1</sup> The first point to be ascertained is whether there is a valid lien according to the laws of the State where the property is situated. If there is no valid lien under those laws, there can be no claim upon the property under the bankrupt law. If there is a valid lien under those laws, it follows the property into the court of bankruptcy, and will be there recognized, protected and enforced. Liens are of various descriptions, and may arise in various ways. The definition that seems to be warranted upon principle, as well as authority, is, that whenever the law gives a creditor the right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives alien on such property to secure the payment of this debt.<sup>2</sup> Whenever such a lien exists, the assignee must determine what course he will pursue in regard to it.

The right of redemption has already been considered. Another course is to release the right of redemption to the creditor. If neither of these plans is adopted, he may sell the property, either subject to the lien or free from the lien. In all cases he should exercise a sound discretion,

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<sup>1</sup> Davis, *Assig. of Bittel et al.* 2 B. R. 392.

<sup>2</sup> *In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116.



and proceed accordingly, as he thinks the interests of the creditors will be best promoted by the one or the other mode of sale.<sup>1</sup> It is not necessary, however, that he should take any proceedings whatever in regard to incumbered property, unless by so doing he can realize a net sum of money free from incumbrances for the benefit of the estate. It would be idle to go through the form of selling the property, if the property is of less value than the amount of the incumbrance.<sup>2</sup> He may sell the property subject to the lien without any order of the court for that purpose.<sup>3</sup> Whenever he sells without such order, he can only sell subject to the lien, and does not give to the purchaser any better right or title than he himself had.<sup>4</sup> The proceeds of such sale are always presumed to be the price or value of the interest so sold, with a full knowledge on the part of the purchaser of all incumbrances.<sup>5</sup>

Whenever he wishes to sell property free from liens, he must apply to the court for an order to that effect. This application should never be made where the property has no market value, or one that is clearly less than the debt secured by the lien.<sup>6</sup> He acts only in the interest of the general creditors, and should institute no proceedings except for their benefit. It is no part of his duty to make such an application unless he believes that such a sale will create a larger fund for distribution among the unsecured creditors.<sup>7</sup> The proper mode of making such an application is by a petition, addressed to the judge of the court of bankruptcy, properly entitled in the cause in bankruptcy, and duly verified. As the

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<sup>1</sup> In re McClellan, 1 B. R. 389.

<sup>2</sup> In re Lambert, 2 B. R. 426.

<sup>3</sup> In re McClellan, 1 B. R. 389; King v. Bowman, 24 La. An. 506.

<sup>4</sup> Kelley v. Strange, 3 B. R. 8; King v. Bowman, 24 La. An. 506.

<sup>5</sup> In re Mebane, 3 B. R. 347.

<sup>6</sup> Foster et al. v. Ames et al. 2 B. R. 455; s. c. Lowell, 313.

<sup>7</sup> In re Mebane, 3 B. R. 347.

granting of such an order is not a matter of course, the petition should set forth the facts that justify the application, and not merely rely upon the petitioner's belief. The question is to be decided upon the belief of the court, and not upon the belief of the assignee, and hence the matters necessary to produce conviction should be fully stated. The petition must also state what persons have liens, incumbrances, or interests in the property.<sup>1</sup>

As this proceeding specially affects the rights of the secured creditor, he must be properly notified and summoned to appear and protect his interests.<sup>2</sup> This is done by passing an order to show cause, and directing that a copy of such order, and of the petition, be served upon him. If a notice is served on an agent of the secured creditor, and such agent appears for the creditor, that is sufficient.<sup>3</sup> The proceedings are usually summary, and are tried in open court. The defense to the application is that the property is worth less than the lien claim, or that the creditor will be injured by such a sale.<sup>4</sup>

The selling of property free from incumbrances is a matter of judicial discretion. It is the duty of the assignee and of the court to take that course in the premises which, in their judgment, having due reference to the rights of the lien creditor, will be most beneficial to all the parties interested. The assignee may be directed to sell at public sale without credit, but he ought not to be permitted to sell at private sale on credit without first submitting the price and terms to the court on notice to the secured creditor, for confirmation and approval.<sup>5</sup> The lien creditor can not demand as a matter of right that the assignee shall, upon his offer, convey the property to him on condition

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<sup>1</sup> In re Anon. 29 Leg. Int. 29.

<sup>2</sup> Ray v. Norseworthy, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128.

<sup>3</sup> In re Fredrick S. Kirtland, 10 Blatch. 515.

<sup>4</sup> Foster et al. v. Ames et al. 2 B. R. 455; s. c. Lowell, 313.

<sup>5</sup> In re Frederick S. Kirtland, 10 Blatch. 515.

of his agreeing not to present a claim for any part of the debt against the other assets of the bankrupt. The rejection of such a proposition will not be at the peril of throwing the costs of any effort to obtain a better price upon the other creditors.<sup>1</sup> If a sale is ordered, the lien is transferred to the fund, and must be paid first, after deducting the expenses of the sale. The apportionment of costs is a matter to some extent of judicial discretion. The bankrupt court, as incident to its power to adjust and liquidate the lien, is authorized to adjust the costs of the proceedings necessary to give effect to the specific lien. The expenses of the sale, including commissions to the assignee, may therefore be charged upon the proceeds.<sup>2</sup> When the conduct of the creditor has been such as to justify the institution of proceedings in bankruptcy, for the purpose of attacking his security, the court may, in its discretion, order all the costs in bankruptcy to be first paid from the proceeds.<sup>3</sup> If there are several liens, they will be entitled to payment according to their respective priorities.<sup>4</sup>

If the assignee does not institute any proceedings to have the property sold, the creditor may, and sometimes must do so. Whenever he wishes to enforce his lien or prove his claim in bankruptcy, he ought generally to make disposition of the property in the court of bankruptcy or under its superintendence. If he attempts during the pendency of the proceedings to enforce his lien in any other manner, he is liable to be enjoined,<sup>5</sup> and any sale so made is liable to be set aside.<sup>6</sup> It does not, however, necessarily

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<sup>1</sup> In *re Ellerhorst et al.* 7 B. R. 49; s. c. 2 Saw. 219.

<sup>2</sup> In *re Ellerhorst et al.* 7 B. R. 49; s. c. 2 Saw. 219; in *re Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362; in *re Blue Ridge R. R. Co.* 13 B. R. 315.

<sup>3</sup> In *re Dumont*, 4 B. R. 17; s. c. 2 L. T. B. 114.

<sup>4</sup> In *re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17.

<sup>5</sup> In *re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497; in *re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79.

<sup>6</sup> *Davis Assig. of Bittel et al.* 2 B. R. 392; *Davis v. Anderson*, 6 B. R. 145.

follow that the bankrupt court must, in all cases, prohibit any proceeding in a State court for the benefit of a lien creditor. Often it is quite convenient, and ordinarily it may be quite desirable to permit the institution of such proceedings.<sup>1</sup> The bankrupt court may therefore authorize a lien creditor to enforce his lien in a State court.<sup>2</sup> Even if such a proceeding is instituted without such authority, it will not be absolutely void;<sup>3</sup> nor will the bankrupt court interfere where no advantage can result to the bankrupt's estate.<sup>4</sup> The assignee must, in such cases, be made a party to the proceeding.<sup>5</sup> The proceeding may be ratified on the application of the secured creditor and proof that the estate and the other creditors will not be injured thereby.<sup>6</sup> It has also been said, that by electing to proceed in the State court, the lien creditor will deprive himself of the right to prove his debt in bankruptcy for the deficiency.<sup>7</sup> The lien creditor may surrender his lien or rely upon his lien without proving his claim.

If he desires a sale in the court of bankruptcy, the first step properly is to prove his claim. He must establish his security and his debt, before he can show that he has any right to call upon the court to sell the property, and both, or either of these, may be disputed. If it is shown that either has no existence, he will have no standing in court.<sup>8</sup> It has, on the other hand, been de-

<sup>1</sup> *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

<sup>2</sup> *In re McGilton et al.* 7 B. R. 294; s. c. 3 Biss. 144; *in re Cook & Gleason*, 3 Biss. 116.

<sup>3</sup> *Whitridge v. Taylor*, 66 N. C. 273; *Cole v. Duncan*, 58 Ill. 176; *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70.

<sup>4</sup> *In re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; *in re Brinkman*, 6 B. R. 541; s. c. 7 B. R. 421.

<sup>5</sup> *Cole v. Duncan*, 58 Ill. 176; *Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377; *Barron v. Newberry*, 1 Biss. 149; *Truitt v. Truitt*, 38 Ind. 16.

<sup>6</sup> *Phelps v. Sellick*, 8 B. R. 390.

<sup>7</sup> *In re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320.

<sup>8</sup> *In re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *in re Frizelle*, 5 B. R. 122; *in re Philo R. Sabin*, 9 B. R. 383.

cided, that a formal proof of his claim is not a necessary preliminary step,<sup>1</sup> but the argument in favor of proving the claim is certainly the strongest, and, as no right is thereby lost or waived, it is certainly the better practice, and the more orderly course of proceeding.

The validity of the debt, or of the lien, or of both may be contested when they are presented for proof, and if the claim is allowed, either with or without dispute, a *prima facie* case is established at least, and this is sufficient to justify an application for a sale. This application must be by a petition addressed to the judge of the court, properly entitled in the cause, and duly verified. The petition should describe the property and set forth the character of the lien. As soon as it is filed, an order to show cause is passed, with a direction that a copy of the petition, and of the order, be served upon the assignee. Service upon him is sufficient, for he represents the creditors generally.<sup>2</sup> This proceeding is also summary, and is tried in the same manner as an application for a sale by the assignee. The defense consists of an attack upon the debt or security, or the omission of the preliminary proof. If the lien and the debt are established, a sale must be ordered in such manner as the court may direct, for this is a right conferred upon the creditor by the statute. After deducting the expenses of the sale, the proceeds are applied toward the payment of the claim.

When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who will hold the funds received in place of the estate disposed of (§ 5065). The application for a sale must be made to the court and

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<sup>1</sup> In re High et al. 3 B. R. 192; s. c. 1 L. T. B. 175.

<sup>2</sup> In re High et al. 3 B. R. 192; s. c. 1 L. T. B. 175.

not to the register.<sup>1</sup> The passing of the order is a matter resting in the discretion of the court. No sale can be ordered unless the property is in the possession of the marshal or assignee.<sup>2</sup> The proceeds must be deposited in court.

Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court may deem reasonable, order it to be sold, under the direction of the assignee, who must hold the funds received in place of the estate disposed of (§ 5063). It is immaterial whether the property is in the possession of the assignee or not. A sale may be ordered of property which is not in his possession, as well as of property which is in his possession. The court may exercise such control as it deems proper in regard to property which is in controversy. If it interferes in the matter, it should order the property into the possession of the assignee. Where a sale has been made, and the proceeds realized by that sale are in controversy, it may order the proceeds to be delivered to the assignee, and held subject to the rights of the party who may prove himself entitled to them.<sup>3</sup> This power, however, is not unlimited. It extends to personal estate found in the hands of a mere depositary, carrier, or bailee for safe keeping or transportation, without claim of title or interest in the goods, and to personal property subsequently discovered in the possession of the bankrupt, which was not transferred to the assignee, and other cases of a like character. But it does not extend to a case where the

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<sup>1</sup> In re John Graves, 1 B. R. 237; s. c. 2 Ben. 100.

<sup>2</sup> Rule XXII; in re Metzler et al. 1 B. R. 38; s. c. 1 Ben. 356.

<sup>3</sup> Bill v. Beckwith, 2 B. R. 241; Foster et al. v. Ames et al. 2 B. R. 455; s. c. Lowell, 313; in re Josiah D. Hunt, 2 B. R. 539.

estate in question is in the actual possession of a third person holding it as owner and claiming absolute title to and dominion over it, whether the title and possession were derived from the debtor or any other former owner. A party can not be deprived of his property without due process of law, and in a case at law where the value in controversy exceeds the sum of twenty dollars he is entitled to a trial by jury. This is a constitutional right, and the bankrupt court can not deprive him of it by directing the assignee to sell his estate, and compelling him to appear in court and vindicate his title, and to accept, if successful, the proceeds of the sale as the value of his property.<sup>1</sup> The application for a sale must be made to the court, and not to the register, and the sale must be public after public notice.<sup>2</sup> The proceeds of the sale, when one is ordered, are considered the measure of the value of the property in any suit or controversy between the parties in any court (§ 5063).

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<sup>1</sup> Knight v. Cheney, 5 B. R. 305 ; s. c. 2 L. T. B. 205.

<sup>2</sup> In re Wm. Major, 14 B. R. 71.

## CHAPTER X.

### STAYING PROCEEDINGS. HABEAS CORPUS.

No CREDITOR whose debt is provable under the statute is allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge has been petermined (§ 5106). The object of this provision is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits while he is proceeding in good faith to obtain his discharge, and until the question of his discharge is determined, and he either obtains it or is refused it, and to enable him to claim protection as against such suits through his discharge, if he obtains it. It applies to all cases where the personal liability of the debtor is sought to be fixed or ascertained by a final judgment pending the determination of the question of his discharge.<sup>1</sup> An action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or one that will not be discharged. There is no good reason why the court should enter into the inquiry, whether a discharge will operate to release any particular debt. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending, and whose determination will be a binding judgment on the question between the parties.<sup>2</sup> Such inquiry can only be instituted after the discharge is pleaded. The attempt

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<sup>1</sup> In re M. Rosenberg, 2 B. R. 236; s. c. 3 Ben. 14; in re Metcalf et al. 1 B. R. 201; s. c. 2 Ben. 78.

<sup>2</sup> In re M. Rosenberg, 2 B. R. 236; s. c. 3 Ben. 14; in re Migel, 2 B. R. 481; in re Seymour, 1 B. R. 29; s. c. 1 Ben. 348.



to determine in advance what will be the effect of a discharge upon particular debts, when as yet it is not known whether any discharge will be granted, is premature and unnecessary.<sup>1</sup>

The provision for a stay is addressed quite as much to the State courts as to the courts of bankruptcy, and is applied and enforced by the former quite as much as by the latter.<sup>2</sup> A stay in the State courts is obtained upon motion supported by the production of a copy of the order of adjudication. The bankruptcy of the defendant can not be pleaded in bar of the action.<sup>3</sup> The motion for a stay should be served on the plaintiff and brought to the notice of the court.<sup>4</sup> An application to the court of bankruptcy must be made by a petition addressed to the judge of the court, properly entitled in the cause, and duly verified. The petition should set forth the suit, the court in which it is pending, and the cause of action, so as to show that the suit is one that may properly be stayed. The option to endeavor to obtain a discharge, and, failing in that, to defend all undetermined personal actions, is a right given to a debtor by the bankrupt law under the Constitution of the United States, and he is entitled to be protected in that right by the court of bankruptcy.<sup>5</sup> The power conferred upon the district court of granting injunctions to stay suits and proceedings to recover debts from a bankrupt is not granted to any other court than the "court of bankruptcy," which means the court where the proceedings in bankruptcy are pending. When the bankrupt applies for the benefit of the bankrupt law in

<sup>1</sup> In re Ghiradelli, 4 B. R. 164; s. c. 1 Saw. 343; s. c. 2 L. T. B. 135.

<sup>2</sup> In re M. Rosenberg, 2 B. R. 236; s. c. 3 Ben. 14; in re Metcalf et al. 1 B. R. 201; s. c. 2 Ben. 78; Delavergue v. Farrand, 1 Mich. N. P. 90; contra, Garrett v. Carow, 3 Houst. 652; Givens v. Robins, 5 Ala. 676.

<sup>3</sup> Stone v. Nat'l Bank, 39 Ind. 284; Hobart v. Haskell, 14 N. H. 127.

<sup>4</sup> Dunbar v. Baker, 104 Mass. 211.

<sup>5</sup> In re M. Rosenberg, 2 B. R. 236; s. c. 3 Ben. 14; in re Metcalf et al. 1 B. R. 201; s. c. 2 Ben. 78; in re Horatio Reed, 1 B. R. 1; in re Meyers, 1 B. R. 581; s. c. 2 Ben. 424.

one district, the district court of another district has no power to grant an injunction to stay suits brought by creditors against him.<sup>1</sup>

Upon the filing of the petition, a stay may be granted forthwith, or an order to show cause may be issued. When the creditor lives out of the district, it is questionable whether the court has jurisdiction over him, and, even if it has, the difficulties that lie in the way of an enforcement of its orders appear to be insurmountable.<sup>2</sup> In this proceeding, no attack can be made upon either the existence of the debt due to the petitioning creditor, or the adjudication upon his petition. So long as the adjudication stands unrevoked, all inquiry as to the validity or existence of the debt is precluded.<sup>3</sup> If the bankrupt has been guilty of unreasonable delay in applying for his discharge, the stay will not be granted (§ 5106). When the amount of the debt is in dispute, the action may be allowed to proceed to a judgment (§ 5106).<sup>4</sup> An action in tort for a personal injury can not be stayed, for the claim is not provable until final judgment is obtained.<sup>5</sup> The entry of a judgment on a verdict in such an action, rendered before the commencement of the proceedings in bankruptcy, will not be stayed.<sup>6</sup> Proceedings on an examination supplemental to an execution may be stayed.<sup>7</sup> An action pending in the Court of Appeals of the State, to which an appeal was taken by the bankrupt prior to the commencement of proceedings in bankruptcy, may be stayed. In such a case there is no final judgment within the meaning of the bankrupt law. A motion for further security in such a suit on the part of the creditor is a pro-

<sup>1</sup> In re Richardson et al. 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20.

<sup>2</sup> In re Hirsch, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.

<sup>3</sup> In re Fallon, 2 B. R. 277.

<sup>4</sup> In re Rundle et al. 2 B. R. 113; in re Richardson et al. 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; Norton v. Switzer, 93 U. S. 355; s. c. 27 La An. 25.

<sup>5</sup> In re Hennocksburg & Block, 7 B. R. 37; s. c. 6 Ben. 150.

<sup>6</sup> Zimmer v. Schleeauf, 11 B. R. 313; s. c. 115 Mass. 52.

<sup>7</sup> In re Horatio Reed, 1 B. R. 1.

ceeding against the bankrupt.<sup>1</sup> Proceedings upon charges filed under a recognizance, taken before the filing of the petition, in accordance with the poor debtors' act, can not be stayed.<sup>2</sup> An action upon a joint contract, made by the bankrupt with other joint contractors, will not be stayed, but an entry will be made to stay all actions against the bankrupt under the judgment that may be rendered.<sup>3</sup>

The language of the injunction should be in accordance with the statute. The injunction only continues in force until the question of discharge can be determined. The stay is temporary. The object of the stay is to give time for putting into action the permanent bar to the debt. If the discharge is refused, the stay ceases; its object having been accomplished, and the bankrupt having had an opportunity, unharassed by suits, to endeavor to obtain his discharge. If the discharge is granted, the stay ceases. The bankrupt is then able to plead his discharge in any suit. No motion for a dissolution is needed. No order to show the termination is required. The bankrupt must use his discharge as his protection in cases thereby affected.<sup>4</sup> If there is unreasonable delay in procuring a discharge, the order staying proceedings will be vacated.<sup>5</sup>

Where the action of the creditor, taken after the granting of the injunction, does not tend to enforce any demand against the bankrupt, nor deprive the assignee of any property or right, the stay is not violated.<sup>6</sup>

While the statute forbids the maintaining or the prosecution to final judgment of any suit for a provable debt, it does not in terms prohibit the commencement of such a

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<sup>1</sup> In re Metcalf et al. 1 B. R. 201; s. c. 2 Ben. 78; in re Lezynsky, 3 Ben. 487; contra, Merritt v. Glidden et al. 5 B. R. 157; s. c. 39 Cal. 559.

<sup>2</sup> Minon v. Van Nostrand, 4 B. R. 108; s. c. Lowell, 458; s. c. 1 Holmes, 251.

<sup>3</sup> Hoyt et al. v. Freel et al. 4 B. R. 131; s. c. 8 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144; Givens v. Robbins, 5 Ala. 676; contra, Tinkum v. O'Neal, 5 Nev. 93; Hogendobler v. Lyon, 12 Kans. 276.

<sup>4</sup> In re V. G. Thomas, 3 B. R. 38; in re M. Rosenberg, 2 B. R. 236; s. c. 3 Ben. 14.

<sup>5</sup> In re W. Belden, 6 B. R. 443; s. c. 5 Ben. 476.

<sup>6</sup> In re Hirsch, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.

suit. Whenever it appears that the suit is one to which the discharge in bankruptcy would be no bar, and that, if not commenced forthwith, the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, the district court may permit the suit to commence for the purpose of saving the statute, effecting a service, or securing testimony. When these objects are obtained the suit can be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor.<sup>1</sup> If the bankrupt has been guilty of unreasonable delay in applying for a discharge, the creditor may be allowed to commence a suit.<sup>2</sup> The special reasons on which the application is based, must be set forth and proved, and leave to prosecute will be granted only so far as may be absolutely necessary to secure the creditor's rights.

Proceedings on an examination supplemental to an execution issued under a judgment rendered after the filing of the petition, on a debt that was provable in bankruptcy, may be stayed when a discharge has been granted.<sup>3</sup> A bankrupt can obtain the full protection of his discharge, after, as well as before judgment, on application to the court in which the action is pending. In case of a judgment rendered prior to the filing of the petition, the bankrupt's only remedy in every case, is by such application to the court which rendered the judgment, or a court of equity.<sup>4</sup>

No bankrupt is liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless such arrest is founded on some debt or claim from

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<sup>1</sup> *In re Ghiradelli*, 4 B. R. 164; s. c. 1 Saw. 343; s. c. 2 L. T. B. 135.

<sup>2</sup> *In re Chester M. Whiting*, 1 W. N. 30; *in re Samuel S. Scott*, 1 W. N. 30.

<sup>3</sup> *World Co. v. Brooks*, 3 B. R. 588; s. c. 7 Abb. Pr. (N. S.) 212.

<sup>4</sup> *Hoyt et al. v. Freel et al.* 4 B. R. 131; s. c. 8 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144.

which his discharge in bankruptcy would not release him (§ 5107). There is no distinction between an arrest on *mesne* and final process. So far as the arrest is concerned, the object and intent of the statute are the same.<sup>1</sup> This provision only applies to arrests that have been made since the commencement of proceedings in bankruptcy.<sup>2</sup> If the arrest was made before that time, the bankrupt is not entitled to a release by virtue of any provision of the bankrupt law. A prisoner out on bail is theoretically and practically in arrest substantially, to all intents and purposes, the same as if he had not been released on bail, and a surrender by the bail is not a new taking.<sup>3</sup> The fact that the magistrate before whom the bankrupt appeared, according to his recognizance given upon taking the poor debtor's oath, did not find him guilty of the charges alleged against him, and, therefore, permitted him to go at large pending the appeal; does not make the taking of his body on execution in case of his ultimate conviction a new arrest. It is merely a restoration to the confinement from which he obtained a temporary relief pending the appeal.<sup>4</sup>

If the arrest is made by a State court, the court making the arrest may, on the application of the bankrupt, release him,<sup>5</sup> and it has been held that in such a case he should first apply to the State court in order to avoid a conflict of jurisdiction.<sup>6</sup>

If the arrest has been made since the commencement of proceedings in bankruptcy, the bankrupt may apply to

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<sup>1</sup> In *re Wiggers*, 2 Biss. 71; in *re Mifflin*, 1 Penn. L. J. 146.

<sup>2</sup> In *re W. A. Walker*, 1 B. R. 318; s. c. *Lowell*, 222; *Hazelton v. Valentine*, 2 B. R. 31; s. c. *Lowell*, 270; s. c. 1 L. T. B. 105; in *re Hoskins*, *Crabbe*, 466; *Shulz v. Fleischer*, 1 Penn. L. J. 11; in *re Rank*, *Crabbe*, 493; in *re Jonathan H. Cheney*, 5 Law. Rep. 19.

<sup>3</sup> *Hazelton v. Valentine*, 2 B. R. 31; s. c. *Lowell*, 270; s. c. 1 L. T. B. 105; in *re Rank*, *Crabbe*, 493; in *re Jonathan H. Cheney*, 5 Law. Rep. 19; *contra*, *Foxall v. Levi*, 1 Cranch C. C. 139; *Lingau v. Bailey*, 1 Cranch C. C. 112.

<sup>4</sup> *Stockwell v. Silloway*, 100 Mass. 287.

<sup>5</sup> *Jones v. Emerson*, 1 Caines, 487.

<sup>6</sup> In *re Michael O'Mara*, 4 Biss. 506.

the court of bankruptcy for a release.<sup>1</sup> If the bankrupt, during the pendency of the proceedings in bankruptcy, is arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim dischargeable in bankruptcy; and if so dischargeable, he must be discharged; if not, he must be remanded to the custody in which he may lawfully be. Before granting the order for discharge, the court must cause notice to be served upon the creditor, or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.<sup>2</sup>

The only court that can entertain such application, by virtue of the bankrupt law and Rule XXVII, is the district court in which the proceedings in bankruptcy are pending. When the bankrupt is arrested out of such district, he must make an application according to the provisions of section 753.

In making the return to the writ of *habeas corpus*, the party who has custody of the bankrupt should set forth the authority by virtue of which he made the arrest and still detains him. The question to be decided is whether the debt is one that will be released by a discharge under the statute. If it will be released, the bankrupt must be set free; if it will not be released, he must be remanded.<sup>3</sup> The debts that will not be released are those created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character (§ 5117). The language of the statute is so broad as to extend to a debt created by the bankrupt

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<sup>1</sup> In re L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; U. S. v. Dobbins, 1 Penn. L. J. 9; s. c. 5 Law Rep. 81; in re Mifflin, 1 Penn. L. J. 146; in re Grenville T. Winthrop, 5 Law Rep. 24; State v. Rollins, 13 Mo. 179; vide in re Edson Comstock, 22 Vt. 642; Robb v. Powers, 7 Ala. 658.

<sup>2</sup> Rule XXVII.

<sup>3</sup> In re L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

while acting in any fiduciary character, and embraces claims for the proceeds arising from the sale of goods consigned to be sold on commission.<sup>1</sup> A debt created by fraud is not so merged and extinguished by the judgment as to be released by a discharge.<sup>2</sup> A judgment rendered upon a declaration setting forth all the facts that made up the fraud is conclusive.<sup>3</sup>

Evidence can not be introduced to show that the averments contained in the declaration upon which the arrest is founded are false.<sup>4</sup> It is not necessary that it should appear from the declaration that the debt is one from which a discharge will not release the bankrupt. It is sufficient if it appears from the affidavit and order of arrest, although they are *ex parte*. Their verity can not be called in question. They are entitled to as much credit as more formal proceedings.<sup>5</sup> The district court examines the papers on which the arrest is founded, not to determine whether the bankrupt is arrested upon a debt which is in fact not dischargeable in bankruptcy, but solely to determine whether the court which ordered the arrest intended to found it on a debt or claim which would not be released by a discharge in bankruptcy. If the district court sees from the face of those papers that the court, in ordering the arrest must have done so because it considered the case made out by the papers to be such a debt, it must regard the arrest as founded upon such debt, and hold the bankrupt liable to such arrest.<sup>6</sup>

It has been said that the question whether the debt was one from which a discharge would release him was

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<sup>1</sup> In re Seymour, 1 B. R. 29; s. c. 1 Ben. 348; in re J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; Lemcke v. Booth, 5 B. R. 351; s. c. 47 Mo. 385; vide Cronan v. Cutting, 4 B. R. 667; s. c. 104 Mass. 245.

<sup>2</sup> In re Whitehouse, 4 B. R. 63; s. c. Lowell, 429.

<sup>3</sup> In re Patterson, 1 B. R. 307; s. c. 2 Ben. 155.

<sup>4</sup> In re Devoe, 2 B. R. 27; s. c. Lowell, 251; s. c. 1 L. T. B. 90; contra, in re Williams & McPheeters, 11 B. R. 145; s. c. 6 Biss. 223.

<sup>5</sup> In re J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292.

<sup>6</sup> In re Valk et al. 3 B. R. 278; s. c. 6 Ben. 431.

one of fact which the district courts must decide for themselves, but as arrests are usually made upon declarations or affidavits setting forth the grounds therefor, a case can hardly ever arise in which testimony can be taken or will be admissible. Whenever such a case does arise, it can not be decided on *ex parte* testimony.<sup>1</sup> If a judgment shows that the debt on which it is founded is dischargeable, no evidence to the contrary is admissible.<sup>2</sup> The district court has authority to require a person within its jurisdiction to release a party held in custody beyond its jurisdiction.<sup>3</sup>

The proceeding to discharge a debtor from arrest is very limited in its scope. The action of the district court is confined in point of time, to the pendency of the proceedings in bankruptcy. They are pending so far as the bankrupt's right to a release upon a writ of *habeas corpus* by virtue of the provisions of the bankrupt law is concerned, only until the determination of his application for a discharge.<sup>4</sup> No release can be granted from any arrest made during the pendency of such proceedings, and founded upon a debt that will not be discharged; and when the papers on which the arrest was made show that it is founded upon such a debt, no evidence is admissible in the district court to show that the debt is one that would be released. If the bankrupt wishes to controvert the allegations in regard to the character of the debt, he must move for a discharge in the court that ordered the arrest.<sup>5</sup> Upon such motion he can enter into the merits of the case, and in that way alone.<sup>6</sup> After he has obtained a discharge he may apply to the court that ordered the

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<sup>1</sup> In re L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

<sup>2</sup> Hazleton v. Valentine, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105.

<sup>3</sup> Hazleton v. Valentine, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105.

<sup>4</sup> In re J. H. Kimball, 2 B. R. 204; s. c. 2 Ben. 554; in re Nathaniel Dole, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch, 499.

<sup>5</sup> In re Migel, 2 B. R. 481.

<sup>6</sup> In re Valk et al. 3 B. R. 278; s. c. 3 Ben. 431.



arrest,<sup>1</sup> or to the district court,<sup>2</sup> to obtain a release from an arrest made before the commencement of proceedings in bankruptcy.

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<sup>1</sup> Hazleton v. Valentine, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105; Comstock v. Grout, 17 Vt. 512.

<sup>2</sup> In re Simpson, 2 B. R. 47.

## CHAPTER XI.

### EXAMINATIONS.

THE district court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination (§ 5086). The district court may, in like manner, require the attendance of any other person as a witness (§ 5087). For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt will not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure the attendance of his wife (§ 5088).

In case of a refusal of a party to attend or to testify before a register, the same proceedings may be had as are now authorized with respect to witnesses to be produced on examination before an examiner of any of the courts of the United States on written interrogatories.<sup>1</sup>

The application for an examination may be made either to the court or to the register to whom the case has been referred, for such register has and may exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents (§ 5002).<sup>2</sup> The only persons who can make the application are the assignee or a creditor. A

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<sup>1</sup> Rule X.

<sup>2</sup> In re Geo. Brandt, 2 B. R. 215; in re B. T. Vetterlein, 4 B. R. 599; s. c. 5 Ben. 7; in re Pioneer Paper Co. 7 B. R. 250; in re Macintire, 1 B. R. 11; s. c. 1 Ben. 277; in re Lanier, 2 B. R. 154.

creditor must prove his claim before he can make such application.<sup>1</sup> The court or the register may, without any application, require the bankrupt or any witness to submit to an examination.<sup>2</sup> If a protest is entered against the allowance of the claim of a creditor who asks for an examination, the register or the court may make the order.<sup>3</sup> The examination may be made at any time after the commencement of proceedings in bankruptcy.<sup>4</sup> The debtor may be examined even before an adjudication whether the case is one of voluntary<sup>5</sup> or involuntary bankruptcy.<sup>6</sup>

An order for an examination will not, in any case, be granted, except upon good cause shown; but, when the application is for the examination of the bankrupt or of a witness, the court or the register may exercise a discretion in regard to what will be considered sufficient cause.<sup>7</sup> The application may be made verbally unless otherwise required, but if required, it must be by a petition duly verified.<sup>8</sup> The petition need not specify the particular matters to which the examination is to be directed.<sup>9</sup> Neither a petition nor an affidavit is usually required of the assignee, for he is a *quasi* officer of the court.<sup>10</sup>

The wife of a bankrupt can only be required to submit to an examination upon the application of some person who has authority to make it. The assignee and creditors must both show good cause for granting the order by a petition duly verified. A *prima facie* case must be established. Such a case is not made out by show-

<sup>1</sup> In re Ray, 1 B. R. 203; s. c. 2 Ben. 53.

<sup>2</sup> In re Baum, 1 B. R. 5; s. c. 1 Ben. 274; in re Patterson, 1 B. R. 100; s. c. 1 Ben. 448.

<sup>3</sup> In re Belden & Hooker, 4 Ben. 225.

<sup>4</sup> In re Baum, 1 B. R. 5; s. c. 1 Ben. 274.

<sup>5</sup> In re Thomas D. Lee, 4 Law Rep. 486; s. c. 1 N. Y. Leg. Obs. 83.

<sup>6</sup> In re Bromley & Co. 3 B. R. 686; in re Salkey & Gerson, 9 B. R. 107; s. c. 5 Biss. 486; in re Mendenhall, 9 B. R. 285; in re Heusted, 5 Law Rep. 510.

<sup>7</sup> In re Solis, 4 B. R. 68; s. c. 4 Ben. 143; s. c. 2 L. T. B. 158.

<sup>8</sup> In re Julius L. Adams, 2 B. R. 95; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51.

<sup>9</sup> In re Lanier, 2 B. R. 154.

<sup>10</sup> In re McBrien, 2 B. R. 197; s. c. 2 Ben. 513.

ing that the bankrupt has committed frauds of which she is probably cognizant. It is not the intention of the statute to destroy the usual and proper confidence between husband and wife. The cases in which she can be examined are where she is, on reasonable grounds, suspected of having or of having had property in her possession which should have been surrendered to the assignee, or to have participated actively in any other fraud upon the statute. In that case, she being a party to the fraud, may be fully examined concerning it, and conversations which are of the *res gestæ*, may be inquired into. So also, if she offers a debt for proof, she may be fully examined concerning it.<sup>1</sup> Where the application is made merely for delay, it will be refused.<sup>2</sup>

If the bankrupt is present before the court or the register, and the assignee or any creditor desires to examine him, they should, unless there is no ground for the request, be allowed to do so, and no special order need be passed.<sup>3</sup> In other cases a special order must be passed. This order must be according to the form prescribed to suit the case.<sup>4</sup> The order is a summons.<sup>5</sup> It must issue out of the court, and be tested by the clerk. Blanks with the signature of the clerk and seal of the court must, on application, be furnished to the registers.<sup>6</sup> The order is *ex parte*, and no previous notice is required to be given to any party.<sup>7</sup> Nor need any notice be given to the bankrupt of the time and the place appointed for the examination of a witness.<sup>8</sup> It is not necessary that the summons shall be served by the marshal. The service may be made

<sup>1</sup> In re Gilbert, 3 B. R. 152; s. c. Lowell, 340.

<sup>2</sup> In re Selig, 1 B. R. 186.

<sup>3</sup> In re Brandt, 2 B. R. 215; in re Bromley & Co. 3 B. R. 686.

<sup>4</sup> Forms No. 45, 47.

<sup>5</sup> In re Bellamy, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

<sup>6</sup> Rule II.

<sup>7</sup> In re Macintire, 1 B. R. 11; s. c. 1 Ben. 277.

<sup>8</sup> In re Levy et al. 1 B. R. 105; s. c. 1 Ben. 454.

by any one,<sup>1</sup> but must be personal.<sup>2</sup> The order can only be served in the district,<sup>3</sup> or within one hundred miles of the place where the examination is to be held.<sup>4</sup> .

Parties and witnesses summoned before a register are bound to attend in pursuance of such summons at the place and the time designated therein, and are entitled to protection, and are liable to process of contempt in like manner as parties and witnesses are liable thereto in case of default in attendance under any writ of subpoena (§ 5005). If a witness fails to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness (§ 5087). For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt (§ 5104).

If the bankrupt is without the district, and unable to return and personally attend at any of the times which may be specified, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he must be permitted so to do with like effect as if he had not been in default (§ 5104).

If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor or any officer in whose custody he may be; or may direct the examination to be had, taken, and certified at such time and place, and in such manner as the court may deem proper, and with like effect as if such examination had been had in court (§ 5089). The court

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<sup>1</sup> *Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99.

<sup>2</sup> *In re Joseph Hodges*, 11 B. R. 369.

<sup>3</sup> *In re Joseph Hodges*, 11 B. R. 369.

<sup>4</sup> *In re Wm. S. Woodward*, 12 B. R. 297.

may, on his application, order him to be produced upon *habeas corpus* by the jailor, or any officer in whose custody he may be, before the register for the purpose of testifying in any manner relating to his bankruptcy.<sup>1</sup>

The bankrupt is bound to appear, and is not entitled to fees as a witness.<sup>2</sup> Neither a witness nor the bankrupt's wife is bound to attend unless the fees are paid or tendered at the time of the service of the summons.<sup>3</sup> The fees to which they are entitled are five cents a mile to and from the place at which they may be summoned to attend, and one dollar and a half for each day's attendance.<sup>4</sup> When the bankrupt's wife can not be found or is beyond the jurisdiction of the court, the order may be served upon him, and if she fails to attend, he will not be entitled to his discharge unless he can prove that he was unable to procure her attendance.<sup>5</sup>

The return should always be in the prescribed form.<sup>6</sup> As the order is made *ex parte*, the bankrupt or other person who is to be examined on appearance in pursuance of the order may make any objection or raise any question which would have been proper if an opportunity had been granted before the order was made.<sup>7</sup> The examination may be and usually is held before the register.<sup>8</sup> The time for an examination is not terminated by an application for a discharge.<sup>9</sup> The proceedings on such application may be adjourned either before or after the filing of specifications until a reasonable opportunity is afforded for such examination.<sup>10</sup> No examination can be had after a

<sup>1</sup> Rule XXVII.

<sup>2</sup> In re Okell, 1 B. R. 303; s. c. 2 Ben. 144; s. c. 1 L. T. B. 32; in re McNair, 2 B. R. 219.

<sup>3</sup> Rule XXIX.

<sup>4</sup> In re Wm. Griffin, 1 B. R. 371; s. c. 2 Ben. 209.

<sup>5</sup> In re Van Tuyl, 2 B. R. 579; s. c. 3 Ben. 237.

<sup>6</sup> Form No. 49.

<sup>7</sup> In re James W. Frisbie, 13 B. R. 349.

<sup>8</sup> In re Tanner, 1 B. R. 316; s. c. 2 Ben. 211; s. c. Lowell, 215; in re Lanier, 2 B. R. 154.

<sup>9</sup> In re Solis, 3 B. R. 761; s. c. 4 Ben. 143; in re Frizelle et al. 5 B. R. 119.

<sup>10</sup> In re Seckendorf, 1 B. R. 626; s. c. 2 Ben. 462; in re Mawson, 1 B. R. 271.

discharge has been granted.<sup>1</sup> A mere witness may be examined before the bankrupt himself, and there need not be any matter of controversy to be settled by testimony,<sup>2</sup> and the fact that he is a party to proceedings instituted by the assignee to recover property alleged to belong to the bankrupt's estate is no ground for objecting to such examination.<sup>3</sup> An examination of a witness and an examination of a bankrupt are two independent proceedings, and may be conducted without reference to each other.<sup>4</sup> The party applying for the examination must see that due appointments are made with the register, and give the other party notice of them.<sup>5</sup> The examination may be adjourned for good cause shown.<sup>6</sup> When a party inadvertently makes default under one order, he may apply for a second order.<sup>7</sup>

The right of examination must not be abused. Every creditor has the right to make an examination, and such examination inures to the benefit of all the creditors. The fact, however, that one creditor has made an examination, is no reason for withholding the privilege from another creditor. Yet the time, manner, and course of the examination should be so regulated as to protect parties from all annoyance, oppression, and mere delay, while at the same time a full and fair opportunity is allowed to the assignees and to the creditors to make all the inquiries permitted by the statute.<sup>8</sup> Where a party has been examined once at considerable length, and some time elapses

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<sup>1</sup> In re C. Dean, 3 B. R. 769; in re G. C. Jones, 6 B. R. 386; in re Nathaniel Dole, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499; contra, in re Heath & Hughes, 7 B. R. 448.

<sup>2</sup> In re Fredenburg, 1 B. R. 268; s. c. 2 Ben. 133; in re Blake, 2 B. R. 10.

<sup>3</sup> In re Feinberg et al. 2 B. R. 475; s. c. 3 Ben. 162.

<sup>4</sup> In re Levy et al. 1 B. R. 107; s. c. 1 Ben. 454.

<sup>5</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>6</sup> In re Mawson, 1 B. R. 271.

<sup>7</sup> In re Van Tuyt, 2 B. R. 70; s. c. 3 Ben. 237; in re Robinson et al. 2 B. R. 516.

<sup>8</sup> In re Julius L. Adams, 2 B. R. 272; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51; in re Gilbert, 3 B. R. 152; s. c. Lowell, 340.

before another application is made, special reasons must be shown before the examination will be allowed.<sup>1</sup> If an examination is sought or carried on to gratify malice or mere curiosity, it may be arrested.<sup>2</sup>

Every party is entitled to reasonable notice of the application for his examination. Such time, or the length of such time, depends upon circumstances and facts surrounding the party; the distance he is from court, or the place of his examination; and also, upon what, if any, particular facts he is to be examined. If he is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would manifestly be much longer than in a case where the notice of examination is in regard to a few items of his property pertaining to his own person, such as a watch, ring, or money in his pocket. A reasonable notice is such time as will enable him to reach and appear before the court with such knowledge as may be under his control upon the matter of the investigation or information asked for. When the interrogatories call for no exercise of skill or investigation, but simply the capacity and the disposition to answer according to the truth, no time for preparation will be allowed.<sup>3</sup> If, however, time is needed to refresh the memory by referring to books or papers, or for the production of any written instruments or documents, it should be granted.<sup>4</sup> So long as the debt of a creditor stands proved and unimpeached, a claim that it has been extinguished by an offset or does not exist, furnishes no ground for a refusal to be sworn.<sup>5</sup>

The persons under examination are to answer substan-

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<sup>1</sup> In re Isidor et al. 1 B. R. 264; s. c. 2 Ben. 123; in re Frizelle et al. 5 B. R. 122; in re James W. Frisbie, 13 B. R. 349.

<sup>2</sup> In re Salkey & Gerson, 9 B. R. 107; s. c. 5 Biss. 486.

<sup>3</sup> In re Bromley & Co. 3 B. R. 686.

<sup>4</sup> In re Tanner, 1 B. R. 316; s. c. Lowell, 215; s. c. 2 Ben. 211.

<sup>5</sup> In re N. W. Kingsley, 7 B. R. 558; s. c. 6 Ben. 300.



tially like other witnesses, and not merely to have interrogatories filed and propounded to them after the manner adopted in equity and admiralty.<sup>1</sup> The usual practice is to conduct the examination orally, by question and answer, which are reduced to writing by the register, and the interrogatories are always numbered in the order in which they are given. The examination of persons before a register may be conducted by the party in person, or by his counsel or attorney, and such persons are subject to examination and cross-examination, which must be had in conformity with the mode now adopted in courts of law. The depositions upon such examination must be taken down in writing by or under the direction of the register in the form of a narrative, unless he determines, or the rules of court require, that the examination shall be by question and answer in special instances, and when completed must be read over to such persons and signed by them in the presence of the register. Any question or questions which may be objected to must be noted by the register upon the deposition, but he has no power to decide on the competency, materiality, or relevancy of the question; and the court has power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.<sup>2</sup>

The register has no power to decide upon the competency, materiality, or relevancy of a question. When a question is objected to, the question and the fact and grounds of objection must be taken down by the register, and the question, although incompetent, immaterial, or irrelevant, must be answered, and when the deposition is closed, the court will deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial, or irrelevant. The bankrupt or other witness has the power, in a clear case of abuse, to refuse,

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<sup>1</sup> In re Tanner, 1 B. R. 316; s. c. Lowell, 215; s. c. 2 Ben. 211.

<sup>2</sup> Rule X.

under the advice and responsibility of counsel, to answer a question. Then, on application to punish the party for contempt, which must come before the court, the whole question as to competency, relevancy, and materiality will be raised in a proper way for adjudication. This extends, not only to objections to questions, but also to objections to answer and testimony, on the grounds of competency, materiality, and relevancy; and neither question nor answer nor testimony is to be held ultimately incompetent, immaterial, or irrelevant, unless objected to on the record for some ground of incompetency, immateriality, or irrelevancy stated on the record. The register is required to note the objection upon the deposition—that is, not merely the fact of objection, but the ground of objection; and if no ground of objection is assigned, he is not bound to note the fact of objection; and the ground of objection must be directed to the competency, materiality, or relevancy of that which is objected to.<sup>1</sup>

There are some objections made in the course of an examination which raise issues that must be adjourned into court, such as objections to the regularity of the order,<sup>2</sup> or to the liability of the party to an examination;<sup>3</sup> but objections to questions or answers are not such issues. The statute, however, gives to any party the right to take the opinion of the judge upon any point arising in the proceedings before the register, and also provides that parties may, by consent, state any question, and submit it to the decision of the court (§ 5010). It is found in practice more convenient to adopt this course than to apply for an attachment. There are but few cases of applications for an attachment, while there are numerous cases

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<sup>1</sup> In *re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; vide in *re Reakirt*, 7 B. R. 329.

<sup>2</sup> In *re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.

<sup>3</sup> In *re Woodward et al.* 3 B. R. 719; in *re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.

where questions have been certified upon the request of one party, or by the consent of both parties.

A mere witness can not have the assistance of counsel.<sup>1</sup> The bankrupt has the undoubted right to have the assistance of counsel. The only question is, whether he has the right to consult counsel during the course of his examination. Generally no consultation is allowed, but no rule can be laid down to govern the exceptions. The solution of the question is left to the register to decide, in the exercise of a sound discretion, according to the facts of each particular case.<sup>2</sup> The bankrupt's wife is not entitled to the assistance of counsel, nor has the bankrupt's counsel a right to advise her while under examination.<sup>3</sup>

The bankrupt may be examined in regard to all matters relating to the disposal or condition of his property; to his trade and dealings with others; and his accounts concerning the same; to all debts due to or claimed from him; and to all other matters concerning his property and estate, and the due settlement thereof according to law (§ 5086). The question has never yet been raised, but it would seem that the examination of a witness and of the bankrupt's wife are limited to and extend to the same subjects.<sup>4</sup> It has, however, been said, that if the purpose of the examination be to elicit facts to be used in opposing the bankrupt's discharge, it is not competent for the register to summon any witness or person who may know, or be suspected of knowing, facts pertinent or that might be serviceable in the preparation of specifications. In regard to such facts, a creditor should be left to establish them upon the trial of the issues, as parties do in ordinary trials

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<sup>1</sup> In re Fredenburg, 1 B. R. 268; s. c. 2 Ben. 133; in re Feinberg et al. 2 B. R. 475; s. c. 3 Ben. 162; in re Stuyvesant Bank, 7 B. R. 445; s. c. 6 Ben. 33; in re Comstock & Co. 13 B. R. 193; s. c. 3 Saw. 517.

<sup>2</sup> In re Lord, 3 B. R. 243; in re Judson, 1 B. R. 364; s. c. 2 Ben. 210; s. c. 35 How. Pr. 15.

<sup>3</sup> In re J. A. Schonberg, 7 Ben. 211.

<sup>4</sup> In re Stuyvesant Bank, 7 B. R. 445; s. c. 6 Ben. 33.

at law. Such information no one has the right to demand or obtain otherwise than as it may be voluntarily given, unless it be upon the trial of issues or questions made up.<sup>1</sup>

It is, however, different with the bankrupt himself. He asks that, in consideration of his complying with every requirement of the law, he may be absolved from every legal obligation to his creditors. This is an extraordinary exemption, and when he asks for it the law only allows it when he surrenders himself to be dealt with in an extraordinary way, if the court sees proper to exercise that power to the ends of justice. Information possessed by the bankrupt is often important to the proper adjustment of conflicting interests; to detect the establishment of an unjust claim against his estate; to establish justice in disputes that may arise between the assignee and debtors to the estate, or between the assignee and such persons as may claim to have liens or priorities. For all such and for all other proper purposes the bankrupt is subject to the order of the court to be summoned and examined at any and at all times when it may seem that the ends of justice will be furthered thereby.<sup>2</sup>

A party need not answer any question which does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, when a truthful answer would tend to degrade him.<sup>3</sup> But he can not refuse to answer questions concerning his dealings with the bankrupt on the ground that his answer may furnish evidence against him in a civil case brought or to be brought on behalf of the assignee, for the main, if not the only, purpose of the statute in authorizing such examination is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence.<sup>4</sup> A claim of privilege

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<sup>1</sup> In re Brandt, 2 B. R. 215.

<sup>2</sup> In re Brandt, 2 B. R. 215; in re Vogel, 5 B. R. 393.

<sup>3</sup> In re H. Lewis, 3 B. R. 621; s. c. 4 Ben. 67.

<sup>4</sup> In re Fay et al. 3 B. R. 660; in re Pioneer Paper Co. 7 B. R. 250; Garrison v. Markley, 7 B. R. 246; in re Danforth, 1 Penn. L. J. 148.

does not warrant a refusal to be sworn. The party claiming it must submit to be sworn, and interpose his privilege when a question is asked that invades it.<sup>1</sup> An attorney is not privileged from answering as to every thing which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his client as such. He must answer questions in regard to acts which might have been performed equally as well by any mere agent or third party, such as conveyances of land to and by him,<sup>2</sup> or the superintendence of an auction sale and disposition of the proceeds.<sup>3</sup> These are his own proceedings, and not something that his clients communicated to him. They are not professional, and do not appertain to the duty of an attorney. Whatever is done in this behalf is not in his capacity of attorney or counsel, but is in the character of an agent or third party. An attorney must also state whether he drew or directed the drawing of a certain deed,<sup>4</sup> and whether at a certain time he received a check drawn to the order of the bankrupt, and what disposition he made of it.<sup>5</sup> He must also state what affairs of the bankrupt were the subject of conversation between him and other persons.<sup>6</sup>

The bankrupt must state whether he has played cards, faro, or any other game of chance, with certain persons prior to the commencement of proceedings in bankruptcy, though the answer may tend to degrade him.<sup>7</sup> The question whether the bankrupt may be compelled to answer a question when his answer would criminate himself may be considered as still unsettled. In two brief cases,

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<sup>1</sup> In re Woodward et al. 3 B. R. 719.

<sup>2</sup> In re Belis et al. 3 B. R. 199; s. c. 3 Ben. 386; s. c. 38 How. Pr. 79; s. c. 1 L. T. B. 178.

<sup>3</sup> In re O'Donohue, 3 B. R. 245.

<sup>4</sup> In re Jas. S. Aspinwall, 10 B. R. 448; s. c. 7 Ben. 433.

<sup>5</sup> In re Jas. S. Aspinwall, 10 B. R. 448; s. c. 7 Ben. 433.

<sup>6</sup> In re Jas. S. Aspinwall, 10 B. R. 448; s. c. 7 Ben. 433.

<sup>7</sup> In re Richards, 4 B. R. 93; s. c. 4 Ben. 303.

it has been decided, without argument and without an examination of the authorities, that he could not.<sup>1</sup> It has also, on the other hand, been decided that he can not cover up his fraud behind the shield that if he answers he will criminate himself by proving up his fraud in testifying as to the distribution of his property. Though such examination may expose him to penalties for fraudulent concealment or fraudulent disposition of his property, he is left to the judgment of the law. It is possible, or rather probable, that he may be protected from disclosing some distinct criminal act; but even in such case he can not be protected in refusing to discover all his estate and effects and the full particulars relating to them, though thereby he may show that he has been guilty of fraud or fraudulent concealment, or that he owns property that has been illegally obtained, and will thus render himself liable to penalties.<sup>2</sup> It has, however, been held that the examination is not competent evidence against him in a criminal action,<sup>3</sup> and in that view of the law there appears to be no good reason why he should not be compelled to answer fully.

The bankrupt can not be examined in regard to property that did not belong to him,<sup>4</sup> or that has been acquired by him since the commencement of proceedings in bankruptcy,<sup>5</sup> unless it is shown that the same has some connection with his property or business before that time.<sup>6</sup> An investigation may commence by showing means and going to results, or showing the results and discovering the means by further examination. The true point of inquiry in such cases is, when and how did he acquire it?

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<sup>1</sup> In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508; in re Koch, 1 B. R. 549.

<sup>2</sup> In re Bromley & Co. 3 B. R. 686.

<sup>3</sup> U. S. v. Prescott, 2 Dillon, 405; in re Brooks, 5 Pac. L. R. 191.

<sup>4</sup> In re Van Tuyl, 1 B. R. 636.

<sup>5</sup> In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508; in re Levy et al. 1 B. R. 186; s. c. 1 Ben. 496.

<sup>6</sup> In re Rosenfield, 1 B. R. 319; s. c. 1 L. T. B. 81.

He must answer whether or not he was in the possession of a large amount of property under exceptional circumstances, and whether it was possessed before bankruptcy, or is the proceeds of property that belongs to the assignee.<sup>1</sup> He may also be examined in regard to property in which it may possibly be shown that he has an interest.<sup>2</sup> It is no ground for refusing to answer a question that he answered the same question in a previous examination by another creditor.<sup>3</sup> It is a contempt of court for the bankrupt to leave the office of the register before the examination is concluded.<sup>4</sup> A witness must answer all proper questions relating to his dealings and trade with the bankrupt, and may be compelled to produce his books or copies therefrom relating to such transactions.<sup>5</sup> The parties may be cross-examined.<sup>6</sup>

The fees of the register must be paid to him by the party for whom the services are rendered (§ 5008). He is not required to look, in the first instance, for such fees to the bankrupt, or to the fifty dollars deposited to secure his fees, or to the bankrupt's estate.<sup>7</sup> When witnesses are produced before the register, each party must pay for the direct examination of his own witnesses and for such cross-examination as he may make of the witnesses of the adverse party.<sup>8</sup> The authorities are conflicting as to whether the bankrupt must pay the fees of his cross-examination or of statements made by him after the close of his direct examination.<sup>9</sup> He must pay for the examination of his own witnesses, and such cross-examination as he may make of adverse witnesses.<sup>10</sup> The assignee must

<sup>1</sup> In re McBrien, 3 B. R. 345; s. c. 3 Ben. 481.

<sup>2</sup> In re Bonesteel, 2 B. R. 330.

<sup>3</sup> In re Vogel, 5 B. R. 393.

<sup>4</sup> In re Vogel, 5 B. R. 393.

<sup>5</sup> In re Earle, 3 B. R. 564.

<sup>6</sup> In re Leachman, 1 B. R. 391; in re Levy et al. 1 B. R. 136; s. c. 1 Ben. 496; in re Maynard Bragg, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.

<sup>7</sup> In re Macintire, 1 B. R. 11; s. c. 1 Ben. 277.

<sup>8</sup> Schofield v. Moorhead, 2 B. R. 1.

<sup>9</sup> In re Mealy, 2 B. R. 128; in re Macintire, 1 B. R. 311; s. c. 1 Ben. 277.

<sup>10</sup> In re Mealy, 2 B. R. 128.

pay for an examination made by him, whether he has assets or not.<sup>1</sup>

The examination must be in writing, and signed by the party examined, and filed with the other proceedings (§ 5086). The bankrupt may be allowed to correct any statement made during the course of his examination.<sup>2</sup> If any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register must refer the matter to the judge, who may order the person so acting to pay the costs thereby occasioned, if such person is compellable by law to answer such question or to sign such examination; and such person is also liable to be punished for contempt (§ 5006). All persons willfully and corruptly swearing or affirming falsely before a register are liable to all the penalties, punishments, and consequences of perjury.

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<sup>1</sup> In re Hughes, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

<sup>2</sup> Rule XXXIII. •



## CHAPTER XII.

### COURTS OF ORIGINAL JURISDICTION IN BANKRUPTCY.

THE several district courts of the United States are constituted courts of bankruptcy, and they have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy (§ 563). Proceedings in bankruptcy can not be initiated in the circuit court. For that purpose the jurisdiction of the district court is plainly exclusive. The statute does not blend or confound the two courts in the administration of the bankrupt law. The courts are distinct under that law as under all others, and exercise a separate jurisdiction, each in its own sphere.<sup>1</sup>

All the jurisdiction, power and authority conferred upon the district courts in cases in bankruptcy, are conferred upon the Supreme Court of the District of Columbia (§ 4977) and upon the district courts of the several Territories (§ 4978).<sup>2</sup> The jurisdiction conferred upon the district courts of the Territories may be exercised by either of the justices of such courts while holding the district court for the district where the proceedings are pending (§ 4978).

The courts of bankruptcy must always be open for the transaction of business under the statute, and the powers and jurisdiction granted and conferred upon them may be exercised as well in vacation as in term time; and a judge sitting at chambers has the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court (§ 4973). In case of a vacancy in the office of dis-

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<sup>1</sup> In re Binninger et al. 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.

<sup>2</sup> Act of 22 June, 1874, § 16.

trict judge of any district, or in case any district judge is, from sickness, absence, or other disability, unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all cases in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court (§ 4976).

The courts of bankruptcy may sit for the transaction of business in bankruptcy at any place in the district, of which place and the time of holding court they shall have given notice, as well as at the places designated by law for holding such courts (§ 4974). They have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity (§ 4975). The proceedings instituted for the purpose of punishing a party for contempt must be separate and distinct from the proceedings in bankruptcy, so that proper issues may be made up between the parties.<sup>1</sup>

In addition<sup>2</sup> to their jurisdiction over all matters and proceedings in bankruptcy, the jurisdiction of the courts of bankruptcy extends to all cases and controversies arising between the bankrupt and any creditor or creditors who claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters,

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<sup>1</sup> *Creditors v. Cozzens & Hall*, 3 B. R. 281.

<sup>2</sup> *In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re William Christy*, 3 How. 292; *in re Dudley*, 1 Penn. L. J. 302; *Mitchell v. Manuf. Co.* 2 Story, 648.

and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy (§ 4972).

The jurisdiction in matters of bankruptcy is conferred upon the district courts in their respective districts. The words, "in their respective districts," must receive their usual ordinary signification, and manifest a purpose and intent on the part of Congress to limit and restrict the authority and jurisdiction of the district courts in bankruptcy within their own districts, and not to confer upon them a jurisdiction throughout the United States in utter conflict with all prior legislation and the settled policy of Congress. Although their authority does extend to all matters in bankruptcy, and there is no limit to the subject-matter over which the courts have jurisdiction, yet they are expressly confined and restricted in its exercise to the limits of their own territory, and enjoy no other or greater power or authority outside of their own districts than they had before the bankrupt law was passed. They can not, therefore, summon parties before them from places beyond the limits of their district.<sup>1</sup>

A voluntary appearance, however, is effective to give jurisdiction over a party, even though there has been no previous service of process upon him. The object of process in a suit *in personam* is to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction, so far as the person is concerned. Thus, where an order of a court of bankruptcy is served upon a party who lives beyond the district, and he voluntarily enters his appearance in the action, the court has jurisdiction over him.<sup>2</sup> So, also, a party who has proved his debt is

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<sup>1</sup> *Paine v Caldwell*, 6 B. R. 558; in *re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92; vide *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497; 511, note.

<sup>2</sup> In *re Ulrich et al.* 3 B. R. 133; s. c. 3 Ben. 355; in *re Frederick S. Kirtland*, 10 Blatch. 515.

subject to its jurisdiction, and may be served with a copy of an order, although he lives beyond the district.<sup>1</sup> If the court, however, has no jurisdiction over the subject-matter of the suit, a voluntary appearance can not give jurisdiction, and it is never too late at any stage of the cause to consider it.<sup>2</sup> When jurisdiction has been conferred by a voluntary appearance merely, it can not be withdrawn by the act of the party who has so appeared, without the consent of the court or of the complainant. If the right to withdraw depends upon questions of fact, the court will pass upon the existence and pertinence of the facts, and allow or refuse the withdrawal on previous notice to the opposite party.<sup>3</sup>

Courts of bankruptcy, as they existed in England at the time the statute was passed, were, and still are, separate, distinct organizations, with powers and jurisdiction separate and distinct from all other courts; and it is, undoubtedly, in this sense that the words are used in the statute: that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is, that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, exercising powers and jurisdiction as a distinct court, than if it were such separate and distinct organization.<sup>4</sup> Being thus the special creature of statutory law, it has no powers except those that are expressly granted by the statute, and such implied powers as may be necessary to give full force and effect to the jurisdiction conferred upon it.<sup>5</sup> The functions of the district court, however, are employed as a court,

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<sup>1</sup> In re Kyler, 2 Ben. 414.

<sup>2</sup> Jobbins v. Montague, 6 B. R. 509.

<sup>3</sup> In re Ulrich et al. 3 B. R. 133; s. c. 3 Ben. 355.

<sup>4</sup> In re Norris, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.

<sup>5</sup> Clark v. Binninger, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; Jobbins v. Montague, 6 B. R. 509; in re Robert Morris, Crabbe, 70.

and a new jurisdiction is conferred on it. It may, therefore, continue to use its customary powers, except where such use is especially limited and restricted. In every particular not otherwise designated by the statute, Congress must have intended that it should proceed with the new jurisdiction upon the principles appropriate to like proceedings under any other branch of its power.<sup>1</sup> The strict rule of construction, moreover, which is applied where a statute gives to a court power to do a particular thing, has no application to the bankrupt law, where full and complete jurisdiction is conferred over an extensive subject.<sup>2</sup>

This jurisdiction over cases in bankruptcy is exclusive of the courts of the several States (§ 711), and necessarily so, for independently of the statute there is no jurisdiction in any tribunal over any such proceedings, and no original jurisdiction is given to any other courts.<sup>3</sup> It extends over the bankrupt, his estate, and all parties and questions connected therewith. The great object of all bankrupt or insolvent laws is to distribute the property of a debtor, who is unable to pay his debts in full, among his creditors, by judicial proceedings, in which all may be heard, and to discharge his property acquired afterwards, or at least his person, from the debts owed by him at the time of the institution of such proceedings. The estate surrendered is placed in the custody and under the protection of the court of bankruptcy as fully as if actually brought into its visible presence, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. This jurisdiction attaches as soon as the proceedings are commenced, and after that time no other court, and no person acting under any process from any other court, can in-

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<sup>1</sup> In re Barney Corse, 1 N. Y. Leg. Obs. 231; in re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240.

<sup>2</sup> In re California Pacific R. R. Co. 11 B. R. 193; s. c. 3 Saw. 240.

<sup>3</sup> Cook v. Whipple, 9 B. R. 155; s. c. 55 N. Y. 150.

refere with or withdraw the property so surrendered, or terminate, in any degree, the manner of its disposition.<sup>1</sup>

The commencement of proceedings in bankruptcy operates as a bar to all other proceedings than such as may afterward be had under the authority of the court of bankruptcy, until such case is closed. Thus the levy of an execution,<sup>2</sup> or the filing of a bill to foreclose a mortgage,<sup>3</sup> or the filing of a libel *in rem*,<sup>4</sup> or the issuing of a distress warrant,<sup>5</sup> or the institution of summary proceedings under a statute relating to tenants holding over after the expiration of their term,<sup>6</sup> or the filing of a mechanic's lien claim where the lien only exists from the time of such filing,<sup>7</sup> or the issuing of a writ of replevin,<sup>8</sup> for the purpose of affecting the estate, is irregular and improper, when such proceedings are instituted in any other court after that time. Claims against the bankrupt's property should be enforced in the court of bankruptcy during the pendency of the proceedings, and this principle extends not only to liens, but to all controversies concerning even the title to property which was in his possession at the time of the filing of the petition.<sup>9</sup> When, however, there was a valid

<sup>1</sup> In re Barrow et al. 1 B. R. 481; s. c. 1 L. T. B. 63; Jones v. Leach, 1 B. R. 595; in re Vogel, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154.

<sup>2</sup> Pennington v. Sale & Phelan et al. 1 B. R. 572; Davis v. Anderson, 6 B. R. 145; in re Wallace, 2 B. R. 134; s. c. 1 Deady, 433; in re John S. Foster, 2 Story, 181; in re Bellows & Peck, 3 Story, 428.

<sup>3</sup> In re Kerosene Oil Co. 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; in re J. M. Snedaker, 3 B. R. 629; Jackson v. Heaney, 4 B. R. 510; s. c. 1 Dillon, 497; Buckingham v. McLean, McLean, 185; s. c. 13 How. 151.

<sup>4</sup> In re People's Mail Steamship Co. 2 B. R. 553; s. c. 3 Ben. 226; contra, The Ironsides, 4 Biss. 518.

<sup>5</sup> In re Wynne, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; Brock v. Terrill, 2 B. R. 643; vide Butler v. Morgan, 8 W. & S. 53.

<sup>6</sup> In re Enoch Steadman, 8 B. R. 319.

<sup>7</sup> In re Dey, 3 B. R. 305; s. c. 3 Ben. 450; s. c. 9 Blatch. 285.

<sup>8</sup> In re Vogel, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154.

<sup>9</sup> In re Vogel, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; Hill v. Fleming, 39 Geo. 662; Samson v. Blake, 6 B. R. 410; s. c. 9 Blatch. 379.

lien at that time, and the filing of a petition in another court is necessary in order to keep it alive, such petition may be filed, but all proceedings under it must be stayed until the termination of the case in bankruptcy.<sup>1</sup> These principles apply with even more force to proceedings *in pais*.<sup>2</sup> A mortgagee therefore can not take possession of the property,<sup>3</sup> or sell under a power contained in the mortgage.

The court of bankruptcy may, however, authorize the institution of suits in other courts for the purpose of affecting property belonging to the bankrupt's estate.<sup>5</sup> Even if such suits are commenced without authority, the court of bankruptcy may not in all cases deem it proper to prohibit their prosecution. Where no advantage can result to the estate of the bankrupt, there is no reason why the court of bankruptcy should interfere. Under such circumstances, it may exercise a discretion on the subject, and may decline interference.<sup>6</sup> The State courts may in those cases assume jurisdiction.<sup>7</sup> The bankrupt court also on application may ratify such proceedings in a State court where it is shown that the estate will suffer no injury thereby.<sup>8</sup> The better practice, however, is to apply

<sup>1</sup> Clifton et al. v. Foster et al. 3 B. R. 656; s. c. 103 Mass. 223; in re Cook & Gleason, 3 Biss. 116.

<sup>2</sup> Phelps v. Sellick, 8 B. R. 390.

<sup>3</sup> Hutchings v. Muzzy Iron Works, 8 B. R. 458; in re Israel M. Rosenberg, 3 B. R. 130; s. c. 3 Ben. 366; contra, Bentley v. Wells, 61 Ill. 59.

<sup>4</sup> Phelps v. Sellick, 8 B. R. 390; Davis, Assig. of Bittel, 2 B. R. 392; Whitman v. Butler, 8 B. R. 487; in re Ruehle, 2 B. R. 577; s. c. 2 L. T. B. 59; Lockett v. Hill, 9 B. R. 167; s. c. 1 Woods, 552. The law has for a long time been considered to be as stated in the text, but the decision of the Supreme Court in the case of Eyster v. Gaff, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28, casts some doubt upon the subject.

<sup>5</sup> In re McGilton et al. 7 B. R. 294; s. c. 3 Biss. 144; in re Cook & Gleason, 3 Biss. 116; in re Philo R. Sabin, 9 B. R. 383.

<sup>6</sup> In re Iron Mountain Co. 4 B. R. 645; s. c. 9 Blatch. 320; in re Bowie, 1 B. R. 628; s. c. 1 L. T. B. 97; Tichenor v. Allen, 13 Gratt. 15; contra, in re Geo. W. Anderson, 9 B. R. 360.

<sup>7</sup> Whitridge v. Taylor, 66 N. C. 273; Cole v. Duncan, 58 Ill. 176; Truitt v. Truitt, 38 Ind. 16; Pierce v. Wilcox, 40 Ind. 70; Reed v. Bullington, 11 B. R. 408; s. c. 49 Miss. 223; Russell v. Cheatham, 16 Miss. 703; Freeny v. Ware, 9 Ala. 370; Talbert v. Melton, 17 Miss. 9; Sorden v. Gatewood, 1 Ind. 107; McCance v. Taylor, 10 Gratt. 580.

<sup>8</sup> Phelps v. Sellick, 8 B. R. 390.

to the bankrupt court for the proper authority before instituting such proceedings,<sup>1</sup> for otherwise all sales made therein are liable to be set aside.<sup>2</sup>

No lien or interest in the estate can be acquired by any proceeding instituted in another court after the filing of the petition. The title of the assignee relates back to the commencement of the proceedings, and from that time the bankrupt is divested of all interest in the estate, and no proceeding against him can affect it; consequently, the appointment of a receiver,<sup>3</sup> or the levy of an execution,<sup>4</sup> or attachment,<sup>5</sup> after that time is absolutely void. It is not even necessary that the assignee should appear and defend such an action.<sup>6</sup> The remedy of the assignee in such case, is by an action against the sheriff or the sheriff's vendee, and not by claiming the proceeds of the property which may have been thus unlawfully sold.<sup>7</sup>

How far the courts of bankruptcy, in the exercise of their jurisdiction, may interfere with other courts, is a question that has been much discussed, and is not entirely free from difficulty. They, clearly, have no authority to withdraw cases instituted in other courts before the commencement of proceedings in bankruptcy from those courts, and proceed to settle and adjust the claims of the parties thereto. Congress could, no doubt, have made an adjudication in bankruptcy operate *proprio vigore* to transfer all cases which should be pending in other courts at the time

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<sup>1</sup> In re Cook & Gleason, 3 Biss. 116.

<sup>2</sup> Davis v. Anderson, 6 B. R. 145; Davis, Assign. of Bittel et al. 2 B. R. 392; in re Ruehle, 2 B. R. 577; s. c. 2 L. T. B. 59.

<sup>3</sup> Buchanan v. Smith, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.

<sup>4</sup> Pennington v. Sale & Phelan, 1 B. R. 572; Jones v. Leach, 1 B. R. 595; in re Wallace, 2 B. R. 134; s. c. 1 Deady, 433; McLean v. Rockey, 3 McLean, 235.

<sup>5</sup> Stuart v. Hines, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; Weisenfeld v. Mispelhorn, 5 W. Va. 46; Williams v. Merritt, 4 B. R. 706; s. c. 103 Mass. 184.

<sup>6</sup> Stuart v. Hines, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

<sup>7</sup> Bush's Appeal, 65 Penn. 363.



of the filing of the petition, and to which the bankrupt should be a party, from those tribunals into the courts of bankruptcy. It has not, however, done so. It not only has not deprived the other courts of jurisdiction over such causes, but it has provided for their prosecution and defense in those courts by the assignee.<sup>1</sup> This principle applies not only to all ordinary actions to collect a debt, but also to all proceedings to enforce a lien.<sup>2</sup> The lien of an attachment,<sup>3</sup> or the lien of a creditor upon property conveyed in fraud of creditors,<sup>4</sup> or the lien of a partner upon partnership funds,<sup>5</sup> or the lien created by a mortgage,<sup>6</sup> may be enforced in other courts when proceedings for that purpose have been instituted before the commencement of the proceedings in bankruptcy. Having obtained lawful jurisdiction over the parties and subject-matters, they have the right to determine all questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by them.

So, also, where a receiver, appointed by another court before the commencement of proceedings in bankruptcy,

<sup>1</sup> *Samson v. Burton et al.* 4 B. R. 1; s. c. 5 Ben. 325; in re *Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; in re *Irwin Davis*, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; *Sutherland v. Lake Superior Canal Co.* 9 B. R. 298; *Peck v. Jenness*, 7 How. 612.

<sup>2</sup> *Baum v. Stern*, 1 Rich. (N. S.) 415; *Biddle's Appeal*, 9 B. R. 144; s. c. 68 Penn. 13.

<sup>3</sup> *Samson v. Burton et al.* 4 B. R. 1; s. c. 5 Ben. 325; *Bates v. Tappan*, 3 B. R. 647; s. c. 99 Mass. 376; *Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me. 559; *Stoddard v. Locke*, 9 B. R. 71; s. c. 43 Vt. 574; *Leighton v. Kelsey*, 4 B. R. 471; s. c. 57 Me. 85; *Perry v. Somerly*, 57 Me. 552; *Daggett v. Cook*, 37 Conn. 341; *May v. Courtney*, 47 Ala. 185.

<sup>4</sup> *Sedgwick v. Minck et al.* 1 B. R. 675; s. c. 6 Blatch. 156; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush. 344; *Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. (N. S.) 68; *Carr v. Fearington*, 63 N. C. 560.

<sup>5</sup> *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; *Clark v. Binninger*, 39 How. Pr. 363; *Miller v. Bowles*, 9 B. B. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253.

<sup>6</sup> *Lenihan v. Hamann*, 8 B. R. 557; s. c. 11 B. R. 471; s. c. 14 Abb. Pr. (N. S.) 274; s. c. 55 N. Y. 652; *Goddard v. Weaver*, 6 B. R. 440; s. c. 1 Woods, 257; in re *Irwin Davis*, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; *Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28.

has taken possession of the property which belonged to the bankrupt, and the jurisdiction of such court over the subject-matter of the suit therein, and over the parties thereto when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver are in no manner impeached or questioned, the courts of bankruptcy can not compel the receiver to give up the possession of such property without its being shown that such possession of the property by such court is void or invalid by reason of the provisions of the bankrupt law. When property is lawfully placed in the custody of a receiver by the court which appoints him, it is in the custody and under the protection and control of such court for the time being, and no other court has the right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. Under such circumstances, the courts of bankruptcy have neither such superior jurisdiction, nor such supervisory control, as to authorize them to take the property from the possession of such court, or to enjoin the receiver from further interfering with it.<sup>1</sup>

When the amount of the lien has been fixed and ascertained by a judgment or decree, the assignee has the right to free the estate from such lien, if that course becomes advisable; and the courts of bankruptcy can protect this right and interpose their authority at such time as may be most expedient and proper.<sup>2</sup> This doctrine appears to be supported by the current of decisions, and the practice certainly conforms to it. This power of the courts of bankruptcy is necessary to a proper administration of the

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<sup>1</sup> *In re Clark et al.* 3 B. R. 524; s. c. 4 Ben. 88; *Sedgwick v. Minck et al.* 1 B. R. 675; s. c. 6 Blatch. 156; *Alden v. Boston R. R. Co.* 5 B. R. 230; *Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253; *Clark v. Binninger*, 39 How. Pr. 363.

<sup>2</sup> *Samson v. Burton et al.* 4 B. R. 1; s. c. 5 Ben. 325; *in re Lady Bryan Mining Co.* 6 B. R. 252.

bankrupt law, and is fairly included in the power conferred upon them by the statute to collect all the assets of the bankrupt, to ascertain and liquidate liens or other specific claims thereon, and to adjust priorities and marshal and dispose of the different funds and assets, so as to secure the rights of all persons and the due distribution of the assets among all the creditors.<sup>1</sup> The means by which this result is to be reached are not enumerated, but power to accomplish the result is given, and the right to employ the proper legal process for effecting the result must follow by necessary implication. A proceeding to ascertain or liquidate a lien would be idle unless the court has the power to restrain the parties from liquidating their liens without its intervention, and to preserve the property by restraining its sale until the lien is ascertained to be good or void. The bankrupt law is highly remedial, and ought to have a liberal construction for the purpose of effecting its aim and policy.<sup>2</sup> The power to liquidate the liens upon the assets necessarily includes the power to ascertain what liens there are and the amount thereof.<sup>3</sup> It makes no difference with the power of the court over the subject that the liens or alleged liens are inchoate and incapable of execution until the amount secured thereby is ascertained and settled, for the power to ascertain and liquidate is expressly given.<sup>4</sup>

A great many actions have been instituted upon the theory that all the property of the bankrupt must be distributed under the direction of the courts of bankruptcy, no matter how it may be situated, but this is clearly a mistake. A distinction is to be drawn between proceedings instituted after and proceedings instituted before the

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<sup>1</sup> In re Schnepf, 1 B. R. 190; s. c. 2 Ben. 72.

<sup>2</sup> In re Lady Bryan Mining Co. 6 B. R. 252; in re E. Mallory, 6 B. R. 22 s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; in re Ellerhorst et al. 7 B. R. 49; s. c. 2 Saw. 219; Samson v. Clarke, 6 B. R. 403; s. c. 9 Blatch. 372.

<sup>3</sup> In re Ellerhorst et al. 7 B. R. 49; s. c. 2 Saw. 219.

<sup>4</sup> Samson v. Clarke, 6 B. R. 403; s. c. 9 Blatch. 372.

filing of the petition. The former are irregular so far as they affect the estate, while in case of the latter there only remains a right to liquidate a lien. But this right is never exercised unless it is shown that the general creditors will be benefited thereby.<sup>1</sup> Thus where a levy has been made before the commencement of proceedings in bankruptcy, the possession and legal title is in the officer making the levy, for the purpose of satisfying the process in his hands, and he, as trustee, has the right to go on and sell the property unless a sale would be injurious to the general creditors, or to some one having a prior lien.<sup>2</sup> This doctrine, however, does not apply to a mere judgment lien, where there has been no levy.<sup>3</sup> When a sale would, under a levy, sacrifice the property, it is the duty of the courts of bankruptcy, charged as they are with the interests of all the creditors, to interfere and direct a sale in such a manner as will be for the benefit of all.<sup>4</sup> If the property has already been sold, the officer has the right to apply the proceeds to satisfy the process and his charges and fees, and will only be required to account for such balance as may remain after this has been done, for no advantage can result from requiring the money to be

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<sup>1</sup> In re Bowie, 1 B. R. 628; s. c. 1 L. T. B. 97; in re Irwin Davis, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; in re Geo. W. Dillard, 9 B. R. 8; s. c. 6 L. T. B. 490.

<sup>2</sup> Jones v. Leach et al. 1 B. R. 595; Sharman v. Howell, 40 Geo. 257; Fehley v. Barr, 66 Penn. 196; Thompson v. Moses, 43 Geo. 383; Goddard v. Weaver, 6 B. R. 440; s. c. 1 Woods, 257; Maris v. Duren, 1 Brews. 428; s. c. 6 Phila. 327; in re Smith et al. 1 B. R. 599; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112; in re Wilbur, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; Marshall v. Knox, 8 B. R. 97; s. c. 16 Wall. 551; Fritsch v. Van Middendorfer, 2 Cin. 261; Peck v. Jenness, 7 How. 612; Colby v. Ledden, 7 How. 626; in re John Kerlin, 3 How. 326.

<sup>3</sup> Davis v. Anderson, 6 B. R. 145; Jones v. Leach, 1 B. R. 595; Pennington v. Sale & Phelan, 1 B. R. 572.

<sup>4</sup> In re Schnepf, 1 B. R. 190; s. c. 2 Ben. 72; Goddard v. Weaver, 6 B. R. 440; s. c. 1 Woods, 257; in re Donaldson, 1 B. R. 181; s. c. 1 L. T. B. 5; in re Wilbur, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; in re R. Atkinson, 7 B. R. 143; s. c. 5 L. T. B. 320; in re E. Mallory, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; in re Lady Bryan Mining Co. 6 B. R. 252; in re Geo. W. Dillard, 9 B. R. 8; s. c. 6 L. T. B. 490; in re Bernstein, 1 B. R. 199; s. c. 2 Ben. 44; contra, in re Campbell, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; in re Burns, 1 B. R. 174; s. c. 6 Phila. 448.

paid into the courts of bankruptcy with a view to its application by those courts in satisfaction of the lien;<sup>1</sup> nor can those courts set aside such a sale, and order the property to be resold, however apparent it may be that the price which was offered and accepted is much below the real value. The purchaser acquires a good title which can only be vacated upon exceptions to the confirmation of the sale, filed in the court under whose process the property has been sold.<sup>2</sup>

The right and power of the courts of bankruptcy to interfere, when the proceedings in other courts are in violation of the principles of the bankrupt law, has been much discussed and seriously denied; but the current of authority, as well as the nearly uniform practice, is in favor of such interference. The ground upon which this power has been denied is, that the courts in which such proceedings are pending are the only ones that are competent to determine upon their validity.<sup>3</sup> It is true that the bankrupt law is equally binding upon all courts, and its provisions must be respected and enforced by one as much as by another, in all cases over which they have valid jurisdiction;<sup>4</sup> but the question, in all such cases, is, whether the courts of bankruptcy, in matters peculiarly cognizable in proceedings in bankruptcy, may not, in the exercise of their powers to collect the assets of the bankrupt, restrain parties to proceedings in other courts from doing what would frustrate or directly impede the jurisdiction expressly conferred upon them by the bankrupt law.<sup>5</sup> The statute was manifestly intended to provide a system capable of entire self-execution by the Federal tri-

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<sup>1</sup> In re Bernstein, 1 B. R. 199; s. c. 2 Ben. 44; in re Campbell, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 6 Phila. 445; s. c. 1 L. T. B. 30; in re Donaldson, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 6 Phila. 143.

<sup>2</sup> In re Price Fuller, 4 B. R. 115; s. c. 1 Saw. 243.

<sup>3</sup> In re Burns, 1 B. R. 174; s. c. 6 Phila. 448.

<sup>4</sup> In re Rohrer's Appeal, 62 Penn. 498.

<sup>5</sup> Irving v. Hughes, 2 B. R. 62; s. c. 6 Phila. 451; Beattie v. Gardner, 4 B. R. 323; s. c. 4 Ben. 479; in re William Christy, 3 How. 292.

bunals, without the assistance or co-operation of the State tribunals.<sup>1</sup> Ample jurisdiction is conferred upon the Federal court to fulfil all its exigencies; they are the appointed instrumentalities for the execution of the law, and their duty to enforce its provisions is imperative.<sup>2</sup>

If this power did not exist, many of the beneficial provisions of the statute would be futile, on account of the difficulty of enforcing them, and the facility with which they might be evaded. The statute declares certain transfers and proceedings absolutely void, and there is no reason why the general principles, applicable to all fraudulent conveyances, should not be applied to these also, and that they should be treated as nullities, no matter how solemn the instrument, or how sacred the proceedings, that parties may adopt to accomplish their purpose. The practice has certainly conformed almost uniformly to this doctrine. Money obtained upon a judgment given as a preference has been recovered in an action of assumpsit.<sup>3</sup> Replevin against an officer of another court has been sustained for the purpose of getting possession of property held under a similar judgment.<sup>4</sup> The officer has also been directed to deliver the property similarly held to the assignee.<sup>5</sup> On several occasions the parties and the officer have been directed to pay over to the assignee the proceeds arising from the sale of property seized under process issued upon judgments which had been given as unlawful preferences.<sup>6</sup> The lien of a judgment has been vacated.<sup>7</sup>

<sup>1</sup> *Mitchell v. Manuf. Co.* 2 Story, 648.

<sup>2</sup> *Zahn v. Fry*, 9 B. R. 546.

<sup>3</sup> *Street v. Dawson*, 4 B. R. 207; *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

<sup>4</sup> *Haughy v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47.

<sup>5</sup> *McGie (ex parte Sanger)*, 2 B. R. 531; s. c. 2 Biss. 163; s. c. 1 L. T. B. 80.

<sup>6</sup> *In re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 2 L. T. B. 39; *Wilson v. Brinkman*, 2 B. R. 468; *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Zahn v. Fry*, 9 B. R. 546; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372; *in re E. Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; *Irving v. Hughes*, 2 B. R. 62; s. c. 6 Phila. 451.

<sup>7</sup> *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Shaffer v. Fritchery*, 4 B. R. 548.

The statute confers the fullest and most comprehensive authority upon the court of bankruptcy and the district judge in respect to all matters relating to proceedings in bankruptcy, and provides that this jurisdiction and authority may be exercised at the place appointed for holding court in the district, or by the district judge sitting in chambers. It is clearly intended that a large portion of the jurisdiction thus conferred shall be exercised in the most summary and informal manner by the district judge, at chambers as well as in term. The same authority is given to the district judge to exercise his jurisdiction under the act at chambers as at term, or when the court is regularly held. The object and policy of the bankrupt law, undoubtedly, is that the proceedings under it shall be summary; that matters shall be settled as speedily as possible, and that the expenses shall be diminished by this summary and informal mode of procedure. The manner in which the courts shall exercise their jurisdiction was a matter for the consideration of Congress in framing the statute. Congress possesses the sole right to say what shall be the forms of proceedings in the courts of the United States. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall, in its judgment, best promote the public convenience and the true interest of all parties.

The truth is, that in no other way can the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Prompt and ready action can be safely relied on where the whole jurisdiction is confided to a single court: in the collection of assets; in the ascertainment and liquidation of liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing the sales at such times and in such manner as shall best sub-

serve the interests of all concerned; in preventing by injunction or otherwise, any particular creditor or person having an adverse interest from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or remedies in the State tribunals; and, finally, in making a due distribution of the assets and bringing to a close within a reasonable time the whole proceedings in bankruptcy.<sup>1</sup>

The bankrupt law necessarily vests a large measure of discretion in the court or judge administering it. This discretion, however, is not a wanton power. It is not a power to order this or that summarily because it may. It is a judicial discretion, to be carefully exercised in view of the rights of all; to be exercised, so far as may be, in accordance with sound precedent; and is so to mold itself to, and meet the necessary new questions, not of practice alone, but of right, as they arise, that while on the one hand it administers the law in the true intent and spirit of its enactment, so as to effectuate the really equitable and beneficial ends it seeks to attain, it does not, on the other, abrogate those useful and striking analogies so well known to the profession, nor those rules of practice and judicial procedure now so interwoven with our system of jurisprudence as to have become an almost inherent and essential part thereof.<sup>2</sup> The grant of jurisdiction confers upon the courts of bankruptcy the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to the grant. This is a universal rule of construction, and without such a rule many rights would go unredressed, for it is not unusual for legislative bodies to leave with the courts the power to devise and adopt a remedy commensurate with the exigencies of the case in the execution of the authority conferred, the re-

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<sup>1</sup> *Bill v. Beckwith*, 2 B. R. 241; in *re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433.

<sup>2</sup> In *re Josiah B. Hunt*, 2 B. R. 539.



triction being that they must not be such as are in violation of the fundamental law or in derogation of constitutional rights of the citizen.<sup>1</sup>

This summary jurisdiction extends only to those persons who are parties to the proceedings. Persons who are not parties, and who have not voluntarily appeared and become parties, can not be compelled to come into court under a petition for a rule to show cause.<sup>2</sup>

All suits which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of the bankrupt transferable to or vested in such assignee, must be either at law or in equity, and not by a summary proceeding.<sup>3</sup> This doctrine rests upon the theory that the practice in the courts of bankruptcy must conform to the practice prescribed for the circuit courts in those cases over which the two courts have concurrent jurisdiction. There are but two courts of original jurisdiction in bankruptcy, the courts of bankruptcy and the circuit courts. The statute first defines the jurisdiction of those courts (§ 4972), but does not prescribe the form of proceedings. If it had stopped here, any of the forms known to jurisprudence might have been used.<sup>4</sup> It goes on, however, to define the original jurisdiction of the circuit courts, and in so doing limits it to suits at law or in equity, and to certain classes of cases, and makes it concurrent with that of the courts of bankruptcy. The phraseology of the statute is so peculiar, that, if such suits must not be either at law or in equity

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<sup>1</sup> Goodall v. Tuttle, 8 R. R. 193; s. c. 3 Biss, 219.

<sup>2</sup> Smith v. Mason, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; Marshall v. Knox, 8 B. R. 97; s. c. 16 Wall. 551.

<sup>3</sup> Smith v. Mason, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; in re Kerosene Oil Co. 3 B. R. 125; s. c. 6 Blatch. 521; in re Bonesteel, 3 B. R. 517; s. c. 7 Blatch. 175; in re Masterson, 4 B. R. 553; Knight v. Cheney, 5 B. R. 305; s. c. 2 L. T. B. 205; Barstow v. Peckham, 5 B. R. 72; Rogers v. Winsor, 6 B. R. 246; in re H. S. Evans, Lowell, 525; contra, in re Norris, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.

<sup>4</sup> In re John Alexander, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.

in the courts of bankruptcy, there will not be any concurrent jurisdiction in the circuit courts. The form of the procedure is made as essential to the jurisdiction as the subject-matter of the suits. The effect of the clause, therefore, is to limit the manner of proceeding in certain classes of cases in the courts of bankruptcy. The objection to the form of the proceedings may be taken even at the hearing,<sup>1</sup> or in the supervisory court.<sup>2</sup> Where a party has made a mistake in selecting his form of proceeding, the petition may be dismissed, with leave to pursue the appropriate remedy.<sup>3</sup> The petition may also be converted into a bill in equity, but the only advantage to be gained by so doing, is the saving of the service of a new subpoena, as the answers filed and the testimony taken, if any, can not be used except by consent in the prosecution of the suit in its amended form.<sup>4</sup> The assignee, who is an officer of the court of bankruptcy, may be proceeded against by a summary petition in respect to any funds in his hands, if the opposing party chooses to proceed in that way, though the assignee himself has no right to take similar action against others.<sup>5</sup>

The power of the courts of bankruptcy is, in its nature, an equity power, and may be exercised by proceedings in the nature of equity proceedings. A party seeking an affirmative relief must proceed in person in the first instance and not by an attorney. He must seek his redress by a petition and not by a motion. It is not necessary or proper that resort should be had to the formal and plenary proceedings common to suits in equity in the circuit court. A petition stating the facts relied on for relief, and praying for the order, relief, or proceeding sought for, is

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<sup>1</sup> *In re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135.

<sup>2</sup> *In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175.

<sup>3</sup> *In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135.

<sup>4</sup> *Barstow v. Peckham*, 5 B. R. 72.

<sup>5</sup> *In re H. S. Evans*, Lowell, 525; *Ferguson v. Peckham*, 6 B. R. 569.

sufficient. It must also be signed and verified by the petitioner.<sup>1</sup> As soon as the petition is filed, an order to show cause is passed, appointing a day for the hearing, and directing that a copy of the order or a copy of the petition and order be served upon the adverse party. The defendant appears and makes his defense by demurrer, exceptions, or an answer, in a manner analogous to the ordinary course of equity practice. The judge may order the issue to be tried by a jury whenever he thinks such course will best subserve the interests of justice.<sup>2</sup> The evidence may be taken before the court *viva voce* or in writing, or before a register, or commissioner of the circuit court, or by affidavit, or on commission; and the court may direct a reference to a register to take and certify it, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits in equity in the circuit courts (§5603).<sup>3</sup>

The jurisdiction of the courts of bankruptcy over suits at law, in matters relating to bankruptcy, in all cases where such actions constitute the appropriate form of the remedy is unquestionable.<sup>4</sup> Such suits may be instituted in those courts in all cases where they have jurisdiction over the parties and the subject-matter. Their jurisdiction over the parties is not made dependent upon either residence or citizenship.<sup>5</sup> The service of the appropriate process, or a waiver of such service by a voluntary appearance is the only requirement. Their jurisdiction over the subject-matter only attaches when the cause of action arises from a proceeding in bankruptcy.

In proceedings at law, instituted in the Federal courts,

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<sup>1</sup> In re J. O. Smith, 2 B. R. 297; in re Wallace, 2 B. R. 134; s. c. 1 Deady, 433; in re Philo R. Sabin, 9 B. R. 383.

<sup>2</sup> Wilson v. Stoddard, 4 B. R. 254.

<sup>3</sup> Bill v. Beckwith, 2 B. R. 241.

<sup>4</sup> Bill v. Beckwith, 2 B. R. 241.

<sup>5</sup> Kelly v. Smith, 1 Blatch. 290; Atkinson v. Purdy, Crabbe, 551.

for the purpose of carrying the provisions of the statute into effect, or for enforcing the rights or remedies given by it, the rules of the circuit court regulating the practice and procedure in cases at law must be followed as nearly as may be; but the court, or the judge thereof, may, by special rule, in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case, so as to facilitate a speedy hearing.<sup>1</sup> Parties may adopt any form of action appropriate to their particular case. Assumpsit,<sup>2</sup> replevin,<sup>3</sup> and trover<sup>4</sup> have already been used.

The jurisdiction of courts of bankruptcy over suits in equity is equally as broad and as extensive as over suits at law, and is limited by the same conditions and regulated by the same circumstances. Suits in equity have been used to obtain an injunction;<sup>5</sup> to set aside a sale of the bankrupt's property on the ground of fraud;<sup>6</sup> to review and set aside a sale, made after the commencement of proceedings in bankruptcy, by virtue of a deed of trust executed to secure a creditor;<sup>7</sup> to recover property conveyed by the bankrupt in fraud of creditors;<sup>8</sup> to recover money obtained upon a judgment given contrary to the bankrupt act;<sup>9</sup> to enforce a right of redemption in mortgaged property;<sup>10</sup> to remove a cloud on the title of the assignee;<sup>11</sup> to recover the amount received by a corporation as interest

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<sup>1</sup> Rule XXXII.

<sup>2</sup> *Street v. Dawson*, 4 B. R. 207.

<sup>3</sup> *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47.

<sup>4</sup> *Babbit v. Walbrun & Co.* 4 B. R. 121; s. c. 1 Dillon, 19.

<sup>5</sup> *Pennington v. Sale & Phelan*, 1 B. R. 572.

<sup>6</sup> *March v. Heaton*, 2 B. R. 180; s. c. Lowell, 278.

<sup>7</sup> *Davis*, Assign. of *Bittel et al.* 2 B. R. 392; *Davis v. Anderson*, 6 B. R. 145.

<sup>8</sup> *Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *Pratt v. Curtis*, 6 B. R. 139.

<sup>9</sup> *Wilson v. Brinkman*, 2 B. R. 468; *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *Zahm v. Fry*, 9 B. R. 546; *Trader's Nat. Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

<sup>10</sup> *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.

<sup>11</sup> *Beers v. Place*, 4 B. R. 459; s. c. 36 Conn. 579; s. c. 1 L. T. B. 262.

above what its charter allowed;<sup>1</sup> to recover the money paid secretly to a creditor in fraud of a composition agreement;<sup>2</sup> to recover the value of property transferred by one partner in fraud of the partnership,<sup>3</sup> and to set aside a mortgage on the property of the bankrupt, made by him with intent to prefer a creditor.<sup>4</sup> In proceedings in equity instituted for the purpose of carrying into effect the provisions of the statute, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States must be followed as nearly as may be.<sup>5</sup>

The question whether any district court except that in which the proceedings are pending may exercise any of the powers conferred upon courts of bankruptcy, has been extensively agitated, but the weight of authority at present is in favor of such jurisdiction. The statute does not contain any words which justify the conclusion that the jurisdiction conferred by it is limited to the district court for the district in which the proceedings are pending. On the contrary, its whole tenor shows that Congress intended to provide for the complete administration of the system in the Federal courts and through the Federal officers. The district courts are accordingly auxiliary to each other to perfect and accomplish the objects of the statute. An assignee elected in one district may therefore institute proceedings in the district court of another district to recover money paid by the bankrupt to a preferred creditor contrary to the provisions of the statute.<sup>6</sup>

<sup>1</sup> *Tiffany v. Boatman's Savings Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

<sup>2</sup> *Bean v. Brookmire*, 1 Dillon, 151.

<sup>3</sup> *Taylor v. Rasch*, 5 B. R. 399.

<sup>4</sup> *Scammon v. Cole*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103; *McLean v. Lafayette Bank*, 3 McLean, 415.

<sup>5</sup> Rule XXXII.

<sup>6</sup> *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; in re *James Martin*, 5 Law Rep. 158; *Moore v. Jones*, 23 Vt. 739; *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516; contra, *Jobbins v. Montague*, 6 B. R. 509; in re *H. Richardson*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.

The circuit courts have concurrent jurisdiction with the district courts of any district of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by such person against such assignee, touching any property or rights of property of the bankrupt transferable to or vested in such assignee (§ 4979).<sup>1</sup> This concurrent jurisdiction is confined to cases in which there is a disputed title or claim to property—to suits to which some title or claim to the property or assets, adverse to that of the assignee, is set up,<sup>2</sup> and to suits brought by the assignee to collect debts due to the bankrupt's estate.<sup>3</sup>

No suit at law or in equity is in any case maintainable by or against the assignee, or by or against any person claiming an adverse interest, touching the property and rights of property of the bankrupt, in any court whatsoever, unless the same is brought within two years of the time the cause of action accrued, for or against such assignee. No right of action barred at the time such assignee is appointed, is revived by such appointment (§ 5057). No person is entitled to maintain an action against an assignee in bankruptcy, for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so (§ 5056).

The power of the courts of bankruptcy to enjoin persons who are parties to suits pending in other courts has been much discussed, and sometimes denied;<sup>4</sup> but is gen-

<sup>1</sup> Act of June 22, 1874, § 3; *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.

<sup>2</sup> *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7.

<sup>3</sup> *Woods v. Forsyth*, 2 W. J. 348; s. c. 16 Pitts. L. J. 234; in re *John Alexander*, 3 B. R. 29; s. c. *Chase*, 295; s. c. 2 L. T. B. 81; *Bachman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264; *Pritchard v. Chandler*, 2 Curt. 488; *Mitchell v. Manuf. Co.* 2 Story, 648; *McLean v. Lafayette Bank*, 3 McLean, 185.

<sup>4</sup> In re *Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 6 Phila. 445; s. c. 1 L. T. B. 30.

erally exercised not only to preserve property surrendered to their custody from encroachments by other courts,<sup>1</sup> and to prevent unlawful preferences,<sup>2</sup> but also to prevent property from being sacrificed by a sale under an execution issued upon a valid judgment,<sup>3</sup> or under a mortgage.<sup>4</sup> There is a special provision for an injunction in cases of involuntary bankruptcy (§ 5024), but the power to issue it in all cases seems to be incident to the general jurisdiction of those courts. When Congress delegated to them the equitable jurisdiction in bankruptcy over the property of the debtor, it by necessary implication also delegated at the same time the power to administer such remedies known to the law as are absolutely indispensable to the complete exercise of the jurisdiction expressly conferred. This jurisdiction extends to all the parties to the proceedings, all the assets, and all the liens thereon. One power directly given is the power to collect all the assets. Closely connected with this is the power to ascertain and liquidate the liens which may be claimed to exist upon those assets. The means by which these results are to be

<sup>1</sup> In re Kerosene Oil Co. 2 B. R. 528; s. c. 2 L. T. B. 79; s. c. 3 B. R. 125; s. c. 6 Blatch. 521; s. c. 3 Ben. 35; Markson v. Heaney, 4 B. R. 510; s. c. 1 Dillon, 497; Pennington v. Lowenstein, 1 B. R. 570; Pennington v. Sale & Phelan, 1 B. R. 572; Jones v. Leach, 1 B. R. 595; in re Bowie, 1 B. R. 628; s. c. 1 L. T. B. 97; Hyde v. Bancroft, 8 B. R. 24; s. c. 6 Ben. 392; in re Isaac Ulrich, 8 B. R. 15; s. c. 6 Ben. 483; in re Wallace, 2 B. R. 134; s. c. 1 Deady, 433; in re William Christy, 3 How. 292.

<sup>2</sup> Irving v. Hughes, 2 B. R. 62; s. c. 6 Phila. 451; Samson v. Clarke, 6 B. R. 403; s. c. 9 Blatch. 372; in re E. Mallory, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; in re Wm. H. Shuey, 9 B. R. 526; Traders' Nat. Bank v. Campbell, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; Sutherland v. Lake Superior Canal Co. 9 B. R. 298; Zahm v. Fry, 9 B. R. 546; contra, in re Burns, 1 B. R. 174; s. c. 6 Phila. 448; Townsend v. Leonard, 3 Dillon, 370.

<sup>3</sup> In re Price Fuller, 4 B. R. 115; s. c. 1 Saw. 243; in re Lady Bryan Mining Co. 6 B. R. 252; in re Schnepf, 1 B. R. 190; s. c. 2 Ben. 72; Goddard v. Weaver, 6 B. R. 440; s. c. 1 Woods, 257; in re Donaldson, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 6 Phila. 143; in re Wilbur, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; in re R. Atkinson, 7 B. R. 143; s. c. 5 L. T. B. 320; in re E. Mallory, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; in re Lady Bryan Mining Co. 6 B. R. 252; in re Geo. W. Dillard, 9 B. R. 8; s. c. 6 L. T. B. 490; in re Bernstein, 1 B. R. 199; s. c. 2 Ben. 44; contra, in re Campbell, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 6 Phila. 445; s. c. 1 L. T. B. 30.

<sup>4</sup> In re Irwin Davis, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; Goddard v. Weaver, 6 B. R. 440; s. c. 1 Woods, 257.

reached are not enumerated, but power to accomplish these results is given, and the right to employ the proper legal process for effecting these results follows by necessary implication. The aim and policy of the statute can not be effectually carried out in any other way.<sup>1</sup>

Before the appointment of an assignee, proceedings for an injunction to protect the property of the bankrupt may be instituted by the bankrupt, or the petitioning creditor.<sup>2</sup> But as soon as the assignee is appointed he should be made a party to the proceedings by a supplemental bill.<sup>3</sup> After an assignee has been appointed, he is the only person who can institute such proceedings on behalf of the estate. The allegations of the bill should be positive, and affidavits may be filed to sustain them.<sup>4</sup> The officer of another court may be, and usually is, made a party to the proceedings whenever it is desirable to stay any action on his part.<sup>5</sup> The court may, in its discretion, require notice to be given to the adverse party before granting an injunction.<sup>6</sup> It may, also, in its discretion, before granting an injunction against a judgment creditor who has a valid lien, require the general creditors to indemnify the judgment creditor.<sup>7</sup> Whenever the proceedings sought to be enjoined are prosecuted for the purpose of enforcing a valid lien, and were instituted before the commencement of proceedings in bankruptcy, the courts, in granting or refusing an injunction, are governed by the same principles that regulate their action in the liquidation of liens, and will only interfere when such interference will benefit the

<sup>1</sup> *In re E. Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

<sup>2</sup> *Irving v. Hughes*, 2 B. R. 62; s. c. 6 Phila. 451; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97.

<sup>3</sup> *Irving v. Hughes*, 2 B. R. 62; s. c. 6 Phila. 451.

<sup>4</sup> *In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>5</sup> *In re Bernstein*, 1 B. R. 199; s. c. 2 Ben. 44; *in re E. Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247.

<sup>6</sup> *Irving v. Hughes*, 2 B. R. 62; s. c. 6 Phila. 451; *in re Wallack*, 2 B. R. 134; s. c. 1 Deady, 433.

<sup>7</sup> *In re Donaldson*, 1 B. R. 181; s. c. 6 Phila. 143; s. c. 1 L. T. B. 5.



creditors generally.<sup>1</sup> Neither proceedings to punish a party for contempt,<sup>2</sup> nor proceedings against the marshal for taking possession of property which did not belong to the debtor, under a warrant in involuntary bankruptcy,<sup>3</sup> will be enjoined.

Where an injunction is obtained upon a summary petition it may be dissolved on motion without resorting to the formality of a demurrer.<sup>4</sup> Upon the hearing of the motion, affidavits and counter affidavits may be read, so that the court may be possessed of all the facts bearing upon the question, and thereby enabled to protect the interests of all parties concerned.<sup>5</sup> If it does not appear that the proceedings under an execution will affect the interests of any party entitled to the protection of the courts of bankruptcy under the bankrupt law, the injunction will be dissolved. When the bankrupt claims that the property held under an execution belongs to his wife, and the assignee does not assert any claim thereto, the injunction will not be continued.<sup>6</sup> When the assignee, after his appointment, does not take possession of property levied on by virtue of an execution issued upon a valid judgment, nor make application for leave to discharge the levy by paying the judgment, and there is no evidence that any advantage will be gained by continuing the injunction, it will be dissolved.<sup>7</sup>

If the weight of evidence is rather with the defendant, and there is no suggestion that he is not abundantly responsible pecuniarily, or that the assets are in peril, the injunction will be dissolved.<sup>8</sup> An execution creditor, who

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<sup>1</sup> In re Bowie, 1 B. R. 628; s. c. 1 L. T. B. 97; in re Price Fuller, 4 B. R. 115; s. c. 1 Saw. 243.

<sup>2</sup> In re M. W. Hill, 2 B. R. 140.

<sup>3</sup> In re Marks, 2 B. R. 575.

<sup>4</sup> In re Wallace, 2 B. R. 134; s. c. 1 Deady, 433.

<sup>5</sup> In re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>6</sup> In re Olcott, 2 Ben. 443.

<sup>7</sup> In re Wilbur, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171.

<sup>8</sup> Collins v. Bell, 3 B. R. 587.

has been delayed by an injunction, is entitled to a prompt adjudication of the validity of his judgment as soon as an assignee is appointed. This question, however, can not be determined on *ex parte* affidavits.<sup>1</sup> When the affidavits, at the hearing of the motion, disclose a valid ground for an injunction which is not covered by the petition, the injunction will be continued, with leave to amend the petition so as to cover that ground; for nothing can be gained by dissolving the injunction and then reissuing it upon the same state of facts.<sup>2</sup> An injunction may also be obtained by a bill in equity, in either the district or circuit court, in cases over which they have jurisdiction.<sup>3</sup>

The jurisdiction of the State courts over suits brought by the assignee is at present exciting considerable attention. It is necessary before deciding this question to determine how far the jurisdiction of the district courts is exclusive. They are constituted courts of bankruptcy (§ 563) and vested with original jurisdiction over such proceedings. That jurisdiction over the proceedings in bankruptcy strictly so called is exclusive both by statute (§ 711) and by the principles of judicial comity.<sup>4</sup> In addition to this jurisdiction,<sup>5</sup> certain other powers are also conferred upon the district court (§ 4972), among which is the power to collect the assets, and there is nothing in the statute to show that this jurisdiction was designed to be exclusive.<sup>6</sup> It seems accordingly, to be generally conceded that the State courts have jurisdiction over actions which arise under the common law or by virtue of some State statute, without reference to the district where the

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<sup>1</sup> In re Hafer & Bros.; in re Beck, 1 B. R. 586; s. c. 6 Phila. 474.

<sup>2</sup> In re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126.

<sup>3</sup> Irving v. Hughes, 2 B. R. 62; s. c. 6 Phila. 451; Foster v. Ames, 2 B. R. 455; s. c. Lowell, 313.

<sup>4</sup> Cook v. Whipple, 9 B. R. 155; s. c. 55 N. Y. 150; Goodall v. Tuttle, 7 B. R. 193; s. c. 3 Biss. 219.

<sup>5</sup> Cook v. Whipple, 9 B. R. 155; s. c. 55 N. Y. 150; in re L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

<sup>6</sup> Payson v. Dietz, 8 B. R. 193; s. c. 2 Dillon, 504.

proceedings are pending.<sup>1</sup> Thus they may entertain suits to collect debts due to the bankrupt,<sup>2</sup> or to set aside a fraudulent conveyance,<sup>3</sup> or to recover property which belonged to the bankrupt at the time when the proceedings in bankruptcy were commenced.<sup>4</sup> The only doubt is in regard to the right of the assignee to bring an action in a State court to recover property conveyed by the bankrupt with the intent to prefer a creditor, or to defeat or delay the operation of the bankrupt law. The State courts have jurisdiction of questions arising between persons within their jurisdiction, whether they arise under the laws of any other State or any foreign nation. If they arise under the laws of the United States, they have the same jurisdiction unless deprived of it by some competent authority. The fact that the Federal courts may have jurisdiction of the same question, does not deprive the State courts of jurisdiction. The Federal and State courts may and do have concurrent jurisdiction of the same questions: When, however, the right of action is created by an act of Congress, Congress may prescribe the manner and the tribunal in which alone that right may be enforced. Congress may confer exclusive jurisdiction in these cases upon the Federal courts, but when it does not prescribe the tribunal in which alone they are to be prosecuted, the Federal and State courts have concurrent jurisdiction over them. The mere fact that Congress confers jurisdiction upon the Federal courts is no evidence that Congress intended to clothe them with exclusive jurisdiction, because they have no jurisdiction

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<sup>1</sup> *Stevens v. Savings Bank*, 101 Mass. 109; *Peiper v. Harmer*, 5 B. R. 252; s. c. 8 Phila. 100; s. c. 4 L. T. B. (C. R.) 166; in re *Central Bank*, 6 B. R. 207; *Boone v. Hall*, 7 Bush, 66; *State v. Trustees*, 5 B. R. 466; *Cogdell v. Exum*, 10 B. R. 327; s. c. 69 N. C. 464; *Hoover v. Robinson*, 3 Neb. 437; *Ward v. Jenkins*, 51 Mass. 583; *Hastings v. Fowler*, 2 Ind. 216; *Russell v. Owen*, 15 B. R. 322; s. c. 61 Mo. 185; contra, *Frost v. Hotchkiss*, 14 B. R. 443; s. c. 1 Abb. N. C. 27.

<sup>2</sup> *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490.

<sup>3</sup> *Boone v. Hall*, 7 Bush, 66.

<sup>4</sup> *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109.

except such as is conferred by Congress.<sup>1</sup> The only ground, therefore, upon which the jurisdiction can be denied, is that the statute prescribes a penalty, and the State courts never enforce a penalty prescribed by an act of Congress. The bankrupt law, however, is established upon the theory of the equal rights of all the creditors. Equality is equity. Preferences, even at common law, were merely permitted, not favored, and were always regarded as in violation of the dictates of abstract justice. The property of an insolvent debtor has necessarily been purchased with the funds of his creditors. At law he is the owner, but equitably it belongs to his creditors. As their funds contributed to its purchase, they are entitled to share in it proportionately. A law which merely enforces the principles of abstract justice can hardly be considered as imposing a penalty.<sup>2</sup> It ought rather to be considered as highly remedial, and should be liberally construed. Moreover in this aspect of the case the question is not simply whether the assignee may institute a suit in the State courts, but whether the State courts will recognize the provisions of the bankrupt law as paramount. The assignee may be defendant as well as plaintiff, and a penalty can not be enforced in favor of a defendant any more than in favor of a plaintiff. If the doctrine is true, the Federal courts will have to interfere with the State courts far more frequently than heretofore. These principles appear to have been recognized by Congress as correct, for the statute now provides that the court having charge of the estate of any bankrupt may direct that any

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<sup>1</sup> Cook v. Whipple, 9 B. R. 155; s. c. 55 N. Y. 150; Gilbert v. Priest, 8 B. R. 159; s. c. 63 Barb. 369; s. c. 65 Barb. 444; s. c. 14 Abb. Pr. (N. S.) 165; Gilbert v. Crawford, 46 How. Pr. 222; Jordan v. Downey, 12 B. R. 427; s. c. 40 Md. 401; Lewis v. Sloan, 68 N. C. 557; Dambmann v. White, 48 Cal. 439; s. c. 12 B. R. 438; Rison v. Powell, 28 Ark. 427; Otis v. Hadley, 112 Mass. 100; Eyster v. Gaff, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28; Kemmerer v. Tool, 12 B. R. 334; s. c. 78 Penn. 147; contra, Voorhees v. Frisbie, 8 B. R. 152; s. c. 25 Mich. 476; s. c. 6 L. T. B. 85; Brigham v. Claffin, 7 B. R. 412; s. c. 31 Wis. 607; Fenlon v. Lonergan, 29 Penn. 471.

<sup>2</sup> Cook v. Whipple, 9 B. R. 155; s. c. 55 N. Y. 150.

of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount.<sup>1</sup> In construing this statute, however, it must be borne in mind that Congress has no right to require that the State court shall entertain suits for the purpose of carrying out the provisions of the bankrupt law. The States in providing their own judicial tribunals have a right to limit, control and restrict their judicial functions and jurisdictions according to their own mere pleasure.<sup>2</sup>

An assignee who is a citizen of one State may maintain an action in the circuit court of another State against a party who is a citizen of that State to enforce any right which may be enforced at common law or in equity.<sup>3</sup>

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<sup>1</sup> Act of June 22, 1874, § 2.

<sup>2</sup> *Mitchell v. Manuf. Co.* 2 Story, 648; *Buckingham v. McLean*, 3 McLean 185; s. c. 13 How. 51.

<sup>3</sup> *Payson v. Dietz*, 8 B. R. 193; s. c. 2 Dillon, 504; *Spaulding v. McGovern*, 10 B. R. 188; *Post v. Rouse*, 1 W. N. 39; *Burbank v. Bigelow*, 1 B. R. 445; s. c. 92 U. S. 179.

## CHAPTER XIII.

### DISTRIBUTION OF THE ESTATE.

At the expiration of three months from the date of the adjudication of bankruptcy, the assignee must file with the register a report which must exhibit just and true accounts of all receipts and payments, verified by his oath; and he must also file at the same time a statement of the whole estate of the bankrupt as then ascertained of the property recovered, and of the property outstanding, specifying the cause of its being outstanding, and also what debts or claims are yet undetermined.<sup>1</sup>

If there are assets on hand sufficient to justify the expense, then, at the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, must call a general meeting of the creditors, of which due notice must be given (§ 5092). The provisions of the statute are imperative, and if the assignee requests it, the second general meeting must be called.<sup>2</sup>

No meetings for distribution ought to be called unless the assignee has in his hands some money out of which a dividend can be made.<sup>3</sup> When no assets have come to hand at the times when such meetings ought to be called, the assignee should make a return<sup>4</sup> to that effect, and have the meetings dispensed with by a special order of court.<sup>5</sup> It is not essential that these meetings shall be held at any

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<sup>1</sup> Act of 22 June, 1874, § 4.

<sup>2</sup> In re Louis H. Rosey, 6 Ben. 137.

<sup>3</sup> In re Son, 1 B. R. 310; s. c. 2 Ben. 153; in re Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>4</sup> Form No. 35.

<sup>5</sup> In re Alex. Alexander, 3 B. R. (quarto), 20.

particular time, but only that they shall be held at the expiration of certain months. The requirement of the statute is, that the court shall call the meetings at the expiration of those months, but they are to be held subsequently. There is no day on which it can be said that it is too late to hold these meetings, unless, possibly, it may be said, that the second meeting should be held before the end of six months from the time of the filing of the petition.<sup>1</sup>

Although it is the duty of the assignee to call the meetings at the expiration of the time mentioned, and he may be required to do so, and may be liable for his neglect if any injury results from it, yet nothing touching the regularity of the proceedings depends upon their being called or held on the days when those months respectively expire. If they are not held, any creditor, or the bankrupt, or the assignee, may call upon the court to require them to be held, though it may have been the fault of the assignee that they were not sooner called; otherwise, it would be in the power of the assignee to take advantage of his own neglect, and to defer indefinitely the accounting which the law requires of him at those meetings.<sup>2</sup>

The application for the meeting should be in the prescribed form,<sup>3</sup> and the order thereon must bear the seal of the court. The notice of the meeting must be published for two successive days in the newspapers designated in the order, and the notices to creditors are generally required to be sent at least ten days before the meeting. These notices must be given by the assignee (§ 5094), and must be sent to all known creditors, whether they have proved their debts or not.<sup>4</sup> The bankrupt should be notified to be present. The meeting is held before the register.

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<sup>1</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>2</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>3</sup> Form No. 28.

<sup>4</sup> In re William Mills, 11 B. R. 117; s. c. 7 Ben. 452.

Upon the day appointed for the meeting, the assignee must make return, under oath, of the publication and the sending of the required notices in the prescribed form,<sup>1</sup> and produce the proper certificates of publication. The assignee must then report, and exhibit to the court and to the creditors just and true accounts<sup>2</sup> of all his receipts and payments verified by his oath. And he must also produce and file vouchers for all payments for which vouchers are required by any rule of the court. He must also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt; and a statement of the whole estate of the bankrupt, as then ascertained, specifying the cause of its being outstanding; also what debts or claims are yet undetermined, and stating what sums remain in his hands.

At such meeting the majority in value of the creditors present must determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but, unless at least one-half in value of the creditors attend such meeting, either in person or by attorney, it is the duty of the assignee so to determine (§ 5092). On any settlement of the accounts of any assignee, he must account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he, upon such settlement, must make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or ad-

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<sup>1</sup> Form No. 29.

<sup>2</sup> Forms Nos. 37, 38.



vantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject.<sup>1</sup>

The court for all purposes of the auditing, settlement, and adjustment of the assignee's account and distributing the estate is held before the register.<sup>2</sup> The intention of the statute is that the disbursements of the assignee in administering the estate, whether only incurred and not yet paid, or whether incurred and paid, shall be submitted to the creditors at a general meeting, and audited by the register as a part of the business of auditing the accounts of the assignee. Consequently, all bills for clerical, professional, or other services rendered to him should be presented at the meeting.<sup>3</sup> The creditors must be prepared to object, if they desire, to the account of the assignee, and all outstanding claims against him which are not disputed or objected to, must be deducted in order to ascertain the net sum to be divided.<sup>4</sup> The register may, however, if no objection is made, postpone the auditing of the assignee's account until the third meeting.<sup>5</sup>

The whole fund in the hands of the assignee, less such sum as may be retained for expenses and contingencies, should be distributed, unless good cause to the contrary is shown, and no fund need be left to pay a similar percentage upon the claims which have not been proved. A sum must, however, be left in his hands sufficient to provide for undetermined claims which are in controversy, and for claims which have not been proved on account of the distance of the creditors, or for any other good cause. The register in a proper case may deduct and retain this sum without a vote of the creditors, for it is the duty of

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<sup>1</sup> Act of 22 June, 1874, § 4.

<sup>2</sup> *In re Bushey*, 3 B. R. 685.

<sup>3</sup> *In re Hubbell & Chappel*, 9 B. R. 523.

<sup>4</sup> *In re Clark & Binninger*, 6 B. R. 197; s. c. 5 Ben. 389.

<sup>5</sup> *In re Clark & Binninger*, 6 B. R. 204; *in re Abraham B. Clark*, 9 B. R. 67.

the court, and not of the creditors, to protect the rights of the absent.<sup>1</sup>

Full opportunity for exception at the public meeting, or an adjourned session of such meeting, should be afforded to all parties interested. The exception must be certified to court with the register's report. Exceptions will not be received afterward, unless upon special cause shown. If no exceptions are taken, the acts of the register are in themselves acts of the court, without any formal judgment or confirmation.<sup>2</sup>

The report of this meeting must be in the prescribed form, and signed by the creditors or the assignee, as the case may be.<sup>3</sup>

In case a dividend is ordered, the register must within ten days after such meeting prepare a list<sup>4</sup> of creditors entitled to dividend, and calculate and set opposite to the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and forward by mail to every creditor a statement<sup>5</sup> of the dividend to which he is entitled, and such creditor will be paid by the assignee in such manner as the court may direct (§ 5102). The manner of payment has been fixed by the rules. The funds are deposited in bank, and can only be drawn out by a check or warrant signed by the assignee and countersigned by the judge or one of the registers designated for that purpose.<sup>6</sup> This check is called a dividend warrant, and is delivered to the creditor or the person authorized to receive it for him.<sup>7</sup>

Similar proceedings must be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors must then be called by the

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<sup>1</sup> In re William Mills, 11 B. R. 117; s. c. 7 Ben. 452.

<sup>2</sup> In re Bushey, 3 B. R. 685.

<sup>3</sup> Form No. 30.

<sup>4</sup> Forms Nos. 32, 33.

<sup>5</sup> Form No. 31.

<sup>6</sup> Rule XXVIII.

<sup>7</sup> Form No. 31.

court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee must, as soon as may be, convert such estate or effects into money, and within two months after the same are so converted, the same must be divided in the same manner (§ 5093.)

Preparatory to the final dividend, the assignee must submit his account to the court, and file the same, and give notice to the creditors of such filing, and must also give notice<sup>1</sup> that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice; and at such time the court must audit and pass the accounts of the assignee; and such assignee must, if required by the court, be examined as to the truth of such account, and, if found correct, he must be discharged<sup>2</sup> from all liability as assignee to any creditor of the bankrupt. The court must thereupon order a dividend of the estate and effects, or of such parts thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the amount of their respective debts (§ 5096).

If, by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings are not held within the times limited, the court may, upon motion of an interested party, order such meetings with like effect as to the validity of the proceedings as if the meetings had been duly held (§ 5098).

Further dividends may be made in like manner as often as occasion requires. And after the third meeting of creditors no further meeting can be called, unless ordered by the court (§ 5093). No dividend already declared will be disturbed by reason of debts being subsequently proved, but the creditors proving such debts are entitled to a dividend equal to those already received by

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<sup>1</sup> Form No. 36.

<sup>2</sup> Form No. 39.

the other creditors before any further payment is made to the latter (§ 5097). No dividend duly declared can be opened except for some error apparent on the face of the papers, either for the purpose of allowing a payment on a claim which was not duly proved, or for the purpose of providing for the payment of an expense incurred by the assignee.<sup>1</sup>

All creditors whose debts are duly proved and allowed, are entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever (§ 5091). The estate must be divided according to the provisions of the statute, and not according to the State laws relating to the distribution of the assets of decedents.<sup>2</sup> There is no authority in the statute for paying dividends to creditors who have not proved their claims.<sup>3</sup> The passing of the order of dividend is the period that fixes the rights of creditors in respect to that particular dividend. Creditors who prove their claims after that time can not participate in the dividend, although the proofs are made previous to the payment of the money out of the hands of the assignee. This is the only construction that can give consistency to the proceedings, for if additional debts may be brought into the computation, no *pro rata* can ever be fixed, as it would be subject to incessant fluctuations.<sup>4</sup>

No debt proved by a person liable as bail, surety, guarantor, or otherwise, for the bankrupt, can be paid to the person so proving the same until satisfactory evidence is produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct (§ 5091). If the debt consists of a judgment from

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<sup>1</sup> In re B. K. Smith, 15 B. R. 97.

<sup>2</sup> In re Erwin et al. 3 B. R. 580.

<sup>3</sup> In re A. W. Hoyt, 3 B. R. 55.

<sup>4</sup> In re Edmund H. Miller, 1 N. Y. Leg. Obs. 180.

which a writ of error has been taken, and a bond given to stay execution, no dividend can be paid until the writ of error is determined.<sup>1</sup>

In the order for a dividend, the following claims are entitled to priority or preference, and to be first paid in full, in the following order: 1st. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under the statute, and for the custody of property. 2d. All debts due to the United States, and all taxes and assessments under the laws thereof. 3d. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State. 4th. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. 5th. All debts due to any persons, who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if the bankrupt law had not been passed (§ 5101). The right to priority is not waived by proving the debt.<sup>2</sup> The United States is entitled to priority, although it does not prove its debt, no matter what the form of indebtedness may be. It need not exhaust collaterals held by it, and may claim payment out of the separate estate of a resident partner, although its claim is against a firm of which an alien is a member.<sup>3</sup> If a party purchases an article duty free, and is compelled to pay the duty, in order to get possession of the property, he is entitled to be subrogated to the right of the United States to priority,<sup>4</sup> although he proved his debt as unsecured.<sup>5</sup> This priority is only allowed out of

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<sup>1</sup> In re Daniel Sheehan, 8 B. R. 345.

<sup>2</sup> Harrison v. Sterry, 5 Cranch, 289; s. c. Bee, 244.

<sup>3</sup> Lewis v. U. S. 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.

<sup>4</sup> In re Kirkland, Chase & Co. 14 B. R. 139.

<sup>5</sup> In re Kirkland, Chase & Co. 14 B. R. 157.

the estate of the bankrupt; therefore, where a fund is derived from the sale of property which is subject to specific liens, the lien creditors must be first paid in its distribution.<sup>1</sup> The claim of a laborer employed by a brickmaker is entitled to priority;<sup>2</sup> but that of a surveyor of wood is not.<sup>3</sup> The claim of an apprentice for work done beyond the time fixed by the master as reasonable, under an agreement for a specific compensation, is entitled to priority, as the claim of an operative.<sup>4</sup> If the claim arises under an entire contract for labor, and for the services of a team, it can not be apportioned, and is not entitled to priority.<sup>5</sup> A party who has taken an assignment of the claims of several operatives is entitled to priority on each claim.<sup>6</sup> A father is entitled to priority for the services rendered by his minor son as an operative.<sup>7</sup>

There has been considerable discussion in regard to the right of partnership creditors to share in the separate estate of a member of the firm who is a bankrupt individually and separately; but the weight of authority at present seems to be in favor of such right where there is no solvent partner and no joint estate. Their debts are provable, and the estate must, by the express terms of the statute, be distributed among all creditors whose debts are duly proved.<sup>8</sup> Where the bankrupt has taken all the property and agreed to pay all the debts of the firm, the firm creditors may avail themselves of the contract, and prove their claims against his estate.<sup>9</sup> The rule in regard

<sup>1</sup> In re William McConnell, 9 B. R. 387.

<sup>2</sup> In re S. Brown, 3 B. R. 720; s. c. 4 Ben. 142.

<sup>3</sup> In re Blackman Bros. 6 C. L. N. 18.      <sup>4</sup> In re Steiner, 1 Penn. L. J. 368.

<sup>5</sup> In re Blackman Bros. 6 C. L. N. 18.

<sup>6</sup> In re S. Brown, 3 B. R. 720; s. c. 4 Ben. 142.

<sup>7</sup> In re Harthorn, 4 B. R. 103.

<sup>8</sup> In re Downing, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207; in re Jewett, 1 B. R. 491; in re Goedde & Co. 6 B. R. 295; in re George Rice, 9 B. R. 373; in re Knight, 8 B. R. 436; s. c. 2 Biss. 518; in re William Mills, 11 B. R. 74; Tucker v. Oxley, 5 Cranch, 34; s. c. 1 Cranch C. C. 419; in re R. S. Pease, 13 B. R. 168; in re Collier, Taylor & Co. 12 B. R. 266; contra, in re Byrne, 1 B. R. 464.

<sup>9</sup> In re Wm. Downing, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. B. T.

to the distribution of the joint and separate property only applies where the joint estates as well as the separate estate is before the court for distribution.<sup>1</sup> But if there is both a joint and a separate estate, the partnership creditors are entitled solely to be paid out of the partnership estate; and the separate creditors are solely entitled to be paid out of the separate estate.<sup>2</sup>

When the partnership is in bankruptcy, after deducting the whole of the expenses and disbursements out of the whole amount received by the assignee, the net proceeds of the joint stock must be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner must be appropriated to pay his separate creditors; and if there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance must be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance must be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner must be applied to the payment of his separate debts (§ 5121). It is of no consequence whether there are several proceedings by or against the partners or only one, for in either case the rights of creditors are precisely the same.<sup>3</sup>

A creditor holding a partnership bond, by express terms, joint and several, for a partnership debt, may re-

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207; in re George Rice, 9 B. R. 373; in re Walter P. Long & Co. 9 B. R. 227; s. c. 7 Ben. 141.

<sup>1</sup> Lewis v. U. S. 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618; in re R. S. Pease, 13 B. R. 168.

<sup>2</sup> In re William Ingalls, 5 Law Rep. 401; in re Henry B. Williams, 5 Law Rep. 402.

<sup>3</sup> In re Edward P. Morse, 13 B. R. 376.

ceive dividends from the separate estates.<sup>1</sup> A creditor who has split up a partnership debt, and taken a partnership note for one part, and individual notes for the other part, is entitled to receive dividends from the estates of the respective makers according to the terms of the respective notes.<sup>2</sup> A creditor holding a partnership note, indorsed by the several partners, is entitled to receive dividends from both the joint and separate estates, and will not be required to make an election.<sup>3</sup> The right of a party holding two valid obligations to the benefit of both is founded both in law and in justice, and he may ordinarily prosecute all his remedies until he obtains complete satisfaction. When a part of the obligation, however, is paid by the indorser or the principal, as the case may be, the claim against the estate of the other is only for the balance that remains unpaid, and not for the whole debt.<sup>4</sup> If the obligation is given by the partners individually and not by the firm name, it is only provable against their individual estate, although the consideration passed to the firm.<sup>5</sup> But where a firm uses funds belonging to an estate of which one partner is executor, with full knowledge of its character, it is liable therefor, and the beneficiaries may prove their claim either against the firm, or against the individual estate of the partner who was executor.<sup>6</sup> When the intention of the contracting parties is that the firm shall be bound, and the obligation is within the scope

<sup>1</sup> In re Bigelow et al. 2 B. R. 371; s. c. 3 Ben. 146; s. c. 2 L. T. B. 41.

<sup>2</sup> Mead v. National Bank of Fayetteville, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108; Stevenson v. Jackson, 9 B. R. 255.

<sup>3</sup> Mead v. National Bank of Fayetteville, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108; in re Howard, Cole & Co. 4 B. R. 571; s. c. 2 L. T. B. 161; Emery v. Canal Nat. Bank, 7 B. R. 217; s. c. 5 L. T. B. 419; in re Bradley, 2 Biss. 515; in re Peter Farnum, 6 Law Rep. 21.

<sup>4</sup> In re Howard, Cole & Co. 4 B. R. 571; s. c. 2 L. T. B. 161; in re Peter Farnum, 6 Law Rep. 21.

<sup>5</sup> In re Bucyrus Machine Co. 5 B. R. 303; in re Hugh T. Herrick, 13 B. R. 312.

<sup>6</sup> In re Wm. A. Webb & Co. 2 B. R. 614; s. c. 2 L. T. B. 87; in re Edmund H. Miller, 1 N. Y. Leg. Obs. 38.



of the partnership business, the obligation will bind the firm in whatever form it may be made, whether signed by the partners jointly, or with the firm name, or by one alone. The presumption which arises from the form of the obligation, that the creditor elected to look to the partners individually, may be overcome by proof that no such election was made. It may be shown that the note of an individual partner was taken with the intention of looking to the firm for the payment of the debt. Where the partners sign a note with their individual names, or one draws a bill and the other accepts it, for a partnership object, the obligation may be treated for all purposes as a partnership debt.<sup>1</sup> If a party takes the note of one partner without knowing that the money is for the benefit of the firm, he cannot prove a claim against the firm after he has obtained judgment on the note.<sup>2</sup> A joint individual bond of all the partners is not a claim against the partnership estate.<sup>3</sup> A judgment against the partners individually and others constitutes a several debt as to the partners and cannot be proved against the firm.<sup>4</sup> If the separate estate of one partner is more than enough to pay his separate debts at the amounts proved, as they stood at the time of the adjudication of bankruptcy, the surplus is to be added to the partnership estate, and applied to the payment of the partnership debts before paying the interest that has accrued on the separate debts since that time.<sup>5</sup> If there are no joint assets, the partnership creditors may share *pari passu* with the individual creditors.<sup>6</sup> If the firm assets are merely sufficient to pay the costs, the rule is the same as if there were no joint assets,<sup>7</sup> but the

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<sup>1</sup> In re Henry Warren, 2 Ware, 322.

<sup>2</sup> In re Hugh T. Herrick, 13 B. R. 312.

<sup>3</sup> In re E. P. & E. M. Tesson, 9 B. R. 378.

<sup>4</sup> In re Hugh T. Herrick, 13 B. R. 312.

<sup>5</sup> In re Berrian et al. 44 How. Pr. 216; s. c. 6 Ben. 297.

<sup>6</sup> In re Collier, Taylor & Co. 12 B. R. 266.

<sup>7</sup> In re McEwen & Sons, 12 B. R. 11; s. c. 6 Biss. 294.

costs will be apportioned to each estate.<sup>1</sup> If there are any joint funds, no matter how small the joint fund may be, the firm creditors can not share in the individual estates.<sup>2</sup>

Where only one creditor has proved his claim, he is entitled to be paid in full, if there are funds enough for that purpose; if there are not enough he takes the whole.<sup>3</sup> If a surplus remains after satisfying all the debts at the amount as proved, it should be applied to the payment of interest to be computed on the claims from the date of the adjudication.<sup>4</sup> What disposition shall be made of the balance that remains after the payment of all the creditors who have proved their debts, in a case where there are names of creditors placed upon the schedule who have not proved their debts, can scarcely be considered as a settled question yet. Such cases are rare, and the authorities are conflicting; some holding that it should be held for the unproved claims,<sup>5</sup> and others that it should be paid to the bankrupt.<sup>6</sup> It is the evident intent of the statute that there shall be further dividends only when additional assets come to hand (§ 5093), and that the estate must be wound up and settled at some definite period. The only persons who can be recognized as creditors are those who have proved their debts. The mere statement of a liability upon the schedule does not make any person a technical creditor, or entitle him to a dividend. It would seem, therefore, that when all the claims proved are paid in full, the estate stands in exactly the same condition as if all creditors had been paid in full, and that the balance which may remain belongs to the bankrupt. The presumption

<sup>1</sup> In re Elijah E. Smith, 13 B. R. 500.

<sup>2</sup> In re Albert Marwick, 2 Ware, 233; in re Elijah E. Smith, 13 B. R. 500.

<sup>3</sup> In re Haynes, 2 B. R. 227; s. c. 1 L. T. B. 121; in re James, 2 B. R. 227; s. c. 1 L. T. B. 121.

<sup>4</sup> In re R. M. & S. R. Town, 8 B. R. 40; in re Edward Hagan, 10 B. R. 383.

<sup>5</sup> In re Haynes, 2 B. R. 227; s. c. 1 L. T. B. 121; in re James, 2 B. R. 227; s. c. 1 L. T. B. 121.

<sup>6</sup> In re A. W. Hoyt, 3 B. R. 55; *Steevens v. Earles*, 25 Mich. 40.

is that the unproved claims have been paid in full previously, although the bankrupt may have forgotten the fact. In order to obtain the balance, the bankrupt must file a petition, duly verified, setting forth his reasons for believing that other creditors do not wish to prove their claims, and asking that it be paid to him. Before such payment is made, it must be shown that the creditors have had due notice of the proceedings in bankruptcy, and an opportunity to prove their claims.<sup>1</sup>

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<sup>1</sup> In re A. W. Hoyt, 3 B. R. 55.

## CHAPTER XIV.

### COSTS.

THE funds deposited with the register, marshal, and clerk are considered in all cases where they come out of the bankrupt's estate as a part of the estate, and the assignee is charged therewith, and is not allowed for any disbursement therefrom, except upon the production of proper vouchers from those officers respectively, given after the due allowance of their respective bills.<sup>1</sup> Ten days before the day fixed for the consideration of the assignee's final account, or at any other time fixed by the court on its own motion, or on the application of any person interested, the clerk, marshal, and register must file with the clerk a statement of fees, including prospective fees for final distribution, which must exhibit, by items, each service and the fee charged for it, and the amount received. The clerk must tax each fee-bill, allowing none but such as are provided for by the Rules, which taxation is conclusive, reserving to the party interested exceptions to the report, which must be decided by the court. Any money received by either of the officers mentioned in excess of lawful fees or compensation, must be ordered by the judge to be paid into court, and such order may be enforced, if necessary, by attachment as for contempt.<sup>2</sup> No allowance can be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as a disbursement.<sup>3</sup> This provision applies to both voluntary and involuntary cases.<sup>4</sup>

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<sup>1</sup> Rule XXIX; Anon. 1 B. R. 123; in re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461; in re Appold, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83.

<sup>2</sup> Rule XXX.    <sup>3</sup> Rule XXX.    <sup>4</sup> In re R. Frederick Gies, 12 B. R. 179.

An attorney for a voluntary bankrupt is not entitled to any priority on account of services rendered in the preparation of the petition and schedules, for he is neither a clerk nor an operative; and the costs, fees, and expenses provided for in the act are those incurred by and due to the register, clerk, assignee, and marshal, and not those due to the bankrupt's attorney for services in connection with the proceedings.<sup>1</sup> No matter how meritorious or necessary the services may have been, the claim stands on the same footing as the claim of any other creditor.<sup>2</sup> He may, however, demand and receive a reasonable compensation before rendering his services, and the payment will be valid.<sup>3</sup> It has been said that he may even include compensation for services already rendered,<sup>4</sup> but this is exceedingly questionable. It has been decided that he can not take a mortgage to secure the payment of his fees,<sup>5</sup> but it is difficult to see upon what grounds this decision can be sustained.<sup>6</sup> The conveyance is not a preference, for it does not secure a pre-existing debt. Being founded upon a present consideration, it would ordinarily be valid. There is only one objection that can be taken to it. The only ground upon which it can possibly be set aside is, that it is made for the purpose of preventing the property from coming to the assignee. But this objection will not lie if the fee is proper and reasonable.<sup>7</sup> If it is so excessive and extravagant as to manifest a recklessness and indifference in regard to the estate, the law will un-

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<sup>1</sup> *In re Heirschberg*, 1 B. R. 642; s. c. 2 Ben. 466; *in re New Lamp Chimney Co.* 3 A. L. J. 343; *in re Hale & Wiggins*, 5 Law Rep. 403; *in re R. Frederick Gies*, 12 B. R. 179; *contra*, *in re Kennedy et al.* 20 Pitts. L. J. 193.

<sup>2</sup> *In re Thos. C. Evans*, 3 B. R. 261; *in re Jaycox & Green*, 7 B. R. 140.

<sup>3</sup> *In re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; *in re James Thompson*, 13 B. R. 300.

<sup>4</sup> *In re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; *in re Sidle*, 2 B. R. 220.

<sup>5</sup> *In re Thos. C. Evans*, 3 B. R. 261.

<sup>6</sup> *In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.

<sup>7</sup> *In re Keefer*, 4 B. R. 389; *Flournoy v. Newton*, 8 Geo. 306; *Lyon v. Marshall*, 11 Barb. 241.

doubtedly set it aside as being the result of a fraudulent combination between the bankrupt and his attorney.<sup>1</sup> The appearance fee of twenty dollars is not allowable in cases of voluntary bankruptcy.<sup>2</sup>

The decisions in regard to an allowance for disbursements in cases of voluntary bankruptcy are difficult to understand or reconcile. In one case disbursements to the amount of \$100 were disallowed, though it is evident that they were paid to the officers of the court as fees.<sup>3</sup> In another case the register was held to have authority to pass an order to allow disbursements for such fees.<sup>4</sup> In the last case it was decided that the application for the allowance must be made to the court.<sup>5</sup> It is not clear for what fees the disbursements were made, though all seem to have been the usual advances required to be made in cases of voluntary bankruptcy.

It is the duty of the bankrupt to see that his property is preserved until the appointment of an assignee, and if it is necessary that he should employ other persons to assist him, it is just that they should receive a compensation out of the estate. In order to justify the allowance of such a claim, it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate in the interest of the general creditors, and not in the interest of any creditor or class of creditors; and the extent, value, and necessity of such services must be clearly established.<sup>6</sup> If there is no satisfactory proof upon which the court can fix and allow any specific sum for such services, the peti-

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<sup>1</sup> Triplet v. Hanley, 1 Dillon, 217; Goodrich v. Wilson, 14 B. R. 555; s. c. 119 Mass. 429.

<sup>2</sup> Gordon, McMillan & Co. v. Scott & Allen, 2 B. R. 86; s. c. 1 L. T. B. 99.

<sup>3</sup> In re Heirschberg, 1 B. R. 642; s. c. 2 Ben. 466; in re R. Frederick Gies, 12 B. R. 179.

<sup>4</sup> In re Lane, 2 B. R. 309; s. c. 3 Ben. 98.

<sup>5</sup> In re Rosenberg, 3 B. R. 236; s. c. 3 Ben. 14; in re New Lamp Chimney Co. 2 A. L. J. 343.

<sup>6</sup> In re Jaycox & Green, 7 B. R. 140.

tion may be dismissed, without prejudice to any subsequent application.<sup>1</sup>

The assignee is entitled to be allowed all the expenses necessarily incurred, and all the necessary disbursements made by him in the execution of his trust (§ 5099) Rent for the use of premises, to store goods of the bankrupt, from the commencement of the proceedings in bankruptcy until the time when he surrenders them,<sup>2</sup> and expenses incurred in putting the property into a salable condition,<sup>3</sup> or in publishing the notice of his appointment or in recording the assignment, or in advertising sales of the assets, or for stationery and postage,<sup>4</sup> or in the custody of the property,<sup>5</sup> are all allowed. Compensation for the services of an auctioneer will depend entirely upon the custom of the locality, and the circumstances of each case.

He is also entitled to an allowance for his services on all moneys received and paid out by him; for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars (§ 5100) This commission can be calculated but once upon the amount of moneys received and paid, and not upon both the receipt and payment thereof.<sup>7</sup> The compensation for receiving and paying out money is limited to this commission, graduated according to the amount.<sup>8</sup> The commission on moneys paid out can only be allowed on the amount of debt canceled, and not on the amount of debt proved.<sup>9</sup>

<sup>1</sup> In re Jaycox & Green, 7 B. R. 140.

<sup>2</sup> In re Laurie et al. 4 B. R. 32; s. c. Lowell, 404.

<sup>3</sup> Foster v. Ames, 2 B. R. 455; s. c. Lowell, 313.

<sup>4</sup> In re Davenport, 3 B. R. 77; s. c. 2 L. T. B. 136.

<sup>5</sup> In re David B. Williams, 2 B. R. 229; s. c. 1 L. T. B. 113.

<sup>6</sup> In re Pegues, 3 B. R. 80; s. c. 2 L. T. B. 136; in re Sweet et al. 9 B. 48.

<sup>7</sup> Rule XXX.

<sup>8</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B.

<sup>9</sup> In re Davenport, 3 B. R. 77; s. c. 2 L. T. B. 136.

In addition to his commissions, the assignee is allowed the following fees, to wit :

For serving or sending notices to creditors, or publishing the same, when required to be done by the assignee, fifteen cents, which includes postage and stationery.

For each hour necessarily employed in making inventory or supplemental inventory of bankrupt's property, or verifying marshal's inventory, one dollar.

For each folio of inventory or supplemental inventory made by assignee, twenty cents.

For all services in designating the exempt property of a bankrupt, and filing report thereon, five dollars.

For attending a general meeting of creditors, three dollars.

For every deed for real estate sold, two dollars.

For drawing and filing each monthly report, one dollar.

For drawing and filing each quarterly report, not exceeding four, unless specially allowed, five dollars.

For each general account, submitted to a creditors' meeting, not exceeding two, unless specially allowed, ten dollars.

For all services in paying a general dividend, or executing an order of final distribution, and making report thereon, including all disbursements, five dollars; in addition, for each creditor to whom a dividend is paid, twenty-five cents.

No allowance can be made to the assignee for custody of the bankrupt's property, except necessary disbursements in relation thereto. The necessity and reasonableness of disbursements must in all cases be passed upon by the court.<sup>1</sup>

In special cases where great care and exertion have been required on the part of the assignee, for which the fees are not a sufficient compensation, the district judge,

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<sup>1</sup> Rule XXX.



with the concurrence of the circuit justice or judge, may make such additional allowance as in his judgment is a fair compensation for the services, having regard to the amount of assets, the amount of labor required, and the special circumstances of the case.<sup>1</sup>

If any assignee fails or neglects to well and faithfully discharge his duties in the sale or disposition of property he forfeits all fees and emoluments to which he might be entitled in connection with such sale. If he in any manner in violation of his duty unfairly or wrongfully sells or disposes of, or in any manner fraudulently or corruptly combines, conspires, or agrees with any person or persons with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, upon proof thereof, he forfeits all fees or other compensation for any and all services in connection with the estate.<sup>2</sup>

If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he is not obliged to proceed therein until the necessary funds are advanced, or satisfactorily secured to him (§ 5100). The funds must be advanced by the party for whom the services are to be performed.<sup>3</sup>

The assignee may apply to the court in the first instance for authority to employ professional or clerical assistance, but the court could do but little more than grant such authority in general terms, leaving the instances in which such assistance may be employed largely to the discretion of the assignee, as emergencies might arise making such assistance necessary. Such authority the assignee possesses without such an order, under his general powers, subject, however, to the control of the court. Such power must be used by him cautiously, and in the exercise of a sound discretion, and with the understanding

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<sup>1</sup> Rule XXX.

<sup>2</sup> Act of June 22, 1874, § 4.

<sup>3</sup> In re Hughes, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

that any abuse of it will be corrected by the court, when applied to for authority to charge the estate for such assistance. No general rule can be given, defining the circumstances under which and the extent to which the assignee is at liberty to charge the assets in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies.<sup>1</sup> Fees for the assistance of an attorney are not allowed without the most satisfactory evidence to show the necessity for legal aid on the part of the assignee and the actual rendition of the services.<sup>2</sup> As a general rule, no charge can be allowed for professional services which were rendered prior to his appointment; but, under special circumstances, services may be included which were rendered as far back as the time of the filing of the petition.<sup>3</sup>

The intention of the statute is that the disbursements of the assignee in administering the estate shall be submitted to the creditors at a general meeting. An application for an allowance for expenses and for disbursements for clerical, or professional, or other services, should accompany his report submitted at such a meeting, and will not in general be allowed in any other way.<sup>4</sup> It should contain a brief statement of the circumstances out of which the necessity for the disbursement or the employment of assistance arose, and from which the reasonableness of the amount claimed therefor may appear, and should be verified.<sup>5</sup>

All accounts of assignees are to be referred, as of course, to the register for audit, unless otherwise specially ordered by the court.<sup>6</sup> The register has the power to

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<sup>1</sup> In re B. B. Noyes, 6 B. R. 277.

<sup>2</sup> In re Davenport, 3 B. R. 77; s. c. 2 L. T. B. 136; Rule XXX; in re Priscilla G. Drake, 14 B. R. 150; in re Merchants' Ins. Co. 6 Biss. 252.

<sup>3</sup> In re N. Y. Mail Steamship Co. 2 B. R. 554.

<sup>4</sup> In re Hubbell & Chappel, 9 B. R. 523; in re B. B. Noyes, 6 B. R. 277.

<sup>5</sup> In re B. B. Noyes, 6 B. R. 277.

<sup>6</sup> Rule XIX; in re Cobwell, 15 B. R. 92.

audit and pass accounts of assignees (§ 4998), to take evidence concerning expenses and charges against the bankrupt's estate, and to order the payment of the salary wages of persons in the employment of the assignee. Consequently he may hear and determine such an application for disbursements, when it is uncontested.<sup>2</sup> The duty enjoined upon the register is to audit, not simply to adjudicate—to hear and examine, not on one side only, but on both sides. The duty is not only judicial but ministerial, administrative. The word "audit" is never applied to the action of a court. It implies executive as well as judicial action. If the act of auditing implied only judicial action, no more would be required of a register than that he take such evidence as the parties see fit to submit, and pass upon the same basing his decision upon such evidence alone. But an auditing officer proceeds to examine an account for the purpose of ascertaining in any way he may be able, without regard to established forms or technical rules, what sum ought in fairness to be allowed. The word, as used in the statute, is used in this accepted sense. In auditing an account, the register may therefore cross-examine witnesses and summon such other witnesses as he may deem proper.<sup>3</sup>

There are some disbursements made after the filing of the petition and before the appointment of the assignee which may be charged against the estate, and are entitled to be paid in full out of the assets. The title of the assignee relates back to the commencement of the proceedings, and he is the debtor by relation for all such expenses. Rent for the use of premises to store goods belonging

<sup>1</sup> Rule V.

<sup>2</sup> *In re B. B. Noyes*, 6 B. R. 277; *in re Henry H. Stafford*, 13 B. R. 378.

<sup>3</sup> *In re John J. Staff*, 43 How. Pr. 110; s. c. 5 Ben. 574.

<sup>4</sup> *In re Fortune*, 2 B. R. 662; s. c. Lowell, 306.

the estate,<sup>1</sup> and the charges for keeping cattle,<sup>2</sup> are instances of such disbursements. Advances and expenditures made to discharge liens and preserve and benefit the estate, by a party whose relation to the property justified such advances and expenditures, are an equitable claim and lien upon the estate.<sup>3</sup> It has even been held that the bankrupt court, in the exercise of its equitable jurisdiction, may require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed, upon the ground that he received the benefit and should sustain the burden.<sup>4</sup>

The marshal serves the court of bankruptcy as a messenger. The statute and the rules designate the fees appertaining to the office, and he can not claim fees other than those thus designated for services rendered under the statute. The marshal is entitled to the same fees as are allowed for similar service by section eight hundred and twenty-nine of the Revised Statutes, as modified by section five thousand one hundred and twenty-six, including additional fees allowed by the latter section for distinct services.<sup>5</sup>

These fees are: 1st, for service of warrant, two dollars (§ 5126). The warrant provided for in this clause is the warrant issued in a voluntary or an involuntary case, and perhaps also the provisional warrant. The marshal may also charge his actual expenses incurred in traveling and these must be equitably apportioned among all the cases attended to at the same time.<sup>6</sup> 2d, for all necessary travel, at the rate of five cents a mile, each way (§ 5126). Mileage

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<sup>1</sup> In re Laurie et al. 4 B. R. 32; s. c. Lowell, 404; in re Merrifield, 3 B. R. 98; Walker v. Barton, 3 B. R. 265; in re Walton et al. 1 B. R. 557.

<sup>2</sup> In re J. C. Mitchell, 8 B. R. 47.

<sup>3</sup> In re Thos. B. Gregg, 3 B. R. 529; s. c. 1 L. T. B. 298.

<sup>4</sup> In re Fortune, 2 B. R. 662; s. c. Lowell, 306; in re Nounnan & Co. 6 B. R. 579; s. c. 4 L. T. B. 228; s. c. 1 Utah Ter. 44.

<sup>5</sup> Rule XXX.

<sup>6</sup> In re Donahue et al. 8 B. R. 453.

may be charged for serving the order to show cause, the injunction and the adjudication. The travel must be necessary travel. The language of the statute precludes all constructive mileage whatsoever. The distance by the nearest traveled route from the place of service to the place of return is the necessary travel meant by the statute. The place of service should be stated in the return, in order that the correctness of the mileage charged may appear on its face. If the marshal has two or more processes in his hands at the same time, and in the same matter or proceeding, which may be served at the same time and place, he can charge mileage but once. If the services of any one of such processes makes additional travel necessary, he may charge for such additional travel, but no more.<sup>1</sup> He may charge for mileage although the process is sent by mail to a deputy at the place of service and returned in the same manner.<sup>2</sup> No charge for constructive mileage can be made when the notices for creditors are served by mail.<sup>3</sup> 3d, for each written note to a creditor named in the schedule, ten cents (§ 5126). A charge of ten cents per folio for each notice can not be made on the ground that it is a copy. the notices are not copies; each is an original.<sup>4</sup> The amount paid for printing them may be allowed as necessary expenses.<sup>5</sup> 4th, for custody of property, publication of notices, and other services, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court; and the oath of the messenger is not conclusive as to the necessity of such expenses (§ 5126). This provision relates exclusively to

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<sup>1</sup> In re Donahue et al. 8 B. R. 453; contra, in re Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15; in re F. L. Hellmer, 13 Pac. L. R. 35.

<sup>2</sup> In re Donahue et al. 8 B. R. 453; in re Anon. 4 C. L. N. 210.

<sup>3</sup> In re A. Alexander, 3 B. R. (quarto), 20.

<sup>4</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>5</sup> In re Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15.

disbursements of money by the marshal in the manner and for the purposes named; in all other respects, his official return is *prima facie* sufficient. Mileage may therefore be allowed without an affidavit that it was necessary and actually performed.<sup>1</sup> The word expenses implies an expenditure or payment, and nothing can be allowed as expenses which is not shown affirmatively to have been necessary, and just and reasonable in amount, and to have been actually paid. The sum actually paid a keeper or keepers to watch property in custody, not exceeding \$2.50 a day, may be taxed and allowed by the court upon satisfactory proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it, that the keeper actually continued in charge of it for the time specified, and that the sum charged therefor is reasonable for the services, and has been actually paid by the marshal,<sup>2</sup> but the entire amount can not exceed \$2.50 a day. At the rate of \$2.50 a day, the marshal can only be allowed for one keeper.<sup>3</sup> A keeper may be appointed, although the goods might be safely stored.<sup>4</sup> Postage, envelopes, and costs of advertising the notices are always allowed.<sup>5</sup> The expense of procuring copies of the advertisements and making affidavit to the return are taxable. There is no fee for attendance.<sup>6</sup> The marshal is also entitled to one dollar for each hour necessarily employed in making an inventory of the bankrupt's property, and twenty cents for each folio of the inventory. He is not entitled to one dollar per hour for the time of persons whom he employs to take an inventory.<sup>7</sup> But if a keeper is employed in taking an in-

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<sup>1</sup> In re Donahue et al. 8 B. R. 453.

<sup>2</sup> In re Lowenstein et al. 3 B. R. 269; s. c. 3 Ben. 422; in re Eugene Comstock, 9 B. R. 88.

<sup>3</sup> In re Johnston & Hall, 12 B. R. 345.

<sup>4</sup> In re Hare, 43 How. Pr. 86.

<sup>5</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>6</sup> In re Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15.

<sup>7</sup> In re Johnston & Hall, 12 B. R. 345.

ventory, and is entitled to be paid therefor, his allowance as keeper must be diminished proportionately.<sup>1</sup> The marshal is not entitled to any allowance for the time spent with the assignee in verifying the inventory, but may charge at the rate of ten cents per folio for a copy of the inventory furnished to the assignee.<sup>2</sup> He is also allowed one dollar for each hour actually and necessarily employed in personal attention in taking care of the bankrupt's property,<sup>3</sup> but this allowance can only be made when he in person actually and necessarily gives his personal attention to the property, and does not cover personal attention by a deputy.<sup>4</sup> No other allowance can be made for the custody of property except for actual disbursements.<sup>5</sup> The marshal can not charge a commission on the value of property for its custody.<sup>6</sup> The marshal is entitled to an allowance of two per cent. on all money disbursed by him.<sup>7</sup> The requirement that the return shall be accompanied by vouchers whenever practicable is in addition to the requirements of the statutes.<sup>8</sup> Whenever vouchers are omitted, the marshal must in his return state the reasons for such omission, or produce testimony for that purpose, so that the court may judge of the practicability of his obtaining vouchers.<sup>9</sup>

The clerk may charge the fees allowed by section eight hundred and twenty-eight, for services required by the bankrupt law, and not otherwise provided for.<sup>10</sup> His fees are regulated by that statute and by the rules (§ 5124). He is entitled to charge ten cents for filing each paper and

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<sup>1</sup> In re F. L. Hellmer, 13 Pac. L. R. 35; contra, in re Johnston & Hall, 12 B. R. 345.

<sup>2</sup> In re Johnston & Hall, 12 B. R. 345.

<sup>3</sup> Rule XXX.

<sup>4</sup> In re Johnston & Hall, 12 B. R. 345.

<sup>5</sup> Rule XXX.

<sup>6</sup> In re Johnston & Hall, 12 B. R. 345.

<sup>7</sup> In re Johnston & Hall, 12 B. R. 345.

<sup>8</sup> In re Donahue et al. 8 B. R. 453.

<sup>9</sup> In re Eugene Comstock, 9 B. R. 88.

<sup>10</sup> In re Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15; in re A. Alexander, 3 B. R. (quarto), 20.

making an entry thereof in the docket, and fifteen cents for making an entry upon the paper itself, of the day and hour of the filing. This entry must be made for every paper filed with him, which has not been previously filed with the register, and so indorsed by him.<sup>1</sup> Every writing which relates to one particular subject is such a paper, no matter of how many sheets it is composed. Thus, the petition is one paper; Form No. 4, another; Form No. 5, another, and so on.<sup>2</sup> For all processes issued by him, he may charge one dollar. This includes the warrant.<sup>3</sup> It has been decided that Form No. 45 is embraced by it;<sup>4</sup> but this form is a subpoena rather than a writ, and the proper fee appears to be twenty-five cents instead of one dollar. He is entitled to this fee, although he delivers the blanks, with his signature and the seal of the court attached, to the register, who fills them up and sends them out. For recording the assignment in those districts where it is recorded, his fee is fifteen cents per folio. For each notice required to be sent by mail, when signed by him, he can charge fifteen cents.<sup>5</sup> For every copy of any paper in proceedings in bankruptcy, his fee is ten cents per folio. The charge for the order of reference,<sup>6</sup> certificate of discharge, and copy of the assignment, should be regulated by these rates.<sup>7</sup>

For entering memoranda or minutes of the register, his fee is ten cents for each folio. For sending notices by mail to creditors, his fee is fifteen cents for each notice. For inserting notice in newspaper, his fee is fifty cents, but the necessary cost of advertising must be paid as an expense of the estate. For taxing costs in each case, his

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<sup>1</sup> Rule I.

<sup>2</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>3</sup> In re A. Alexander, 3 B. R. (quarto), 20.

<sup>4</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>5</sup> Rule XXX.

<sup>6</sup> Form No. 4.

<sup>7</sup> In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; in re A. Alexander, 3 B. R. (quarto), 20.



fee is one dollar, and in addition to that, ten cents for each folio of the taxed bill.<sup>1</sup>

The register is entitled to five dollars for filing and entry of the general order of reference, and for office rent, stationery, and other incidental expenses of proceedings, conducted in the usual office of the register, to be allowed once only in any cause.<sup>2</sup>

When the proceedings are not conducted in the usual office of the register, but in some other city or town, he is allowed for each day employed in going, attending, and returning, five dollars, and traveling and incidental expenses of himself and of any clerk or other officer attending him. These expenses and fees must be apportioned among the cases by the judge.<sup>3</sup>

Every register must keep an accurate account of his traveling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties in any case or number of cases which may be referred to him; and make return of the same under oath, with proper vouchers, when vouchers can be procured, on the first Tuesday in each month.<sup>4</sup>

For each day's service while actually employed under a special order of the court, he is entitled to a sum to be allowed by the court, not exceeding five dollars.

But only one *per diem* allowance can be made for a single day, and no duplication of such allowances can be made for different cases on the same day. No other allowance can be made for clerk hire except as above stated.<sup>5</sup>

The construction of this provision depends entirely upon the meaning of the term special order. The proper meaning seems to be, an order directing him to perform services not in the course of his general duties. The order of reference<sup>6</sup> merely directs him to perform the duties

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<sup>1</sup> Rule XXX.

<sup>2</sup> Rule XXX.

<sup>3</sup> Rule XXX.

<sup>2</sup> Rule XXX.

<sup>4</sup> Rule XII.

<sup>5</sup> Form No. 4.

which the statute imposes upon him, and is not such a special order.<sup>1</sup> He is entitled to this allowance while acting under a special order to examine the papers and report upon their regularity,<sup>2</sup> or to take charge of the bankrupt's property and superintend sales thereof,<sup>3</sup> or to perform any other service specially required of him by the court.

For every affidavit to any petition, schedule or other proceeding in bankruptcy, except proof of debt by a creditor or his agent, he is allowed twenty-five cents for each oath and certifying the same.<sup>4</sup>

His fee for taking depositions, including proofs of debts, and examination of bankrupt or his wife, twenty cents for each folio, and twenty-five cents for certifying proof of debt as satisfactory.<sup>5</sup>

He is also allowed ten cents for every summons or subpoena requiring the attendance of a bankrupt, a bankrupt's wife, or a witness for examination, for each person summoned.<sup>6</sup>

His fee for examining petition and schedules, and certifying to their correctness, is three dollars. He is entitled to two dollars for every warrant in bankruptcy, or other process, issued and directed to the marshal, not including warrants for payment of money or anything other than process.<sup>7</sup> He can not make any extra charge for the list of creditors inserted in it, for this is a part of the warrant itself.<sup>8</sup> He is also entitled to the same fee for a supplemental warrant.<sup>9</sup>

For each day in which a general meeting of creditors is held, and attending same, he is allowed three dollars.<sup>10</sup>

<sup>1</sup> In re Bellamy, 1 B. R. 113; s. c. 1 Ben. 474; in re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>2</sup> In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>3</sup> In re Loder Brothers, 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.

<sup>4</sup> Rule XXX.

<sup>5</sup> Rule XXX.

<sup>6</sup> Rule XXX.

<sup>7</sup> Rule XXX.

<sup>8</sup> In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>9</sup> In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>10</sup> Rule XXX.

The meeting is one to which all the creditors are summoned. An attendance for the purpose of conducting an examination is not a meeting,<sup>1</sup> neither is the appearance of creditors to show cause against the granting of a discharge.<sup>2</sup> It has, however, been held, that three dollars may be charged for the day on which the bankrupt first attends before the register.<sup>3</sup> The allowance is for the day, and not for the meeting. It has accordingly been held that where two meetings are held in the same case on one day, the charge can only be three dollars.<sup>4</sup> This fee can not be increased by means of an order designed to be special.<sup>5</sup>

His fee for notification to assignee of his appointment is fifty cents.<sup>6</sup> The fee allowed for an assignment of bankrupt's effects is one dollar.<sup>7</sup> He is entitled to one dollar for every bond with sureties.<sup>8</sup> The approval of the assignee's bond entitles him to this allowance.<sup>9</sup> For every application for a general meeting of creditors, he is entitled to one dollar.<sup>10</sup> This fee is limited to the application, and when two meetings are called upon one application, only fifty cents can be charged.<sup>11</sup> The register is entitled to this allowance whenever he orders the creditors to meet.<sup>12</sup> It has been decided that there is no application for the first meeting, and that this fee can not be allowed for calling it.<sup>13</sup> He is not entitled to the fee for making an order for an examination,<sup>14</sup> or an order to show cause against the grant-

<sup>1</sup> *In re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277.

<sup>2</sup> *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>3</sup> *In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.

<sup>4</sup> *In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25;  
*in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>5</sup> *In re A. Alexander*, 3 B. R. (quarto), 20.

<sup>6</sup> Rule XXX.

<sup>7</sup> Rule XXX.

<sup>8</sup> Rule XXX.

<sup>9</sup> *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>10</sup> Rule XXX.

<sup>11</sup> *In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>12</sup> *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

<sup>13</sup> *In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>14</sup> *In re Macintire*, 1 B. R. 11; s. c. 3 Berr. 277.

ing of a discharge.<sup>1</sup> For copies of depositions and other papers, he is allowed ten cents each folio.<sup>2</sup> His fee for each notice which the register may be required to send to or serve on any creditor, which includes for postage and stationery, is fifteen cents.<sup>3</sup> He is entitled to the same mileage in making personal service, when necessary, as is allowed by law to the marshal.<sup>4</sup> For inserting notice in newspaper when required, he is allowed fifty cents, and the costs of advertising are allowed as part of the expenses of the estate.<sup>5</sup> His fee for each order for a general dividend is three dollars.<sup>6</sup> The order for a dividend is that which is made by the creditors or the assignee at a regular meeting. He is allowed three dollars for computation of dividends, and ten cents in addition thereto for each creditor.<sup>7</sup> For every judicial order made by a register, necessary or proper to be made by him, and not herein otherwise specially provided for, and not including matters merely ministerial, he is entitled to one dollar.<sup>8</sup> His fee for every discharge, where there is no opposition, is two dollars.<sup>9</sup> He is allowed one dollar for auditing the accounts of assignees, and one dollar for each additional hour necessarily employed therein after the first hour.<sup>10</sup> His fee is one dollar for every certificate of question to the district court or judge, under sections five thousand and nine, and five thousand and ten of the Revised Statutes, and twenty cents for each folio in such certificate.<sup>11</sup> His fee for each folio of memorandum sent to the clerk is ten cents.<sup>12</sup> He is also allowed ten cents for countersigning check of assignee.<sup>13</sup> For filing every paper not previously filed by the clerk, and marking and identifying every exhibit, he is entitled to ten cents.<sup>14</sup>

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<sup>1</sup> In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

<sup>2</sup> Rule XXX.

<sup>3</sup> Rule XXX.

<sup>4</sup> Rule XXX.

<sup>5</sup> Rule XXX.

<sup>6</sup> Rule XXX.

<sup>7</sup> Rule XXX.

<sup>8</sup> Rule XXX.

<sup>9</sup> Rule XXX.

<sup>10</sup> Rule XXX.

<sup>11</sup> Rule XXX.

<sup>12</sup> Rule XXX.

<sup>13</sup> Rule XXX.

<sup>14</sup> Rule XXX.

The fees of the officers are entitled to priority in all cases where there are funds (§ 5101). The fees of the register, marshal and clerk must be paid or secured in all cases before they can be compelled to perform the services required of them.<sup>1</sup> It is further provided that the fees of the register shall have priority of payment over all other claims out of the estate, and before a warrant issues the petitioner must deposit with the clerk of the court fifty dollars as security for the payment thereof. The petition may be filed even though the deposit is not made. The deposit is merely an act preliminary to the issuing of the warrant.<sup>2</sup> This deposit must be delivered by the clerk to the register to whom the case is referred.<sup>3</sup> If there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued must pay the same, and the court may issue an execution against him to compel payment to the register (§ 5124).

The enumeration of the fees in the statute does not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in sections 5124, 5125, and 5126, in classes of cases to be named in their rules and orders (§ 5127). They have the power to regulate the fees payable, and the charges and costs to be allowed, with respect to all proceedings in bankruptcy, not exceeding the rate of fees now allowed by law for similar services in other proceedings (§ 4990). But they must not in any case exceed the rate now allowed for similar services.<sup>4</sup>

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<sup>1</sup> Rule XXX.

<sup>2</sup> In re C. H. Preston, 6 B. R. 545.

<sup>3</sup> Rule XXX.

<sup>4</sup> In re John W. Dean, 1 B. R. 249 ; s. c. 1 L. T. B. 9.

## CHAPTER XV.

### DISCHARGE.

If no debts have been proved, or if no assets have come to the hands of the assignee, the bankrupt may apply for a discharge at any time after the expiration of sixty days from the adjudication of bankruptcy, and before the final disposition of the cause.<sup>1</sup> The time is to be computed from the date of the adjudication, and not from the time of the commencement of proceedings in bankruptcy.<sup>2</sup>

The construction given to the phrase, no assets, is that no money has been received or paid out by the assignee, on account of the estate.<sup>3</sup> Neither an outstanding claim,<sup>4</sup> nor an uncollected note,<sup>5</sup> nor certificates of stock,<sup>6</sup> upon which nothing has been realized up to the time of the application, constitute assets withing the meaning of this provision of the statute, although the assignee may have reason to believe that he will, at some future time, be able to realize something out of them.

Where both debts have been proved, and assets have come to the hands of the assignee, the application can not be made until after the expiration of six months from the date of the adjudication.<sup>7</sup>

The computation of the time must, in all cases, be so made as to exclude the day of the adjudication of bank-

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<sup>1</sup> Act of July 26, 1876.

<sup>2</sup> *In re Bodenheim et al.* 2 B. R. 419; s. c. 2 L. T. B. 64.

<sup>3</sup> *In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347.

<sup>4</sup> *In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

<sup>5</sup> *In re Dodge*, 1 B. R. 433; s. c. 2 Ben. 347.

<sup>6</sup> *In re Solis*, 3 B. R. 761; s. c. 4 Ben. 143.

<sup>7</sup> *In re Bodenheim et al.* 2 B. R. 419; s. c. 2 L. T. B. 64.

ruptcy, and include the day when the application can or should be made, according to the phraseology of the statute, unless this last day falls on a Sunday, Christmas Day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time must be reckoned exclusive of that day also (§ 5013).

An involuntary, as well as a voluntary, bankrupt may apply for a discharge.<sup>1</sup> The application must be by a petition in the prescribed form,<sup>2</sup> addressed to the judge, and properly entitled in the cause. It should state the day on which the petitioner was adjudged bankrupt, and the date on which it is filed. If it is made within six months from the date of the adjudication of bankruptcy, it must allege either that no debts have been proved, or that no assets have come to the hands of the assignee. A member of a firm need not pray for a discharge from his partnership debts in precise words, for if he asks for a discharge from all his provable debts, he virtually prays for a discharge from his partnership debts.<sup>3</sup> The petition must be signed by the petitioner, but need not be sworn to. When it is sworn to, the affidavit is usually according to the form appended to the petition in involuntary bankruptcy. The general practice is to file the petition in court.<sup>4</sup> In some districts it is referred to the register, but generally it is retained in court. At the time of filing the petition the bankrupt must deposit money enough to secure the costs of serving the notices upon the creditors. A list of all creditors who have proved their debts must also be obtained from the assignee or register, and filed with the petition. If the assignee refuses to furnish such list, the register, upon the application of the bankrupt

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<sup>1</sup> In re S. D. Clark, 3 B. R. 16; s. c. 2 Biss. 73; in re Bunster, 5 B. R. 82 s. c. 41 How. Pr. 406; s. c. 5 Ben. 242.

<sup>2</sup> Form No. 51.

<sup>3</sup> In re Wm. H. Pierson, 10 B. R. 107.

<sup>4</sup> In re Bellamy, 1 B. R. 113; s. c. 1 Ben. 474.

has the power to pass an order directing him to make it out and deliver it to the bankrupt.<sup>1</sup>

The court, as soon as it finds that the application is properly filed, orders notice to be given by mail to all creditors who have proved their debts, and by publication, at least once a week, in such newspapers as may be designated, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors reside, to appear upon a certain day, appointed for that purpose, and show cause why a discharge shall not be granted to the bankrupt (§ 5109).

The order to show cause must be in the prescribed form.<sup>2</sup> It must have the seal of the court and the signature of the clerk even when it is issued by the register, and may be made returnable at his office. The newspapers in which the notices are to be published must be designated, and be selected from among those named in the rules of court.<sup>3</sup> The rules provide that the second and third meetings may be called at the same time that the notices are sent to the creditors,<sup>4</sup> but these meetings are now everywhere dispensed with in cases where there are no assets.

The notices must be sent by the clerk,<sup>5</sup> and should be in the prescribed form.<sup>6</sup> These notices are only sent to those creditors who have proved their debts.<sup>7</sup> If no creditors have proved their debts, the publication is the only notice required.<sup>8</sup> A return is always made to the register. The clerk's certificate is sufficient evidence that the notices were duly mailed.<sup>9</sup> Copies of the advertisements in the

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<sup>1</sup> *In re Blaisdell et al.* 6 B. R. 78; s. c. 42 How. Pr. 274; s. c. 5 Ben. 420.

<sup>2</sup> Form No. 51.

<sup>3</sup> *In re Bellamy*, 1 B. R. 98, 113; s. c. 1 Ben. 426, 474.

<sup>4</sup> Rule XXV.

<sup>5</sup> *In re Bellamy*, 1 B. R. 98, 113; s. c. 1 Ben. 426, 474.

<sup>6</sup> Form No. 52.

<sup>7</sup> *In re McIntyre*, 1 B. R. 151; s. c. 1 Ben. 543; *Morse v. Presby*, 25 N. H. 299.

<sup>8</sup> *Anon.* 1 B. R. 123.

<sup>9</sup> *In re Townsend*, 1 B. R. 216; s. c. 2 Ben. 62; s. c. 1 L. T. B. 2.



newspapers are always filed with the return, and in some districts are verified by the oath of the printer.<sup>1</sup>

If the application has been made within six months from the date of the adjudication, the bankrupt must, upon the return day or before the granting of the discharge, procure and file a return of the assignee, certifying that, at the date of the filing of the petition for a discharge, there were either no assets in his hands or no debts proved, as the case may be.<sup>2</sup> He must also appear before the register, and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in the statute as a ground for withholding such discharge, or as invalidating such discharge if granted (§ 5113). This oath is merely an item of indispensable evidence, without which the discharge can not be granted, and should be taken and subscribed before the certificate of conformity can be granted.<sup>3</sup> It may, however, be produced and filed at the hearing.<sup>4</sup> It should be administered whether specifications have been filed or not.<sup>5</sup> No discharge can be granted if the bankrupt dies before he takes this oath.<sup>6</sup> But if he dies after he has taken the final oath, the discharge may be granted as of a date when he was alive.<sup>7</sup> When specifications are withdrawn after the oath is taken, it must be again taken and subscribed after the withdrawal.<sup>8</sup>

After the oath has been taken, it is the duty of the register to examine all the papers in the case, including the clerk's return of the service of the order to show cause, and certify whether all the proceedings have been regular,

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<sup>1</sup> In re Bellamy, 1 B. R. 98; s. c. 1 Ben. 426.

<sup>2</sup> In re Bellamy, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

<sup>3</sup> In re Bellamy, 1 B. R. 98; s. c. 1 Ben. 426.

<sup>4</sup> In re Robert A. Sutherland, 1 Deady, 573.

<sup>5</sup> In re Eugene Pulver, 2 B. R. 313; s. c. 3 Ben. 65.

<sup>6</sup> In re O'Farrell et al. 2 B. R. 484; s. c. 3 Ben. 191; s. c. 1 L. T. B. 159.

<sup>7</sup> Young v. Ridenbaugh, 11 B. R. 563; s. c. 3 Dillon, 239.

<sup>8</sup> In re Machad, 2 B. R. 352.

and whether the bankrupt has complied with all the requirements of the statute. This is called the certificate of conformity, and can only be made under a special order of the court.<sup>1</sup> This certificate is made essential by the requirement that no discharge shall be granted unless it appears that the bankrupt has in all things conformed to his duty under the statute, and is entitled under its provisions to be discharged (§ 5114). The court must take notice of its own record, not only of irregularities in the proceedings, but of all other matters, which prevent the granting of a discharge, and is legally bound to make a thorough examination for the purpose of ascertaining that no valid ground exists for withholding it. Any admission, in the course of an examination, of loss of money by gambling, since the passage of the statute, prevents a discharge.<sup>2</sup> These were matters that appeared upon the face of the record, and were made the grounds for refusing a discharge, although no creditor interposed an objection.

Irregularities in the course of the proceedings affect the jurisdiction of the court, and must be judicially noticed. Thus, defects in the service of the warrant, whether in the publication or in the mailing of the required notices,<sup>3</sup> or the reference of the case to the wrong register,<sup>4</sup> or an application either premature or too late, make the proceedings void. In all such cases, all proceedings subsequent to the irregularity must be set aside, and the same proceedings must, if possible, be had again with due regularity. It certainly seems to be the better opinion that the failure of the assignee to publish the notice of his appointment properly, or to call the second and third meetings of creditors at the required times, does not affect the regularity of the proceedings.<sup>5</sup>

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<sup>1</sup> In re Bellamy, 1 B. R. 98, 113; s. c. 1 Ben. 426, 474.

<sup>2</sup> In re Wilkinson, 3 B. R. 286.

<sup>3</sup> In re Erie L. Hall, 2 B. R. 192.

<sup>4</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>5</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; contra, in re Bellamy, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

What the statute means by declaring that the bankrupt must conform to his duty under the statute has been frequently considered, but never carefully defined. The duty is the duty of the party as a bankrupt, and not his duty simply as a debtor before he becomes a bankrupt. For violations of his duty as a debtor, other penalties are imposed; for violations of his duty as a bankrupt, the penalty imposed is the withholding of his discharge. The question to be determined, then, is what is the duty of a bankrupt under the statute? It must be confessed that this is difficult to define or determine; and the decisions do not render much assistance. He is made at all times subject to the orders of the court (§ 5104), and it would seem that this penalty might have been intended as a punishment for disobedience; yet it has been gravely questioned whether there is any other punishment in such case except commitment for contempt.<sup>1</sup> It certainly appears to be a greater violation of his duty to disobey an order than to be negligent in making the officers perform their duties; yet he has been made responsible, in some cases, for a failure of the assignee to perform his duties, such as to publish the proper notice of his appointment,<sup>2</sup> or to file his account,<sup>3</sup> or to properly notify creditors to attend meetings for distribution.<sup>4</sup> Those duties which the statute specially imposes upon other persons can scarcely be said to be duties of the bankrupt. He is only made responsible for an omission to perform his own duties, and not for omissions of others to perform their duties, except so far as a failure may affect the regularity of the proceedings and the jurisdiction of the court to grant a discharge. The statute has imposed duties upon various officers and other persons, but it has not, either expressly or impliedly, made him a general supervisor to overlook and superin-

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<sup>1</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>2</sup> In re Bellamy, 1 B. R. 98; s. c. 1 Ben. 390.

<sup>3</sup> In re Pierce & Holbrook, 3 B. R. 258.

<sup>4</sup> In re Bushey, 3 B. R. 685.

tend their labors. It is his duty to file correct schedules,<sup>1</sup> and a discharge should be withheld until he has complied with this requirement. A discharge would probably also be withheld for a failure to surrender his property to the assignee, or to execute any necessary papers, or for fraudulently withdrawing himself from the jurisdiction of the court. He is made responsible for the failure of his wife to attend for examination, unless he can prove that he was unable to procure her attendance.<sup>2</sup> No discharge can be refused or delayed by reason of the non-payment of any fees except the fee for his certificate of discharge.<sup>3</sup>

When the order to show cause is made returnable before the register, he must make a certificate of the proceedings, stating whether or not there is any opposition. When specifications have been filed, the certificate of conformity should except the particulars covered by the specifications.<sup>4</sup> In those districts where a final examination is made, it is generally held at this stage of the proceedings;<sup>5</sup> but generally there is no final examination, nor any examination at all, unless specially ordered.<sup>6</sup> If there are no assets, or the assets have all been distributed, the register must file all the papers in the case in the office of the clerk of the district court, and these, together with those on file in the clerk's office, constitute the record in each case. It is the duty of the clerk to cause them to be bound together.<sup>7</sup> The register must see that they are filed. He ought not deliver them to the bankrupt, or a creditor, or any person representing them.

Any creditor may file specifications against the granting of a discharge (§ 5111). There has been considerable discussion as to whether a creditor must prove his debt

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<sup>1</sup> In re Connell, 3 B. R. 443; in re Redfield, 2 Ben. 72.

<sup>2</sup> In re Van Tuyl, 2 B. R. 579; s. c. 3 Ben. 237.

<sup>3</sup> Rule XXX.

<sup>4</sup> In re E. Pulver, 2 B. R. 313; s. c. 3 Ben. 65. <sup>5</sup> In re Brandt, 2 B. R. 215.

<sup>6</sup> U. S. v. Clark, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

<sup>7</sup> Rule VII.

before he can oppose the discharge, but the weight of authority, as well as of argument, is against imposing this requirement. The statute clearly gives to any person who has a suit pending in a State court, at the time of the commencement of proceedings in bankruptcy, the right to keep aloof from the court of bankruptcy and prosecute his action already instituted.<sup>1</sup> Since he has this right, he must necessarily have the power to protect his interests against the injurious effects of a discharge, which might materially affect him. Yet, if he proves his debt he surrenders his right (§ 5105). The justices of the Supreme Court foresaw this, and provided that all persons in interest might file specifications.<sup>2</sup> In general a person who has not proved his debt, is not deemed a creditor, and has no interest in the mode of settling the estate, or in the dividend, or in the acts or omissions of any of the parties to the proceedings. But he has an interest in the discharge, because if it is granted, he will be barred. He may hold security which is inadequate for its full payment, and yet is not in a condition to be advantageously liquidated, or he may have many other good reasons for not proving his debt or concerning himself with the proceedings, and yet it may be of the greatest importance to him that the bankrupt should not receive his discharge. Upon principle, therefore, he ought to be heard on that issue. The statute evidently contemplates it, because it gives every creditor whose debt is provable, whether proved or not, the right to set aside the discharge, at any time within two years, on proving fraud, and that he had no knowledge of the fraud until after the discharge was granted. It is very difficult to maintain that the statute debars a creditor from opposing the discharge before it is granted, when it allows him to do so, afterward upon

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<sup>1</sup> *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.

<sup>2</sup> *In re Boutelle*, 2 B. R. 129.

showing good cause why he did not do it before.<sup>1</sup> If he does not prove his debt, he must show, by affidavit or otherwise, what interest he has in the matter. The interest must be pecuniary, and must be satisfactorily shown.<sup>2</sup>

A creditor of an estate of which the bankrupt was administrator, may oppose the discharge if the probate court has directed a dividend to be made among the creditors of the estate.<sup>3</sup> If a creditor who has assigned his claim as a collateral will have any surplus coming to him after the payment of the debt, he may oppose the discharge.<sup>4</sup> The appointment of a receiver and an assignment of the claim to him does not so divest the creditor of his interest in the claim, but that he can oppose the discharge.<sup>5</sup>

Any creditor who desires to oppose the discharge must enter his appearance on the day when the creditors are required to show cause.<sup>6</sup> This provision is considered as enabling and not prohibitory. If the appearance is not entered by the time specified, the right to appear will be lost, but it may be entered before that time.<sup>7</sup> A request to have an appearance entered, however, can not be made until after the petition for a discharge is filed.<sup>8</sup> This seems to be the orderly course of proceedings. The creditors are not called upon to state their objections until that time. Before that time it is not known whether the bankrupt will apply for a discharge. The application, as it were, institutes a new suit in which there are separate pleadings and distinct issues. There certainly can not be a defense until it is called for, and it is not called for until the petition is filed. In some districts, however, it may

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<sup>1</sup> In re Murdock, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; in re Smith & Bickford, 8 Blatch. 461; in re Samuel Book, 3 McLean, 317.

<sup>2</sup> In re Sheppard, 1 B. R. 439; s. c. 1 L. T. B. 49.

<sup>3</sup> In re John C. Tebbetts, 5 Law. Rep. 259.

<sup>4</sup> In re Traphagen, 1 N. Y. Leg. Obs. 98; s. c. 5 Law. Rep. 323.

<sup>5</sup> In re Traphagen, 1 N. Y. Leg. Obs. 98; s. c. 5 Law. Rep. 323.

<sup>6</sup> Rule XXIV. <sup>7</sup> In re Baum, 1 B. R. 5; s. c. 1 Ben. 274.

<sup>8</sup> In re McVey, 2 B. R. 257; in re Paget, 1 Penn. L. J. 367; in re George Livermore, 5 Law. Rep. 370.

be made at any time after the commencement of the proceedings.<sup>1</sup> The appearance may be in person or by counsel. The direction to enter the opposition may be either verbal or in writing, but an entry of the opposition must be made upon the docket.<sup>2</sup>

The proceedings may be adjourned<sup>3</sup> without requiring creditors to enter their appearance. The rights of creditors upon the adjourned day are the same in all respects as upon the return day.<sup>4</sup> An adjournment *sine die* terminates the proceedings. The petition for a discharge will remain good, but a new order to show cause must be issued.<sup>5</sup> The proceedings are sometimes adjourned to enable creditors to make a more complete examination of the bankrupt or of witnesses.<sup>6</sup> The application for an adjournment may be made by a creditor, although a protest has been made against the allowance of his claim.<sup>7</sup> No adjournment should be made except for good cause shown,<sup>8</sup> and any abuse of this power by the register will be corrected by the court.<sup>9</sup> An appearance not duly authorized,<sup>10</sup> or not entered within the prescribed time,<sup>11</sup> will be disregarded. But the court has a discretion in this matter, and may allow an appearance to be entered even after the time for filing specifications has expired. There

<sup>1</sup> In re Baum, 1 B. R. 5; s. c. 1 Ben. 274.

<sup>2</sup> In re McVey, 2 B. R. 257.

<sup>3</sup> In re Mawson, 1 B. R. 271.

<sup>4</sup> In re Thompson, 1 B. R. 323; s. c. 2 Ben. 166; in re Tallman, 1 B. R. 540; s. c. 2 Ben. 404; in re James M. Seabury, 10 B. R. 90; in re S. S. Houghton, 10 B. R. 337.

<sup>5</sup> In re Seckendorf, 1 B. R. 626; s. c. 2 Ben. 462.

<sup>6</sup> In re Seckendorf, 1 B. R. 626; s. c. 2 Ben. 462; in re Belden & Hooker, 4 Ben. 225.

<sup>7</sup> In re Belden & Hooker, 4 Ben. 225.

<sup>8</sup> In re Mawson, 1 B. R. 271.

<sup>9</sup> In re W. E. Robinson, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18.

<sup>10</sup> In re Eidom, 3 B. R. 106.

<sup>11</sup> In re McVey, 2 B. R. 257; in re Smith & Bickford, 5 B. R. 20; in re Robert A. Sutherland, 1 Dedy, 573; Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166; in re James M. Seabury, 10 B. R. 90; in re Joseph Buxbaum, 13 B. R. 477.

fore, if a creditor files specifications and then declines to prosecute them, other creditors may be permitted to enter their appearance in support of the specifications, although the time for entering an appearance is passed.<sup>1</sup> If no appearance is entered, the proceedings may be continued from time to time, to suit the convenience of the bankrupt. A day is appointed for the creditors to show cause, but such appointment does not fix the day for hearing the application for the discharge.<sup>2</sup> The proper entry of an appearance suspends further proceedings until the time for filing specifications.

The specifications must be in writing and set forth the grounds of the opposition (§ 5111). They must state the name of the opposing creditor.<sup>3</sup> They must be filed within ten days after the last day on which an appearance can be entered, unless the time is enlarged by the district court.<sup>4</sup> They can only be filed by those who have entered their appearance properly. If they are not filed within the prescribed time, they can not be entertained.<sup>5</sup> If a creditor who has regularly entered his appearance fails, through inadvertence, to file them within the prescribed time, he may, on showing proper cause, be allowed to file them *nunc pro tunc*.<sup>6</sup> Although the register can not hear any question concerning the allowance of a discharge (§ 4999), the specifications may, nevertheless, be filed with him.<sup>7</sup> The practice varies according to the place where the order to show cause is returnable. If it is made returnable in court, they are filed there; if it is made returnable before the register, they are filed with him. He proceeds with the case, notwithstanding the specifications,

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<sup>1</sup> In re S. S. Houghton, 10 B. R. 337; in re Lewis Levin, 14 B. R. 385; contra, Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166.

<sup>2</sup> In re Robert A. Sutherland, 1 Deady, 573.

<sup>3</sup> In re S. S. Houghton, 10 B. R. 337.

<sup>4</sup> Rule XXIV.

<sup>5</sup> In re McVey, 2 B. R. 257.

<sup>6</sup> In re Grefe, 2 B. R. 329.

<sup>7</sup> In re Bellamy, 1 B. R. 98; s. c. 1 Ben. 426.



until his duties are performed,<sup>1</sup> and then the case, by virtue of the specifications, is removed into court.<sup>2</sup> If the specifications are not filed within the prescribed time, and the time for filing is not extended, the cause progresses as though there were no opposition.<sup>3</sup> If there is no opposition, the grounds for withholding a discharge are regarded as not existing,<sup>4</sup> unless they appear upon the face of the proceedings.

The specifications must be in the prescribed form,<sup>5</sup> and set forth some act which is a valid ground for withholding the discharge. This must be some one of the acts specifically designated by the statute (§ 5110), or some defect or irregularity that defeats the jurisdiction of the court over the debtor,<sup>6</sup> or deprives it of the power to grant the discharge in the present condition of the proceedings.<sup>7</sup> Objections which go to the power of the court to grant the discharge, may also be made by motion.<sup>8</sup> Proceedings in bankruptcy are strictly statutory proceedings, and if the formal and jurisdictional requirements of the statute have been met and complied with, the discharge can only be refused for some ground specially set forth in the statute. Hence the existence of fiduciary debts,<sup>9</sup> or fraud in the creation of the debt,<sup>10</sup> is not a sufficient ground. By the express terms of the statute, however, no discharge can be granted if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any

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<sup>1</sup> In re Puffer, 2 B. R. 43.      <sup>2</sup> In re Mawson, 1 B. R. 265; s. c. 2 Ben. 122.

<sup>3</sup> In re McVey, 2 B. R. 257.

<sup>4</sup> In re Schuyler, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.

<sup>5</sup> Form No. 53.

<sup>6</sup> In re Little, 2 B. R. 294; s. c. 3 Ben. 25.

<sup>7</sup> In re Anson Martin, 2 B. R. 548.

<sup>8</sup> In re Woolums, 1 B. R. 496.

<sup>9</sup> In re Elliott, 2 B. R. 110.

<sup>10</sup> In re Rathbone, 1 B. R. 324; s. c. 2 Ben. 138.

books or writings relating thereto ; or if he has been guilty of any frauds or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of the petition and inventory, excepting such property as he is permitted to retain under the provisions of the statute ; or if he has caused, permitted, or suffered any loss, waste, or destruction thereof ; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution ; or if, since March 2, 1867, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made, or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors ; or has removed, or caused to be removed, any part of his property from the district, with intent to defraud his creditors ; or if he has given any fraudulent preference contrary to the provisions of the statute ; or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property ; or has lost any part thereof in gaming ; or has admitted a false or fictitious debt against his estate ; or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge ; or if, being a merchant or tradesman, he has not, at all times, since March 2, 1867, kept proper books of account ; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation ; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against

him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the statute in satisfaction of his debts; or if he has been convicted of any misdemeanor under the statute (§ 5110).

It is not sufficient for the specifications to follow and adopt the language of the statute, nor will they be allowed to be vague and general. They must be precise and definite, and allege facts so distinctly and specifically as to advise the bankrupt of what he must be prepared to meet and resist. They must particularize the facts descriptive of the offense alleged as the ground for withholding the discharge, setting forth as clearly as may be, the time, place, person, property, both as to kind and quality, and the manner in which the act was committed. The facts, and not the evidence to prove them, should be stated. The allegations should also be positive, and so framed that an issue can be raised upon them.<sup>1</sup>

When the specifications deny the right of the bankrupt to apply in the district, they must aver that he resided or carried on business, as the case may be, in some other district for a longer period during the six months next immediately preceding the filing of the petition than he did in the district where the proceedings are pending. An averment that he did not reside or carry on business in the district for six months is too broad. It may be true, and yet he may be entitled to his discharge.<sup>2</sup> An averment that he swore falsely in the affidavit to his petition, schedule, or inventory, or upon any examination, must charge that such false oath was willful. If the alleged false oath was taken in the course of an examination, it must set forth the facts in regard to which it was taken,

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<sup>1</sup> In re Rathbone, 1 B. R. 294; s. c. 2 Ben. 138; in re Eidom, 3 B. R. 106; in re Smith & Bickford, 5 B. R. 20.

<sup>2</sup> In re Burk, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

and charge that they were material.<sup>1</sup> If the specifications charge a concealment of property, they must state, with some particularity, both as to kind and quantity, what property was concealed.<sup>2</sup> When the specifications charge that the bankrupt destroyed, mutilated, or falsified his documents, papers or writings, they must aver that the act was done with intent to defraud his creditors.<sup>3</sup> Specifications which charge that he has not kept proper books of account must aver that he was a merchant or tradesman. Where the objection is that a cash account is wholly wanting, the allegations may be general.<sup>4</sup> Thus, an allegation that the books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no such account whatever was kept for a period of time.<sup>5</sup> If the objection, however, is that certain entries are wanting, or that there are irregularities in the mode of keeping the books, these must be specially pointed out.<sup>6</sup> If the specifications charge that the bankrupt has procured the assent of a creditor to his discharge, or influenced the action of any creditor at any stage of the proceedings, they must aver that he did so by means of a pecuniary consideration or obligation.<sup>7</sup>

As soon as the specifications are filed, the bankrupt must determine what course he will pursue in regard to them. If they are vague and general, he may move to have them stricken out,<sup>8</sup> or rely upon this defense at the trial, for the court will always disregard them.<sup>9</sup> If they

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<sup>1</sup> In re Rathbone, 1 B. R. 324; s. c. 2 Ben. 138; in re Eidom, 3 B. R. 106.

<sup>2</sup> In re Mawson, 1 B. R. 437; s. c. 2 Ben. 332.

<sup>3</sup> In re William H. Marston, 5 Ben. 313.

<sup>4</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>5</sup> In re Belis et al. 3 B. R. 496; s. c. 4 Ben. 53.

<sup>6</sup> In re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

<sup>7</sup> In re Mawson, 1 B. R. 437, 548; s. c. 2 Ben. 332, 412.

<sup>8</sup> In re Waggoner, 1 Ben. 532.

<sup>9</sup> In re Rathbone, 1 B. R. 294; s. c. 2 Ben. 138.

are insufficient in law, he may demur to them,<sup>1</sup> or file exceptions analogous to those allowed in equity.<sup>2</sup> If the creditor finds his specifications are defective, he may, upon application, be allowed to amend them.<sup>3</sup> Whenever the bankrupt sees proper to make the general defense, he commonly does so by means of an answer.

As soon as the issues are made up, the court must make an order as to the entry of the case for trial on the docket, and the time within which the same will be heard and decided.<sup>4</sup> If the bankrupt is dilatory, the creditor may move the court to set the case down for a hearing.<sup>5</sup> The judge may, in his discretion, order any question of fact to be tried at a stated session of the court (§ 5111). A trial by a jury may be directed, and parties may ask for it on the day assigned for a hearing, without having made any previous demand.<sup>6</sup> The burden of proof rests upon the opposing creditor.<sup>7</sup> Evidence in support of the specifications is the only evidence that can be introduced. The creditor is bound by them, and can not go beyond them or produce evidence outside of them.<sup>8</sup> If he has given his assent to any act, he will be estopped from urging it as a ground from withholding the discharge.<sup>9</sup> Where it appears to be due to justice, an amendment of the specifications may be allowed at the trial.<sup>10</sup>

If the bankrupt is successful upon the trial of the specifications, or if there is no opposition to his discharge, there is still, in cases of voluntary bankruptcy, another requirement of the statute that must be complied with before he can obtain his discharge. No discharge can be

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<sup>1</sup> In re McVey, 2 B. R. 257.

<sup>2</sup> In re Rosenfield, 2 B. R. 117; s. c. 1 L. T. B. 100.

<sup>3</sup> In re W. D. Hill, 1 B. R. 275; s. c. 2 Ben. 136.

<sup>4</sup> Rule XXIV.

<sup>5</sup> In re Robert A. Sutherland, 1 Dedy, 573.

<sup>6</sup> In re Lawson, 2 B. R. 113.

<sup>7</sup> In re Okell, 2 B. R. 105; in re George & Proctor, Lowell, 409. .

<sup>8</sup> In re Rosenfield, 2 B. R. 117; s. c. 1 L. T. B. 100.

<sup>9</sup> In re Schuyler, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.

<sup>10</sup> In re Belis et al. 3 B. R. 496; s. c. 4 Ben. 53.

granted to a voluntary bankrupt whose assets are not equal to thirty per centum of the claims proved against his estate upon which he is liable as the principal debtor, without the assent of at least one-fourth in number and one-third in value of his creditors.<sup>1</sup> A debtor who is put into bankruptcy on the petition of his copartner is regarded as a voluntary bankrupt within the meaning of this provision.<sup>2</sup> The value of the assets is to be determined, not by an appraisement made at the time of the filing of the petition,<sup>3</sup> but by such proceeds of the assets as may be in the hands of the assignee at the time of the hearing.<sup>4</sup> In ascertaining the amount, the sum necessary to pay off and discharge all liens must be deducted.<sup>5</sup> The term "assets" is not used to express the net balance to be distributed among the creditors, but means the entire estate of the bankrupt, without any deductions for the costs or expenses of the proceedings.<sup>6</sup> The statute does not permit a fictitious or exaggerated valuation of his assets by the bankrupt, while, on the other hand, if the assets are, at a fair and just estimate, equal to thirty per cent. of the debts proved upon which he is liable as principal debtor, the discharge is not to be denied by reason of any sacrifice made by the assignee or the creditors in converting the assets into cash.<sup>7</sup>

The time of the hearing of the discharge is the return day of the order to show cause, whether that is the original day or an adjourned day, and no claim proved after that time

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<sup>1</sup> Act of June 22, 1874, § 9; in re James Derby, 12 B. R. 241.

<sup>2</sup> In re W. F. Wilson, 13 B. R. 253.

<sup>3</sup> In re Frederick, 3 B. R. 465; s. c. 1 L. T. B. 181; in re Van Riper, 6 B. R. 573.

<sup>4</sup> In re Webb & Taylor, 3 B. R. 720; in re Borden & Geary, 5 B. R. 128; s. c. 5 Ben. 228; in re Van Riper, 6 B. R. 573; vide in re Lincoln & Cherry, 7 B. R. 334; s. c. 2 L. T. B. 241.

<sup>5</sup> In re W. H. Graham, 5 B. R. 155; in re Van Riper, 6 B. R. 573.

<sup>6</sup> In re Kahley et al. 6 B. R. 189; s. c. 3 Biss. 169; contra, in re Vinton, 7 B. R. 138; in re Thompson, 2 Biss. 481.

<sup>7</sup> In re Thompson, 2 Biss. 481; in re Lincoln & Cherry, 7 B. R. 334; s. c. 2 L. T. B. 241.

can be counted among the claims that are to be taken into account in computing the number requisite to a discharge.<sup>1</sup> A party who purchases claims against the bankrupt at a discount, holds them to their full amount.<sup>2</sup> Creditors who have given a release in pursuance of an assignment made before the commencement of the proceedings in bankruptcy, can not be recognized as creditors, for the debts must be existing and unpaid at the time of the hearing.<sup>3</sup> A liability as indorser is not a liability as principal debtor, for such liability is secondary to that of the maker who is the principal debtor.<sup>4</sup>

A certificate of conformity can not be granted, unless the bankrupt, before or at the time of hearing the application for a discharge, tenders or files the assent in writing of the requisite number of such creditors, or shows by the return of the assignee, that his assets equal the required proportion of such debt.<sup>5</sup> A creditor who has given his assent in writing, by which others have been presumptively influenced in giving theirs, has no absolute right to withdraw it even on the day fixed for the hearing.<sup>6</sup>

It is also provided that no person who has been discharged under the statute, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge. But a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bank-

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<sup>1</sup> In re John B. Borst, 11 B. R. 96.

<sup>2</sup> In re Chas. B. Houghton, 5 Law Rep. 321.

<sup>3</sup> In re Aspinwall, 3 Penn. L. J. 212.

<sup>4</sup> In re Lewis B. Loder, 4 Ben. 328.

<sup>5</sup> In re Bunster, 5 B. R. 82; s. c. 41 How. Pr. 406; s. c. 5 Ben. 242; in re Cretiew, 5 B. R. 423; s. c. 2 L. T. B. 137.

<sup>6</sup> In re Brent, 8 B. R. 444; s. c. 2 Dillon, 129.

ruptcy, or who has been voluntarily released therefrom by his creditors, is entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt (§ 5116).

Whenever it appears that the bankrupt has in all things conformed to his duty under the statute, and is entitled to a discharge, the court must grant him a certificate under its seal in the prescribed form (§ 5114). The original order of discharge is retained in court, and a copy is given to the bankrupt.<sup>1</sup> When a partnership is brought into bankruptcy, the certificate of discharge is granted or refused to each partner in the same manner as it would be if the proceedings had been against him alone<sup>2</sup> (§ 5121).

The bankruptcy court has the same inherent power as all other courts to recall its own decrees, or to vary or annul them, as justice may require. A decree allowing a discharge, however, will only be opened upon good cause shown, and for a trial upon the merits, and not upon any mere technical matter.<sup>3</sup>

Any creditor or creditors of the bankrupt, whose debts were proved or provable against the estate in bankruptcy, who see fit to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. This application must be in writing, and specify which, in particular, of the several acts mentioned in section twenty-nine, it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance; and no evidence will be admitted as to any other act, but the application is subject to amendment at the discretion of

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<sup>1</sup> In re J. W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; Pennell v. Percival, 13 Penn. 197.

<sup>2</sup> In re Schofield et al. 3 B. R. 551.

<sup>3</sup> In re Dupee, 6 B. R. 89; Thomas v. Hunter, 3 McLean, 297.



the court. The court must cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same within such time as to the court may seem fit and proper. If, upon the hearing, the court finds that the fraudulent acts, or any of them, set forth by the creditor or creditors against the bankrupt, are proved, and that the creditor or creditors had no knowledge of the same until after the granting of the discharge, judgment must be given in favor of the creditor or creditors, and the discharge must be set aside and annulled. But if the court finds that the fraudulent acts, and all of them, are not proved, or that they were known to the creditor or creditors before the granting of the discharge, then judgment must be rendered in favor of the bankrupt, and the validity of his discharge will not be affected by such proceedings (§ 5120).

It appears to be the better opinion that the power conferred upon the court of bankruptcy to annul the discharge is exclusive, and that the discharge, like any other judgment, can not be impeached, when brought in question in a collateral action by any party who has been properly notified of the pendency of the proceedings in bankruptcy. The statute, it is true, declares that the discharge, if granted, shall not be valid, if the bankrupt has committed any of the acts which would constitute valid grounds for withholding it (§ 5110); but this evidently contemplates the means subsequently provided for annulling it. If this were not so, it would be idle to summon creditors into a special court to set up objections which could be alleged and tried equally as well in any court. There must, moreover, be an end of litigation, a time beyond which certain facts can not be contested. This is the design in appointing one special forum to hear and adjudicate upon such facts, and if they are not raised in the prescribed mode, it is certainly due to justice, and consonant with the intent and spirit of the statute, to hold that they can not be raised

elsewhere. The necessity of meeting and contesting them in every court in which the discharge may be pleaded is a hardship that Congress never intended to impose upon the bankrupt, and is, moreover, so flagrantly unjust and contrary to all the ordinary principles of jurisprudence, that nothing but the plainest and most imperative terms of the statute could justify or warrant such a construction.<sup>1</sup>

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<sup>1</sup> *Corey v. Ripley*, 4 B. R. 503; s. c. 57 Me. 69; *Oates v. Parish*, 47 Ala. 157; *Batchelder v. Low*, 8 B. R. 571; s. c. 43 Vt. 662; *Ocean Nat'l Bank v. Olcott*, 46 N. Y. 12; *Parker v. Atwood*, 51 N. H. 181; *Way v. Howe*, 4 B. R. 677; s. c. 108 Mass. 502; *Alston v. Robinett*, 9 B. R. 74; s. c. 37 Tex. 56; *Hudson v. Bingham*, 8 B. R. 494; s. c. 6 L. T. B. 326; *Dusenbury v. Hoyt*, 10 B. R. 313; s. c. 14 Abb. Pr. (N. S.) 132; s. c. 53 N. Y. 521; s. c. 36 N. Y. Sup. 94; *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223; *Stephens v. Brown*, 11 B. R. 568; s. c. 49 Miss. 597; contra, *Perkins v. Gay*, 3 B. R. 772; s. c. 1 L. T. B. 221; *Beardsley v. Hall*, 36 Conn. 270.

## CHAPTER XVI.

### MODE OF REVISING THE PROCEEDINGS OF THE COURTS IN MATTERS OF BANKRUPTCY.

APPEALS may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed from the circuit courts to the district courts in cases at law, under the jurisdiction created by the statute, when the debt or damages claimed amount to more than five hundred dollars (§ 4980). When the matter decided is of an equitable character, and is, therefore, one which is usually reviewed in the Federal courts by appeal, it may be carried to the circuit court by that mode of transferring cases. When it is a question which, by the system of Federal jurisprudence, is treated as a question of law, as distinguished from equity or admiralty proceedings, it may be carried to the circuit court by a writ of error; but in either case, the debt or damages claimed must amount to more than five hundred dollars.<sup>1</sup> Any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may also appeal from the decision of the district court to the circuit court for the same district (§ 4980). The proceedings in such appeals have been fully treated of heretofore, and need not now be explained again.

These are the only provisions relating to appeals, and from them it is apparent that appellate jurisdiction of decisions of a court of bankruptcy is conferred upon the circuit court in only four classes of cases: 1st. By appeal in cases in equity decided in the district court under the jurisdiction created by the statute; 2d. By writs of error

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<sup>1</sup> Ruddick v. Billings, 3 B. R. 61; s. c. 1 Wool. 330.

in cases at law, decided in the exercise of that jurisdiction; 3d. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4th. By appeal from decisions allowing such claims. In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class, it is given to the dissatisfied creditor; in the fourth, to the dissatisfied assignee. The suits belonging to the first two classes of cases are those of which concurrent jurisdiction is given to the circuit courts and courts of bankruptcy, and other similar suits.<sup>1</sup> The cases at law in which a writ of error may be taken are not merely suits, which the common law recognized among its settled proceedings, but all suits of a similar kind in which legal rights are to be determined, without reference to the particular form of procedure which may be adopted.<sup>2</sup> No appeal lies, when the issue is tried by the court without a jury, from a decision upon a petition in involuntary bankruptcy,<sup>3</sup> or upon a petition for a discharge,<sup>4</sup> or from an order annulling an adjudication of bankruptcy,<sup>5</sup> or from the ratification of a sale by the bankruptcy court,<sup>6</sup> or from a decision in a summary proceeding.<sup>7</sup> A writ of error has been used to review decisions in actions of assumpsit,<sup>8</sup> trover,<sup>9</sup> and an adjudication of bankruptcy where the case was tried before a jury.<sup>10</sup> But if an action at law is tried

<sup>1</sup> In re John Alexander, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; Morgan v. Thornhill, 5 B. R. 1; s. c. 11 Wall. 65; in re York & Hoover, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

<sup>2</sup> Insurance Co. v. Comstock, 8 B. R. 145; s. c. 16 Wall. 258.

<sup>3</sup> In re O'Brien, 1 B. R. 176.

<sup>4</sup> In re J. M. Reed, 2 B. R. 9; Ruddick v. Billings, 3 B. R. 61; s. c. 1 Wool. 330; Coit v. Robinson, 9 B. R. 289; s. c. 19 Wall. 274.

<sup>5</sup> In re Hall, 1 Dillon, 586.

<sup>6</sup> In re York & Hoover, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

<sup>7</sup> Samson v. Blake, 6 B. R. 410; s. c. 9 Blatch. 379; Samson v. Clarke, 6 B. R. 403; s. c. 9 Blatch. 372.

<sup>8</sup> Street v. Dawson, 4 B. R. 207.

<sup>9</sup> Babbit v. Walbrun & Co. 4 B. R. 121; s. c. 1 Dillon, 19.

<sup>10</sup> Insurance Company v. Comstock, 8 B. R. 145; s. c. 16 Wall. 258; Phelps v. Clasen, 3 B. R. 87; s. c. 1 Wool. 204.

before the district court without the intervention of a jury, and no case is stated in the nature of a special verdict, a writ of error will not lie.<sup>1</sup> When the debt or damage claimed does not exceed the sum of five hundred dollars, the decree or judgment of the district court is final and conclusive.<sup>2</sup> An appeal in cases in equity must be from the final decree, and from that only. The language of the statute plainly indicates that it is to be from a decree, and not from any and every order in the progress of the cause.<sup>3</sup> If the decree declares a conveyance void, but directs a reference to a master to take an account of the rents and profits, and to make allowances affecting the rights of the parties, it is not a final decree.<sup>4</sup> The decree must be final, not merely as to all rights in litigation, but as to all parties. If it is not final as to one party, the others can not appeal.<sup>5</sup> No appeal is allowed in any case from the district to the circuit court, unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the opposite party in equity, within ten days after the entry of the decree or decision appealed from, and unless the appellant at the time of claiming the same, also gives bond in manner required by law in cases of such appeals. The appeal must be entered at the term of the circuit court which is first held within and for the district next after the expiration of ten days from the time of claiming the same (§ 4981).

The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district or the circuit court. The regulation of appeals is a regulation of juris-

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<sup>1</sup> Blair v. Allen, 3 Dillon, 101.

<sup>2</sup> Knight v. Cheney, 5 B. R. 305; s. c. 2 L. T. B. 205.

<sup>3</sup> Clark v. Iselin, 9 Blatch. 196; in re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

<sup>4</sup> Platt v. Stewart, 47 How. Pr. 206.

<sup>5</sup> Platt v. Stewart, 47 How. Pr. 206.

diction. The circuit court has no jurisdiction of any appeal in any case under the bankrupt law from the district court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by the statute, within ten days after entry of the decree or decision appealed from.<sup>1</sup> The notice must be given to the opposite party as well as to the clerk.<sup>2</sup> If the requirements of the statute have not been complied with, the appeal may be dismissed upon the motion of the appellee.<sup>3</sup> The words which refer to the entering of the appeal at the next circuit are, however, merely directory. The circuit court obtains jurisdiction by the filing and serving of the notice of appeal.<sup>4</sup> What is required to be filed in the circuit court within the ten days, is the appeal containing a statement of the appellant's claim, and a brief account of what has been done in the district court, and the grounds of appeal. It is not necessary that the transcript of the proceedings shall be filed within the ten days.<sup>5</sup> The district or circuit judge may, in a proper case, enlarge the time for entering the appeal,<sup>6</sup> or the time may be enlarged by agreement.<sup>7</sup> Although the rule is merely directory, still if it is disregarded, the appellee has a *prima facie* ground of dismissal.<sup>8</sup> The district court will not grant a reargument, so that an appeal may be taken from the decree when re-entered, except, perhaps, in extraordinary and extreme cases.<sup>9</sup> But where the omission to take the appeal in time arose from a mistake in selecting the rem-

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<sup>1</sup> In re John Alexander, 3 R. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.

<sup>2</sup> Wood v. Bailey, 12 B. R. 132; s. c. 21 Wall. 640.

<sup>3</sup> In re Kyler, 3 B. R. 46; s. c. 6 Blatch. 514; in re Coleman, 2 B. R. 671; s. c. 7 Blatch. 192; in re Place et al. 4 B. R. 541; s. c. 8 Blatch. 302; Hawkins v. Nat'l Bank, 1 Dillon, 453; Sedgwick v. Fridenburg, 11 Blatch. 77.

<sup>4</sup> Baldwin v. Rapplee, 5 B. R. 19; Barron v. Morris, 14 B. R. 371; s. c. 2 Woods, 354.

<sup>5</sup> Barron v. Morris, 14 B. R. 371; s. c. 2 Woods, 354.

<sup>6</sup> Barron v. Morris, 14 B. R. 371; s. c. 2 Woods, 354.

<sup>7</sup> Baldwin v. Rapplee, 5 B. R. 19.

<sup>8</sup> Barron v. Morris, 14 B. R. 371; s. c. 2 Woods, 354.

<sup>9</sup> In re Troy Woolen Co. 6 B. R. 16; s. c. 5 Ben. 413.

edy, the district court may grant a review of the decree so that a regular appeal may be taken.<sup>1</sup>

Appeals in equity from the district to the circuit court, and from the circuit court to the Supreme Court, are regulated by the rules governing appeals in equity in the courts of the United States.<sup>2</sup> If the appellant, in writing waives his appeal before any decision thereon, proceedings may be had in the court of bankruptcy as if no appeal had been taken (§ 4983).

No writ of error is allowed unless the party claiming it complies with the statutes regulating the granting of such writs (§ 4981). The limitation of ten days applies to writs of error as well as appeals, and due notice thereof must be given in the same manner.<sup>3</sup> The bill of exceptions must show on its face that it was taken at the trial.<sup>4</sup> Questions of fact can not be re-examined on a writ of error. It may be necessary to enable the court to see the principle of law that was decided, to make the facts, to some extent, a part of the record by bill of exceptions, but it is always the law decided that is subject to review, and not the facts.<sup>5</sup> If a bill of exceptions is taken to the rejection of certain evidence, it must set out the evidence so rejected,<sup>6</sup> and if it does not, the defect can not be removed by a petition for a writ of error which forms no part of the bill of exceptions.<sup>7</sup> A motion to dismiss a writ of error can not be made before the return day.<sup>8</sup>

The only other mode of revising the decisions of the courts of bankruptcy is by means of the supervisory

<sup>1</sup> *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

<sup>2</sup> Rule XXVI.

<sup>3</sup> *Insurance Company v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

<sup>4</sup> *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

<sup>5</sup> *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513.

<sup>6</sup> *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

<sup>7</sup> *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

<sup>8</sup> *Globe Ins. Co. v. Cleveland Ins. Co.* 21 I. R. R. 14.

jurisdiction conferred upon the circuit court. The several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy may be pending, have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district, when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not (§ 4986). The only construction which gives due effect to all parts of the act relating to revisory jurisdiction, is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit courts, the appellate jurisdiction which has already been explained and defined; and, on the other, brings within that category all decisions of the courts of bankruptcy, or the district judge at chambers, which can not be thus reviewed upon appeal or writ of error.<sup>1</sup> Except in a regular action at law, or suit in equity, or case of decision upon a disputed claim, the circuit courts have a general and universal superintendence of the proceeding of the courts of bankruptcy,<sup>2</sup> and of all questions that may be decided by them. They may review a decision upon a petition in involuntary bankruptcy where there is no jury trial,<sup>3</sup> or upon a petition for a discharge,<sup>4</sup> or upon a petition for a stay of proceedings in a pending suit,<sup>5</sup> or upon a petition for a release from arrest,<sup>6</sup> or upon a summary petition,<sup>7</sup> or upon

<sup>1</sup> In re John Alexander, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81. .

<sup>2</sup> Bill v. Beckwith, 2 B. R. 241; Littlefield v. Del. & Hud. Canal Co. 4 B. R. 257.

<sup>3</sup> Perry v. Langley, 2 B. R. 596; Farren v. Crawford, 2 B. R. 602; in re Craft, 2 B. R. 111; s. c. 6 Blatch. 177; Sutherland v. Kellogg, 2 Biss. 405; Thornhill v. Bank, 5 B. R. 367; s. c. 1 Woods, 1; in re Picton, 11 B. R. 420; s. c. 2 Dillon, 548.

<sup>4</sup> In re H. Reed, 2 B. R. 9; Ruddick v. Billings, 3 B. R. 61; s. c. 1 Wool. 330; in re Greenfield, 6 Blatch. 287; Littlefield v. Del. & Hudson Canal Co. 4 B. R. 257; Coit v. Robinson, 9 B. R. 289; s. c. 19 Wall. 274.

<sup>5</sup> In re W. E. Robinson, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18.

<sup>6</sup> In re J. H. Kimball, 2 B. R. 354; s. c. 6 Blatch. 292; s. c. 3 Ben. 554.

<sup>7</sup> Bill v. Beckwith, 2 B. R. 241; in re Kerosene Oil Co. 3 B. R. 125; s. c. 6 Blatch. 521.



a petition for the sale of property.<sup>1</sup> When issues are, however, framed upon an involuntary petition, or a petition for a discharge, and tried by a jury, they can not be revised by this mode.<sup>2</sup> Nor can questions which arise in the progress of the case be reviewed, except by a writ of error after a final judgment.<sup>3</sup> One creditor can not in this manner obtain a revision of a decision of the district court allowing the claim of another creditor.<sup>4</sup> An interlocutory order made by the district court in a suit in equity can not be thus revised.<sup>5</sup> These examples are sufficient to illustrate the character and extent of the jurisdiction. The statute confers a complete supervision over all the proceedings of the court of bankruptcy within the limits above mentioned. There is not only a general superintendence, but, lest that word might not include everything, there is a general jurisdiction conferred. This extends not only to all cases, but to all questions arising under the statute. In other words, the circuit court may review the whole case and decide on it, or it may assume jurisdiction of any particular question arising in the progress of the case.<sup>6</sup> It is immaterial whether the decision is an interlocutory order or a final decree. In conferring jurisdiction upon the circuit court for the district where the proceedings are pending, the statute simply describes the particular circuit court in which the jurisdiction shall be exercised, and not the state of the matters to be revised.<sup>7</sup> The jurisdiction of the circuit court to review summary proceedings is not limited by any measure of the value of the property involved.<sup>8</sup>

It is clear, however, that the superintendence and ju-

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<sup>1</sup> In re John Alexander, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.

<sup>2</sup> Morgan v. Thornhill, 5 B. R. 1; s. c. 11 Wall. 65.

<sup>3</sup> In re Oregon B. P. & P. Co. 14 B. R. 394; s. c. 3 Saw. 529.

<sup>4</sup> In re Troy Woolen Co. 9 B. R. 329; s. c. 9 Blatch. 191; Bank v. Cooper, 9 B. R. 529; s. c. 20 Wall. 171.

<sup>5</sup> Warren v. Tenth National Bank, 9 Blatch. 193.

<sup>6</sup> Ruddick v. Billings, 3 B. R. 61; s. c. 1 Wool. 330.

<sup>7</sup> Littlefield v. Del. & Hud. Canal Co. 4 B. R. 257.

<sup>8</sup> Samson v. Blake, 6 B. R. 410; s. c. 9 Blatch. 379.

risdiction can only be exercised over proceedings already pending in the court of bankruptcy.<sup>1</sup> They are revisory of cases and questions arising in the court of bankruptcy, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which, in a special and perhaps more restricted form, was given in the sixth section of the bankrupt act of 1841, wherein authority was given to adjourn any point or question arising in any case in bankruptcy into the circuit court, to be there heard and determined; and it may be that, under the present statute, the presentation of such questions and the jurisdiction of the circuit court over them, does not, as in the former, depend upon the discretion of the court of bankruptcy. But, in either view, the questions, or cases presenting such questions, must arise in the court of bankruptcy; and their determination in the circuit court is either for the guidance or control of the court of bankruptcy. This is not a jurisdiction to assume the conduct of the proceedings, or to specifically enforce or execute the orders or decrees of that court. For that purpose the court of bankruptcy has ample and exclusive power.

The statute does not blend or confound the two courts in the administration of the bankrupt law. The courts are distinct under that statute, as under all others, and exercise a separate jurisdiction, each in its own sphere. The proceedings for a review of the decree of the court of bankruptcy bring the decree, and whatever orders are involved therein, before the circuit court, but do not operate to transfer the entire proceedings in bankruptcy into the circuit court, to be there continued as in a court of first instance. If the decree is affirmed, it stands as the decree of the court of bankruptcy, and not of the circuit court; and is to be carried into due execution by the former, and not

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<sup>1</sup> In *re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.

the latter.<sup>1</sup> The circuit court can not assume the primary exercise of the primary jurisdiction conferred upon the court of bankruptcy, and will not during the pendency of proceedings for a review, direct the marshal to take possession of the property of the bankrupt, nor proceed to ascertain and liquidate the assets.<sup>2</sup> The case or question presented for revision must, moreover, be a case or question fairly presented to and passed upon by the bankrupt court. That is the court of first resort. To that court first must the question and proofs be presented, and if that court errs, then, and then only, can resort be had to the circuit court. A party can not go into the circuit court in the first instance to make his case or question.<sup>3</sup> The exercise of this jurisdiction is not placed by the statute under specific regulations and restrictions, like the proceeding by appeal or writ of error, nor has the Supreme Court prescribed any rule concerning it. It must depend upon the sound discretion of the court. Unreasonable delay in invoking the superintending jurisdiction should not be allowed, nor should such excessive rigor be exercised that the ends of justice will probably be defeated.<sup>4</sup>

The statute provides that, except when special provision is otherwise made, the circuit may, upon bill, petition, or other proper process of any party aggrieved, hear and determine such cases as in a court of equity (§ 4986). The revisory jurisdiction may be invoked either by a formal bill<sup>5</sup> or by a petition,<sup>6</sup> addressed to the circuit court, stating clearly and specifically the point or question

<sup>1</sup> *Binninger et al.* 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183; *Clark et al.* 3 B. R. 489; s. c. 7 Blatch. 159, 165.

<sup>2</sup> *In re Clark et al.* 1 B. R. 489; s. c. 7 Blatch. 165.

<sup>3</sup> *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

<sup>4</sup> *In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257; *Sutherland v. Kellogg et al.* 2 Biss. 405; *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171; *in re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

<sup>5</sup> *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217.

<sup>6</sup> *In re J. M. Reed*, 2 B. R. 9.

decided in the district court, charging that the petitioner is aggrieved thereby, and praying the circuit court to review and reverse the decision of the court below. A notice of appeal is not a proper process for invoking a review of a decision of the district court.<sup>1</sup> It has, however, been intimated that the circuit court may exercise this authority either upon the statement of counsel or the admissions of the parties, or upon petition and answer.<sup>2</sup> An allegation by a petitioner that he is aggrieved is not sufficient, unless it be also alleged in what the error consists—whether of law or fact; and the nature of the error should be distinctly stated for the information of the circuit court, and as a matter of notice to the opposite party. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court is correct, and the burden to show error is upon the appellant. The petition must also state the relief desired.<sup>3</sup> While the whole mode of procedure is summary, and may be exercised in such manner as shall be thought proper, yet care will be taken that it is not so summary that wrong or injustice is done to either party.<sup>4</sup> The adverse party should be notified of the pendency and object of the proceedings, and of the day assigned for hearing the cause.<sup>5</sup> A service of the petition upon the attorney who acted as his counsel in the original proceedings is sufficient. The proceeding in review is a part of the original case, and for the purpose of the review the parties are still in court.<sup>6</sup>

Appeals in equity suits and in causes of admiralty and maritime jurisdiction vacate the respective decrees in the subordinate court, and remove the whole record into the

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<sup>1</sup> In re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

<sup>2</sup> Bill v. Beckwith, 2 B. R. 241.

<sup>3</sup> Littlefield v. Del. & Hud. Canal Co. 4 B. R. 257; Sutherland v. Kellogg, 2 Biss. 405; Samson v. Blake, 6 B. R. 410; s. c. 9 Blatch. 379; in re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

<sup>4</sup> Bill v. Beckwith, 2 B. R. 241.

<sup>5</sup> In re J. M. Reed, 2 B. R. 9.

<sup>6</sup> Ala. & Chat. R. R. Co. v. Jones, 5 B. R. 97.

court of paramount jurisdiction; but nothing of the kind is done in a proceeding by a supervisory petition.<sup>1</sup>

The supervisory powers and jurisdiction granted to the circuit court may be exercised either by the court, or by any justice thereof, in term time or vacation (§ 4086). The district judge can not sit as a member of the circuit court in the exercise of its supervisory powers.<sup>2</sup> When the case is heard in vacation, at chambers, the judge may entertain and act upon the petition either in<sup>3</sup> or out of the district.<sup>4</sup> The statute declares that the circuit court shall hear and determine the case as in a court of equity. The statement of the grievance and the redress desired is sometimes called a petition,<sup>5</sup> and sometimes a bill.<sup>6</sup> The questions presented for decision have generally been merely points of law. In one case all the proceedings in the court below, including the testimony, were made a part of the bill.<sup>7</sup> In another, the court is reported to have heard the case anew,<sup>8</sup> but probably on the testimony that was produced before the court of bankruptcy. In another, leave was given to the parties to file affidavits.<sup>9</sup> From this it appears that the circuit court does not hear the case strictly as an appellate court, but as a court of original jurisdiction, and hence may receive additional testimony,<sup>10</sup> and is not limited to the evidence produced in the court below. It has, on the other hand, been held that although matters of fact as well as matters of law may be revised, yet it is not the intention of the statute in this form of proceeding to give a party a second trial merely as such, but to secure to him an appellate tribunal

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<sup>1</sup> Littlefield v. Del. & Hud. Canal Co. 4 B. R. 257.

<sup>2</sup> Nelson v. Carland, 1 How. 265.

<sup>3</sup> Ala. & Chat. R. R. Co. v. Jones, 5 B. R. 97.

<sup>4</sup> Markson v. Heany, 1 Dillon, 511, note.

<sup>5</sup> In re J. M. Reed, 2 B. R. 9.

<sup>6</sup> Farrin v. Crawford, 2 B. R. 602.

<sup>7</sup> Perry v. Langley, 2 B. R. 596.

<sup>8</sup> Farrin v. Crawford, 2 B. R. 602.

<sup>9</sup> In re John Alexander, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.

<sup>10</sup> In re Bost. & Hart. R. R. Co. 6 B. R. 209; s. c. 9 Blatch. 101; contra, in re Great West. Tel. Co. 5 Biss. 359.

for the re-examination and revision of the rulings, orders, and decrees of the district court, and for the reversal of the same in case they are found erroneous.<sup>1</sup> It has also been held that a statement made by counsel, setting forth the order or ruling complained of, and sufficient facts to enable the circuit court to form an opinion upon the point, and verified by the judge or clerk, might form the basis of the petition, or that the whole case may be brought up by a bill of exceptions.<sup>2</sup> The petition may be amended.<sup>3</sup> Advantage may be taken of defects in the petition by demurrer,<sup>4</sup> or by an answer.<sup>5</sup>

The statute does not declare in terms that the party aggrieved, or any party, shall have the right to invoke that superintendence and jurisdiction; but that is necessarily implied. A court of justice is not at liberty to disown its jurisdiction, or to refuse to entertain parties who apply in due form for its exercise. Where the jurisdiction is itself discretionary, it may be declined; and where parties do not apply in the legal or prescribed manner, or in due season, or are otherwise in fault in the matter of the review sought, doubtless the court may dismiss their application. And the control of the court over frivolous and vexatious appeals of any kind is not questionable. But the court can not impose compulsory dismissal as a penalty or consequence of alleged or supposed misconduct elsewhere, which has no effect to delay or impede the exercise of the power of the court in the matter of the relief sought. It will not compel a party to elect whether he will further prosecute his petition of review or an action commenced in a State court against

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<sup>1</sup> *Littlefield v. Del. & Hudson Canal Co.* 4 B. R. 257; in *re Great West. Tel. Co.* 5 Biss. 359.

<sup>2</sup> *Sutherland v. Kellogg et al.* 2 Biss. 405.

<sup>3</sup> *Littlefield v. Del. & Hudson Canal Co.* 4 B. R. 257; *Sutherland v. Kellogg et al.* 2 Biss. 405; *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.

<sup>4</sup> *Littlefield v. Del. & Hudson Canal Co.* 4 B. R. 257.

<sup>5</sup> *Sutherland v. Kellogg et al.* 2 Biss. 405.

the appellee to restrain him from prosecuting the proceeding in bankruptcy.<sup>1</sup> When the revisory jurisdiction of the circuit court is invoked over a decision of the district court upon a question of fact, the burden is on the petitioner to show error in the decision. It is not sufficient merely to show such a condition of the testimony in the case that different minds, with equal fairness, might possibly arrive at different conclusions, but it must be shown, more nearly in analogy to the case of a motion for a new trial, that the evidence can not support the finding.<sup>2</sup> A finding of fact upon an examination of witnesses in the presence of the district court, where the opportunity for judging correctly of the credibility of the witnesses, and the weight of the testimony is better than can be afforded by an inspection of the testimony when reduced to writing, will not be reversed without a very clear and decided conviction that it is erroneous.<sup>3</sup> The circuit court sits as a court of equity, and on an inquiry into questions of fact is not bound to reverse upon strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done.<sup>4</sup> If there is nothing in the record to show that the district court found anything upon a particular point, the circuit court can not consider that as a question properly before it.<sup>5</sup>

In those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court may be exercised by the district judge (§ 4988). There appears to be some doubt as to the mode in which the supervisory power may be exercised in the territories. The statute provides that the supreme courts of the territories shall have the same super-

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<sup>1</sup> *Binninger et al.* 3 B. R. 489; s. c. 7 *Blatch*. 165; s. c. 1 L. T. B. 186.

<sup>2</sup> *Coggeshall v. Porter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 *Holmes*, 75.

<sup>3</sup> *Samson v. Clarke*, 6 B. R. 403; s. c. 9 *Blatch*. 372; in *re Cornwall*, 6 B. R. 305; s. c. 9 *Blatch*. 114; in *re Picton*, 11 B. R. 420; s. c. 2 *Dillon*, 548.

<sup>4</sup> *Samson v. Blake*, 6 B. R. 410; s. c. 9 *Blatch*. 379.

<sup>5</sup> In *re McGilton et al.* 7 B. R. 294; s. c. 3 *Biss*. 144.

visory jurisdiction over the acts and decisions of the justices thereof as is conferred upon the circuit courts over proceedings in the district courts (§ 4987). The recent amendment<sup>1</sup> makes the district courts of the territories subject to the general superintendence and jurisdiction of the circuit courts, but no circuit courts appear to have been created that can exercise such jurisdiction.

In cases arising under the statute, no appeal or writ of error is allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case exceeds five thousand dollars (§ 4989).

In all cases where concurrent jurisdiction is vested in the circuit and district courts (§ 4979), either party, where the proceeding is instituted in the circuit court may, in a proper case, if the matter in dispute is sufficient, remove it into the Supreme Court for re-examination, when it has proceeded to a final judgment or decree, in the same manner as is provided for other controversies outside of the bankrupt law.<sup>2</sup> The final decrees and judgments rendered in the circuit courts, in the exercise of their appellate jurisdiction over the judgments and decrees of the district courts by appeal or writ of error (§ 4980), where the sum or value exceeds five thousand dollars, may be re-examined in the Supreme Court by appeal or writ of error in the same manner as in other cases of a similar character.<sup>3</sup> But if the circuit court in such a case dismisses a writ of error for want of jurisdiction, the proper remedy is by a writ of mandamus, and not by a writ of error.<sup>4</sup> No appeal lies to the Supreme Court from a decree of the circuit court rendered in the exercise of its special supervisory jurisdic-

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<sup>1</sup> Act of 22 June, 1874, § 16.

<sup>2</sup> *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65.

<sup>3</sup> *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274; *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.

<sup>4</sup> *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.



tion,<sup>1</sup> but if the circuit court decides that it has no jurisdiction to entertain a petition or bill of review, the Supreme Court may entertain an appeal from such decision, not for the purpose of reviewing, but for the purpose of correcting an erroneous decision respecting the power of the circuit court, and enabling the party to be heard on his application.<sup>2</sup> If the circuit court renders a judgment or decree in favor of the party instituting the suit in a case where it is without jurisdiction, the Supreme Court will reverse the judgment or decree and remand the cause with directions to dismiss the suit.<sup>3</sup> A judgment rendered in the circuit court on an appeal from a decision of the district court allowing or rejecting a claim<sup>4</sup> can not be revised.<sup>5</sup> The Supreme Court can not entertain an appeal from the district court,<sup>6</sup> nor exercise a direct revising power over its decree.<sup>7</sup>

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<sup>1</sup> *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Hall v. Allen*, 9 B. R. 6; s. c. 12 Wall. 452; *Mead v. Thompson*, 8 B. R. 529; s. c. 15 Wall. 635; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274; *Nelson v. Carland*, 1 How. 265.

<sup>2</sup> *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.

<sup>3</sup> *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

<sup>4</sup> *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

<sup>5</sup> *Wiswall v. Campbell*, 15 B. R. 421; s. c. 93 U. S. 347.

<sup>6</sup> *Crawford v. Points*, 13 How. 11.

<sup>7</sup> *In re William Christy*, 3 How. 292; *Crawford v. Points*, 13 How. 11.

# THE BANKRUPT LAW

AND

NOTES OF DECISIONS.



# THE BANKRUPT LAW.

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## CONSTITUTION.

ART. I. SEC. 8.—The Congress shall have power \* \* \* \*  
to establish \* \* \* \* uniform laws on the subject of bank-  
ruptcies throughout the United States.

### Extent of the Power.

The subject is divisible in its nature into bankrupt and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say with positive precision what belongs exclusively to one and not to the other class of laws. The difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law. (*Sturges v. Crowninshield*, 4 Wheat. 122.)

The word bankruptcy is employed in the Constitution in the plural and as part of an expression, "the subject of bankruptcies." The ideas attached to the word in this connection are numerous and complicated. They form a subject of extensive and complicated legislation. Of this subject Congress has general jurisdiction. (*In re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *in re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.)

Bankruptcy bears a meaning co-extensive with insolvency, and is equivalent to that word in the Constitution. (*Kunzler v. Kohaus*, 5 Hill, 317; *Sackett v. Andross*, 5 Hill, 327; *Morse v. Hovey*, 1 Barb. Ch. 404; s. c. 1 Sandf. Ch. 187.)

The grant is a grant of plenary power over the "subject of bankruptcies." The subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States. (*In re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

The power of Congress extends to all cases where the law causes the property of a debtor to be distributed among his creditors. This is its least limit. Its greatest is a discharge of the debtor from his contracts. All intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution and discharge—is in the competency and discretion of Congress. (*In re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg.

Obs. 185; *in re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.)

To this power there is no limitation, and consequently it is competent to Congress to act on the whole subject of bankruptcy with a plenary discretion. (*In re Irwine*, 1 Penn. L. J. 291.)

The power conferred is without restriction, save in its uniformity. It is plenary, and in reference to its subject may be exercised with the same latitude as the like power has been and may be by the British Parliament. (*Kunzler v. Kohaus*, 5 Hill, 317; *in re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185.)

Congress in passing laws on the subject of bankruptcies is not restricted to laws with such scope only as the English bankrupt laws had when the Constitution was adopted. The power is general, unlimited, and unrestricted over the subject. (*In re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562; *Thompson v. Alger*, 53 Mass. 428.)

The framers of the Constitution did not intend to limit the power to any particular class of persons. (*Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; *in re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Kunzler v. Kohaus*, 5 Hill, 317; *in re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240; *in re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.)

It is not necessary that a bankrupt law shall provide for the debtor's discharge. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

Congress may establish a system of voluntary as well as involuntary bankruptcy. (*Loud v. Pierce*, 25 Me. 233; *Lalor v. Wattles*, 8 Ill. 225; *Kunzler v. Kohaus*, 5 Hill, 317; *in re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; *Thompson v. Alger*, 53 Mass. 428; *State Bank v. Wilborn*, 6 Ark. 35; *Keene v. Mould*, 16 Ohio, 12; *Cutler v. Folsom*, 17 N. H. 139; *McCormick v. Pickering*, 4 N. Y. 276; *Rowan v. Holcomb*, 16 Ohio, 463; *Dresser v. Brooks*, 3 Barb. 429; *Hastings v. Fowler*, 2 Ind. 216; *Reed v. Vaughan*, 15 Mo. 137; *in re Irwine*, 1 Penn. L. J. 291.)

The directly granted power over bankruptcies carries the incidental authority to modify the obligation of contracts so far as the modification may result from a legitimate exercise of the delegated power. A discharge may therefore be granted releasing the debtor from contract subsisting at the time when the law was passed. (*Kunzler v. Kohaus*, 5 Hill, 317; *Sackett v. Andross*, 5 Hill, 327; *in re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; *Loud v. Pierce*, 25 Me. 233; *Keene v. Mould*, 16 Ohio, 12; *McCormick v. Pickering*, 4 N. Y. 276; *in re Irwine*, 1 Penn. L. J. 291.)

Congress may pass a law which will have the effect to make void an assignment which is valid under the State laws. (*In re Henry Brennan*, Crabbe, 456.)

The power to enact a bankrupt law implies the power to make it efficient. The end implies the means. (*Russell v. Cheatham*, 16 Miss. 703.)

Congress has the power not only to establish uniform laws on the subject of bankruptcies, but also to commit the execution of the system to such Federal courts as it may see fit, and to prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation. (*Sherman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *Mitchell v. Manuf. Co.* 2 Story, 648.)

Congress has the power to define what and how much of the debtor's property shall be exempt from the claims of his creditors. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

To come within the constitutional provision, a bankrupt law must be a uniform law throughout the United States. A law which prescribes one rule in one district and a different one in another can not be regarded as a uniform law. (*Kittredge v. Warren*, 14 N. H. 509.)

The laws established by Congress on the subject of bankruptcies under the power conferred by the Constitution must, indeed, be uniform throughout the United States. But the extent to which this power shall be exercised rests in the discretion of Congress. Uniformity is required in the national legislation only, and the laws of the several States may be left in force so long and to such extent as Congress may see fit. (*Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 246.)

### State Insolvent Laws.

The power granted to Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the States. (*Sturges v. Crowninshield*, 4 Wheat. 122; *Blanchard v. Russell*, 13 Mass. 1; *Farmers' Bank v. Smith*, 3 S. & R. 63; *Betts v. Bagley*, 29 Mass. 572; *Adams v. Storey*, 1 Paine, 79; *Pugh v. Bussel*, 2 Blackf. 294; *Alexander v. Gibson*, 1 N. & McC. 480; *contra*, *Vanuxem v. Hazelhursts*, 4 N. J. 192; *Oldens v. Hallet*, 5 N. J. 466; *Golden v. Prince*, 3 Wash. 313; *Mason v. Nash*, 1 Breese, 16; *Ballantine v. Haight*, 16 N. J. 196.)

One prominent reason why the power was given to Congress was to secure to the people of the United States, as one people, a uniform law by which a debtor might be discharged from his previous engagements, and his future acquisitions exempted from his previous engagements. The rights of debtor and creditor equally entered into the minds of the framers of the Constitution. The great object was to deprive the States of the dangerous power to abolish debts. (*In re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185.)

The peculiar terms of the grant deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is perhaps incompatible with State legislation on that part of the subject to which the acts of Congress may extend. (*Sturges v. Crowninshield*, 4 Wheat. 122.)

The right of the States to pass a bankrupt law is not extinguished but merely suspended by the enactment of a general bankrupt law. The repeal of that law can not confer the power on the States, but it removes a disability to its exercise, which was created by the act of Congress. (*Sturges v. Crowninshield*, 4 Wheat. 122.)

The bankrupt act, as soon as it took effect, *ipso facto*, suspended all action upon future cases arising under the insolvent laws of the State, where the insolvent laws act upon the same subject-matter and the same persons as the bankrupt act; and all proceedings upon such cases commenced under the State laws after that time are null and void. (*Commonwealth v. O'Hara*, 1 B. R. 86; s. c. 6 Phila. 402; s. c. 6 A. L. Reg. 765; *Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; *Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30

Md. 128; *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Corner v. Miller et al.* 1 B. R. 403; *Shears v. Solhinger*, 10 Abb. Pr. [N. S.] 287; *in re Reynolds*, 9 B. R. 50; s. c. 8 R. I. 485; *in re Lucius Eames*, 2 Story, 322; *Bishop v. Loewen*, 2 Penn. L. J. 364; *Griswold v. Pratt*, 49 Mass. 16; *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.)

The State insolvent laws are not entirely abrogated. They exist and operate with full vigor until the bankrupt law attaches upon the person and property of the debtor. (*In re John Ziegenfuss*, 2 Ired. 463; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209.)

Two statutes having the same general object, and acting upon the same persons and the same cases, by different modes and in different jurisdictions, must be in conflict with each other. Though the modes by which the remedy is administered may vary, yet, where the bankrupt act and the State insolvent law have substantially the same scope and object, and act upon the same persons and cases, the State insolvent law is suspended. The act of Congress is both a bankrupt act and an insolvent act. (*Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30 Md. 128.)

The jurisdiction of the bankrupt act does not depend upon the right of the debtor to ultimately obtain a discharge. If his case comes within the provisions of the bankrupt act, he can not obtain a discharge under the State insolvent law, even though his assets are not sufficient to pay thirty per centum on the claims that may be proved against his estate. (*Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30 Md. 128.)

If a State court has acquired jurisdiction, under a State law, of a case in insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which the act of Congress upon the same subject takes effect, the State court may, nevertheless, proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by Congress. (*Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Meekins, Kelly & Co. v. Creditors*, 3 B. R. 511; s. c. 19 La. An. 497; *in re Eli Horton*, 5 Law Rep. 462; *in re Bela Judd*, 5 Law Rep. 328; *West v. Creditors*, 5 Rob. [La.] 261; s. c. 8 Rob. [La.] 123; *Dwight v. Simon*, 4 La. An. 490; *Larrabee v. Talbot*, 5 Gill, 426; *Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153; *Longis v. Creditors*, 20 La. An. 15.)

If the debtor was divested of his property under the State insolvent law at the time of the adoption of the bankrupt law, the jurisdiction of the State court is not affected thereby. (*Judd v. Ives*, 45 Mass. 401.)

All proceedings on a petition to compel an insolvent debtor to surrender his property, which are pending at the time when the proceedings in bankruptcy were commenced, should be stayed until an assignee is appointed. (*West v. Creditors*, 4 Rob. [La.] 88; s. c. 8 Rob. [La.] 123.)

The jurisdiction of the State court attaches from the moment when it makes the order staying the creditors from all interference with the property of the debtor. From that time the State court has the legal custody and control of his estate. (*Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Meekins, Kelly & Co. v. Creditors*, 3 B. R. 511; s. c. 19 La. An. 497.)

A suit to compel a new surrender is a new suit, and not a continuation of the suit in insolvency previously pending. The suspension of the State insolvent law by the enactment of the bankrupt law before the surrender was ordered, divested the State court of its jurisdiction over cases previously instituted, and no further proceedings can be had therein. (*Fisk v. Montgomery*, 21 La. An. 446.)

The State laws relating to insolvent corporations were superseded. The State courts have jurisdiction as far as the forfeiture of the charter of a corpora-

tion for insolvency is concerned; but with the decree of forfeiture their jurisdiction ends. They can not go on and administer upon the property of a corporation as the property of an insolvent corporation, for the insolvent laws of a State touching corporations are no longer in force. (*Thornhill et al. v. Bank of Louisiana et al.* 3 B. R. 435; s. c. 5 B. R. 367; s. c. 1 Woods, 11; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; *in re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 248.)

The treatment which a corporation may receive at the hands of the State court can not avail to sustain that court's control over the assets. If the fact of insolvency exists, and the corporation is within the provisions of the bankrupt law, the Federal courts sitting in bankruptcy have exclusive jurisdiction of the property, and the fact that a State law does not purport or attempt to relieve the debtor from his debts can not be urged as a reason why the State court should hold the assets and administer them after proper proceedings in bankruptcy have been instituted in the Federal courts. So far as a State law attempts to administer on the effects of an insolvent debtor, and distribute them among creditors, it is, to all intents and purposes, an insolvent law, although it may not authorize the discharge of the debtor from further liability. If the fact of insolvency does not exist, the State court may probably have the right to administer the assets as an incident to a proceeding for the dissolution of the corporation, but when insolvency intervenes so as to make the debtor a proper subject for the operation of the bankrupt law, the exclusive jurisdiction of the bankrupt court attaches, and the State court, and those acting under its mandates, must surrender the control of the assets, whatever may be the final decree in regard to the continuance of the corporation. (*In re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243; *Thornhill et al. v. Bank of Louisiana et al.* 3 B. R. 435; s. c. 5 B. R. 367; s. c. 1 Woods, 11; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; *in re Independent Ins. Co.* 6 B. R. 169, 260; s. c. 1 Holmes, 103; *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559; *Shryock v. Bushore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 159.)

A proceeding in bankruptcy is not the exclusive method of winding up insolvent corporations. The bankrupt act does not *ipso facto* suspend State laws for the collection of debts. (*Chandler v. Siddle*, 10 B. R. 236; s. c. 3 Dillon, 477.)

A State law to abolish imprisonment on civil process in certain cases, which is limited to the single instance of involuntary confinement, and whose aim and purpose is simply to liberate the person, is not superseded. (*Steelman v. Mattix*, 36 N. J. 344; *Shears v. Solhinger*, 10 Abb. Pr. [N. S.] 287; *in re Reynolds*, 9 B. R. 50; s. c. 8 R. I. 485; *Jordan v. Hall*, 9 R. I. 218; *in re Rank, Crabbe*, 493.)

If the distribution of the property is merely incidental to the release of the person from imprisonment, and the debt is not discharged, the proceeding is not a proceeding in bankruptcy. (*Steelman v. Mattix*, 36 N. J. 344.)

The bankrupt act can not affect the determination of a debtor's right to be discharged by taking the poor debtor's oath, and of his liability to imprisonment by way of punishment for fraud, upon proceedings which were commenced before the act took effect. (*Stockwell v. Silloway*, 100 Mass. 287.)

In an action on a bond given on the arrest of the debtor, and conditioned that he will apply for the benefit of the State insolvent laws, a plea that he has since obtained a discharge under the bankrupt law is a valid plea, unless the debt is one that is not released by a discharge. (*Hubert v. Horter*, 14 B. R. 430; s. c. 24 Pitts. L. J. 19; *Barber v. Rogers*, 71 Penn. 362; *Nesbit v. Greaves*, 6 W. & S. 120.)

A bond to apply for the benefit of the State insolvent laws, and if he fails to be discharged to surrender himself to the sheriff is valid. The undertaking



is in the alternative, either to obtain a discharge or to return to the condition from which he was released. If he can not apply for the benefit of the State insolvent laws because they are suspended, he must perform the other alternative of the condition. (*Steelman v. Mattix*, 36 N. J. 344.)

A State insolvent law which merely protects the person from imprisonment, without affecting contracts, is not superseded, although it also provides for the distribution of the debtor's property. (*Sullivan v. Hieskill*, Crabbe, 525; s. c. 4 Penn. L. J. 171.)

A State law providing, for the arrest and punishment of fraudulent debtors is not suspended by the bankrupt law. (*Scully v. Kirkpatrick*, 79 Penn. 324.)

The bankrupt law does not supersede the State laws relating to the settlement of the insolvent estate of lunatics, spendthrifts, or deceased persons. (*Hawkins v. Learned*, 54 N. H. 333.)

A State law which makes a transfer by an insolvent with intent to give a preference operate as an assignment for the benefit of all creditors is not an insolvent law, and is not superseded by the bankrupt law. (*Ebersole v. Adams*, 13 B. R. 141; s. c. 10 Bush, 83; *Linthicum v. Fenley*, 11 Bush, 181.)

The bankrupt law does not supersede a State law regulating assignments for the benefit of creditors. (*Mayer v. Hillman*, 13 B. R. 440; s. c. 91 U. S. 496; *in re Hawkins et al.* 2 B. R. 378; s. c. 34 Conn. 548; *Beck v. Parker*, 65 Penn. 262, *Maltbie v. Hotchkiss*, 5 B. R. 485; s. c. 38 Conn. 80.)

A State law which provides a mode of apportioning the losses of a savings bank among the depositors is valid, although it was passed while the bankrupt law was in force. (*Simpson v. Savings Bank*, 15 B. R. 385; s. c. 56 N. H. 466.)

A provision in State law which prohibits an insolvent corporation from transferring its property with the intention to give a preference is superseded. (*French v. O'Brien*, 52 How. Pr. 394.)

An act which provides for the arrest of a debtor who removes or disposes of his property with the intent to defraud his creditors is not superseded. (*Gregg v. Hilsen*, 34 Leg. Int. 20.)

The law allowing assignments for the benefit of creditors is not a part of the insolvent laws, and is not superseded by the bankrupt law. (*Cook v. Rogers*, 13 B. R. 97; s. c. 31 Mich. 391; s. c. 14 A. L. Reg. 633; *Von Hein v. Elkus*, 15 B. R. 195; s. c. 15 N. Y. Supr. 516.)

An assignment made as a part of the machinery of a State insolvent law, and deriving all its validity and efficacy from the statute is void. (*Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 159; *Rouse v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.)

Whether an assignment in proceedings under a State insolvent law is void, is a question that may be raised in a collateral action. (*Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 158.)

The insolvent laws are no further suspended than they seek upon notorious grounds to seize and distribute the effects of the debtor among his creditors generally. A statute for the more effectual appropriation of a debtor's property to satisfy an individual debt is not suspended. (*Berthelon v. Betts*, 4 Hill, 577.)

The State insolvent laws were not suspended until June 1, 1867. (*Day v. Bardwell et al.* 3 B. R. 455; s. c. 97 Mass. 246; *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Chamberlain v. Perkins*, 51 N. H. 336.)

The State laws are operative to some extent and for some purposes. They are clearly operative in all cases which are not within the provisions of the bankrupt law. (*Shepardson's Appeal*, 36 Conn. 23; *Clarke v. Ray*, 1 H. & J. 318; *in re Winternitz*, 4 B. R. (quarto), 127; s. c. 18 Pitts. L. J. 61.)

The bankrupt law applies only to cases where the debtor owes debts provable under the act exceeding the amount of three hundred dollars. When the debts do not exceed that amount, the case is not within the purview of the act. Before proceedings under the State law can be held to be erroneous, it must affirmatively appear that the debts are more than that amount. Until then, there is no conflict of laws, and courts will not presume that the debts are more or less than that amount. (*Shepardson's Appeal*, 36 Conn. 23.)

The State insolvent laws are still in force so far as they affect debts that will not be released by a discharge under the bankrupt act, such as debts created by the fraud of the bankrupt. Where the bankrupt act expressly excepts a class of cases, it must have been the intention of Congress not to interfere, in such specified class, with the laws of the several States. A party imprisoned under a judgment founded upon a fraudulent debt, may take the benefit of the State insolvent laws for the purpose of obtaining a release and discharge from that debt. (*In re Winternitz*, 4 B. R. (quarto), 127; s. c. 18 Pitts. L. J. 61; *Stepp v. Stahl*, 2 W. N. 80.)

The State insolvent laws are suspended even as between citizens of the same State. (*Cassard et al. v. Kroner*, 4 B. R. 569.)

An attachment law which permits a writ of attachment to issue for the causes which would be sufficient to authorize the institution of proceedings in involuntary bankruptcy, and authorizes the distribution of the property equally among all the creditors, is superseded. (*Tobin v. Trump*, 3 Brews. 288; s. c. 7 Phila. 123.)

Whether a State insolvent law is unconstitutional, is a question that can not be raised by the defendant in an action by an insolvent trustee to recover a debt due to the estate. (*Shryock v. Bashore*, 13 B. R. 48; s. c. 15 B. R. 283; s. c. 82 Penn. 159.)

There is a material distinction between discharging a debtor and distributing his assets among his creditors. The bankrupt act was demanded and passed mainly for the former. The latter is in its nature incidental to the former, which is the principal thing. There probably existed in every State, at the time of the passage of the bankrupt law, some statutory provisions for the distribution of the effects of insolvent debtors among their creditors, and it can hardly be supposed that Congress intended to repeal or suspend those State laws, except so far as was necessary for the accomplishment of the main object in view, and that necessity may well be limited to those cases over which the Federal courts actually assert their jurisdiction within the time limited for that purpose. An assignment under the State law is good unless attacked within six months. If all the parties concerned desire that the estate may be settled in the State courts, it can be done. Should a case arise in which there will be an actual conflict of jurisdiction, the State courts must yield to the Federal courts, and when the bankrupt court, within the time limited, asserts its jurisdiction, the proceedings in the State court are thereby superseded. Should the State courts attempt to grant a certificate of discharge to an insolvent debtor, no court would give any effect to it. (*Maltbie v. Hotchkiss*, 5 B. R. 435; s. c. 38 Conn. 80; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209.)

As a bankrupt law merely suspends State insolvent laws without repealing them, they revive and are in force on the repeal of the bankrupt law, and need not be re-enacted. (*Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153.)

The bankrupt law must prevail in cases where it conflicts with the ordinance of 1787. (*Stow v. Parks*, 1 Chand. 60.)

# TITLE XIII.

## THE JUDICIARY.

### CHAPTER THREE.

#### DISTRICT COURTS.

SEC.  
563.—Original jurisdiction.  
566.—Mode of trial in district courts.

SEC.  
648.—Mode of trial in circuit courts.  
711.—Jurisdiction exclusive.

SEC. 563.—Eighteenth. \* \* \* The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

Statute Revised—March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statutes—April 4, 1800, ch. 19, 2 Stat. 19; Aug. 19, 1841, ch. 9, § 6, 5 Stat. 441.

#### Rule of Interpretation.

The words of the bankrupt act were, in most parts of it, wisely taken from the English statutes of 1849 and 1851, and from the insolvent law of Massachusetts. In applying the rule that the interpretation of a law forms a part of it, the construction of a statute by the courts of the country whose legislature enacted it, is adopted. The Supreme Court has more than once applied this rule where an American statute has been taken from a prior English one, and has followed its English construction where the meaning might otherwise have been doubtful. (*Barnes v. Rettew*, 8 Phila. 133.)

*Ex antecedentibus et consequentibus fit optima interpretatio*, is one of the most important canons of construction. Every part of a statute should be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire statute, and not merely upon disjointed parts of it. (*Hall v. Deshler*, 71 Penn. 299.)

In the construction of the law the principle of uniformity must not be out of sight, for such construction ought to be put on a statute as may best answer the intention the makers had in view. (*Barstow v. Adams*, 2 Day, 70.)

While a construction of a Federal law by the Federal courts other than Supreme, is not conclusive, it is entitled to careful consideration in the State courts. (*Frank v. Houston*, 9 Kans. 406.)

The English decisions properly apply as rules of construction. (*Roosevelt v. Mark*, 6 Johns. Ch. 266; *Livermore v. Bagley*, 3 Mass. 487; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419; *Globe Ins. Co. v. Cleveland Ins. Co.* 14 B. R. 311; s. c. 8 C. L. N. 258.)

### Character of the Jurisdiction.

Courts of bankruptcy, as they existed in England at the time the act was passed, were, and still are, separate, distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is, that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as a district court, than if it were such separate and distinct organization. (*In re Norris*, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.)

Congress, in passing the act, in pursuance of its constitutional power, not only intended to make it uniform, but operative, throughout the United States. It does not stop at State lines. Property, wherever situate, which is not exempted from the operation of the act, passes to the assignee. This is equally true of property under mortgage, as of that which is unincumbered. Debts, whenever payable, and creditors, wherever residing within the United States, are within the operation of the act. The bankrupt court is invested with this jurisdiction over the bankrupt and his estate, and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors according to their respective rights. Thus, it is plain beyond controversy, that the property of the bankrupt, though situate in another State, and though mortgaged by the bankrupt, prior to the institution of proceedings in bankruptcy, is within the jurisdiction and under the control of the bankrupt court. (*Markson et al. v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.)

The district court, as a court of bankruptcy, is the creature of statute, and has no powers except those conferred upon it, either expressly or by necessary implication, for the just and full execution of the law. (*In re Robert Morris*, Crabbe, 70; *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49.)

In administering the statute, the functions of the district court, as a court, are employed; and the jurisdiction is not a jurisdiction conferred on the judge, as a commissioner, in the nature of the appointment by which the chancellor formerly executed the bankrupt law in England. (*In re Barney Corse*, 1 N. Y. Leg. Obs. 231.)

The strict rule of construction, which is applied in cases where a statute gives to a court power to do a particular thing, has no application to the bankrupt law, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

In enjoining upon the district court to take cognizance of, and administer the bankrupt law, Congress must be accepted to intend that, in every particular not otherwise designated by the statute, those courts should proceed with the new jurisdiction upon the principles appropriate to like proceedings under any other branch of their power. The law-giver, in adding to the range of their employment, must be supposed to contemplate that they will continue the use of their customary powers, unless he specially limits and restricts that use. (*In re Barney Corse*, 1 N. Y. Leg. Obs. 231; *in re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

The district court has jurisdiction of two distinct kinds: 1st. As a court of bankruptcy, over the proceedings in bankruptcy initiated by the petition and ending in the distribution of assets among the creditors, and the discharge or

refusal of a discharge to the bankrupt; 2d. As an ordinary court over suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due to or from him. (*Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.)

The jurisdiction of the district courts extends to all matters and proceedings in bankruptcy, without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred, but those powers extend to all matters of bankruptcy without limitation. (*Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516; *Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179.)

The words, "in their respective districts," must receive their usual ordinary signification, and manifest a purpose and intent in Congress to restrict and limit the authority and jurisdiction of the district courts in bankruptcy within their own districts, in accordance with the practice as it then was, and not to confer upon them a jurisdiction throughout the United States, in utter conflict with all prior legislation and the settled policy of Congress. While their authority does extend to all matters in bankruptcy, and there is no limit to the subject-matter over which the court has jurisdiction, yet they are expressly confined and restricted in its exercise to the limits of their own territory, and enjoy no other or greater power or authority outside of their own districts than they had before the bankrupt act was passed. They can not summon parties before them from without their districts. (*Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284; *in re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92; *Markson et al. v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497, 511, note.)

An assignee can not proceed by attachment against a party in a district where the latter neither resides nor is found at the time of serving the writ. (*Nazro v. Crugin*, 3 Dillon, 474.)

The whole tenor of the bankrupt act shows that Congress intended to provide for the complete administration of the bankrupt system in the Federal courts, and through the instrumentality of Federal officers. This section does not contain any words which justify the conclusion that the jurisdiction conferred by it is limited to the district court for the district in which the proceedings in bankruptcy are pending. District courts should be naturally auxiliary to each other to perfect and accomplish the object of the act. An assignee elected in one district may institute proceedings in the district court of another district to recover money paid by the bankrupt to a preferred creditor contrary to the provisions of the act. (*Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *in re James Martin*, 5 Law Rep. 158; *Moore v. Jones*, 23 Vt. 739; *contra*, *Jobbins v. Montague*, 6 B. R. 509; *in re Richardson*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.)

The petitioning creditor who has filed a petition against the debtor in one district, may apply to the district court of another district to restrain parties from interfering with the debtor's property. (*In re James Martin*, 5 Law Rep. 158.)

If the bankrupt sues on a demand which passed to his assignee, and recovers judgment, the district court may arrest the payment of the money to the bankrupt, and order it to be paid over to the assignee. (*Moore v. Jones*, 23 Vt. 739.)

If the assignee claims the benefit of a judgment recovered by the bankrupt in his own name, he must take it subject not only to such charges as are legally taxable and recoverable as costs, but also to all other reasonable charges and expenses incurred in obtaining the judgment. (*Moore v. Jones*, 23 Vt. 739.)

The attorney for the bankrupt can not be allowed for services rendered in opposition to a motion made by the assignee in a State court for leave to appear and prosecute the suit in his own name. (*Moore v. Jones*, 23 Vt. 739.)

A State court, in a collateral action, may inquire into the jurisdiction of the district court as a court of bankruptcy. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254.)

A State court may inquire into the jurisdiction of the district court, and declare its decree void, where the decree was rendered without authority of law. (*Wells v. Brackett*, 30 Me. 61.)

The district court, although a court of limited jurisdiction, is not an inferior court in the technical sense of that term, and its jurisdiction need not appear on the face of the proceedings. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Rucknam v. Cowell*, 1 N. Y. 505; *Reed v. Vaughn*, 10 Mo. 447; *Hayes v. Ford*, 15 B. R. 569; *vide Morse v. Presby*, 25 N. H. 299.)

An adjudication is in the nature of a decree *in rem* as respects the *status* of the debtor, and can not be impeached in a collateral action if the record shows that the court making it had jurisdiction over his person and the subject-matter. (*Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398; *Bissell v. Post*, 4 Day, 79; *Sloan v. Lewis*, 12 B. R. 173; s. c. 22 Wall. 150.)

A decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the *status* of the corporation, and if the court rendering it has jurisdiction, can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. (*New Lamp Chimney Co. v. Ansonia Brass and Copper Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

A creditor can not impeach an adjudication in a collateral action on the ground that it was procured by fraud. (*Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398.)

Although the record does not show affirmatively that the district court acquired jurisdiction of the person of the bankrupt, that fact will be presumed. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Wright v. Watkins*, 2 Greene [Iowa], 547.)

Where a court has jurisdiction to hear and determine a question either at law or in equity, it must of necessity have the power of determining in which form the remedy shall be administered; and an error of judgment on that point can not be urged as a defect of jurisdiction in a collateral action. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254.)

Where an involuntary proceeding is dismissed, and then reinstated without further notice to or appearance by the debtor, the adjudication is void, and a payment to an assignee, under an order of the district court, will not protect the party making such payment. (*Gage v. Gates*, 15 B. R. 145; s. c. 62 Mo. 412.)

SEC. 566.—The trial of issues of fact in the district court, in all causes except in cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. \* \* \*

Statutes Revised—Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76; Feb. 26, 1845, ch. 20, 5 Stat. 726.

## CHAPTER SEVEN.

SEC. 648.—The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy. \* \* \*

Statute Revised—Sept. 24, 1789, ch. 20, § 12, 1 Stat. 79.

## CHAPTER TWELVE.

SEC. 711.—The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States. \* \* \*

Sixth. Of all matters and proceedings in bankruptcy.

The jurisdiction thus given depends wholly upon the act, and is necessarily exclusive, because independently of it there is no jurisdiction in any tribunal over any such proceedings, and no original jurisdiction is given to any other. This includes all proceedings for adjudging any one a bankrupt, thereby vesting title to his property in an assignee appointed pursuant to the act. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.)

By the proceedings and adjudication, jurisdiction is obtained of the bankrupt and his creditors, and the court making the adjudication is the only one that can deal with the bankrupt and his creditors, and settle all conflicting claims, equities and controversies arising between them. All such matters are exclusively within the jurisdiction of the court where the proceedings are pending. (*Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.)

A State court, on the application of the debtor, may enjoin the petitioning creditor from prosecuting a fraudulent and oppressive petition in bankruptcy against him, especially if the latter invoked the jurisdiction of the State court to enforce his claim before filing the petition. (*Pusey v. Bradley*, 1 N. Y. Supr. 661; s. c. 46 How. Pr. 255.)

No State court can by any process prevent a party from applying to the district court for the benefit of the provisions of the bankrupt law. (*Watson v. Citizens' Savings Bank*, 11 B. R. 161; *Fillingim v. Thornton*, 12 B. R. 92; s. c. 49 Geo. 384.)

The district court will not prevent a seizure of the bankrupt's property on execution, or a delivery to a receiver before an adjudication in a voluntary case, for it has no exclusive power over the property until there is an adjudication. (*In re W. C. H. Waddel*, 1 N. Y. Leg. Obs. 53.)

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition. (*In re Barrow, re Loeb, Simon & Co. re Winter*, 1 B. R. 481; s. c. 1 L. T. B. 63; *in re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *in re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226; *in re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 Ben. 35; s. c. 2 L. T. B. 79; *Brock v. Terrel*, 2 B. R. 643; *Pennington v.*

*Sale & Phelan et al.* 1 B. R. 572; *Jones v. Leach et al.* 1 B. R. 595; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151; *Watson v. Citizens' Savings Bank*, 11 B. R. 161.)

Any interference with the property, while so in the custody of the court, is liable to be punished as a contempt. (*In re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154.)

From the time of the filing of the bankrupt's petition, the property is in the custody of the bankrupt court, and at least from the time of the appointment of the assignee, the possession of it by the bankrupt is, in law, the possession of it by the assignee. (*In re J. M. Rosenberg*, 3 B. R. 130; s. c. 3 Ben. 866.)

The district court would fail in its duty if it were to suffer the possession of the assignee to be forcibly displaced by a third person, although using the form of the process of a State court, in a suit to which the assignee is not a party, and in which the title of the assignee is not in question, but where the property would be subjected to such a fate as a contest between two strangers to the proceedings in bankruptcy might involve. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

The district court has the power to protect the possession of the assignee against interference, except by a resort to a proper legal proceeding, to which he is a party; and if the property is taken from his possession without such proceeding, may compel its return. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

A party who holds a claim that is not provable need not apply to the district court for leave to issue an execution. (*Black v. McClelland*, 12 B. R. 481; s. c. 7 C. L. N. 420.)

A State court has no jurisdiction to direct a depository of the bankrupt court to pay a judgment against the assignee out of the funds of the estate deposited with it. (*Havens v. Nat'l City Bank*, 13 B. R. 95; s. c. 6 N. Y. Supr. 346.)

The appointment of the assignee in bankruptcy relates back, and gives to him title to all the estate, real and personal, legal and equitable rights, interests and things in action which belonged to the debtor on the presentation of the petition. From and after the filing of the petition, therefore, creditors can acquire no interest by receivership, or otherwise, in the property of the debtor which the decree in bankruptcy will not displace or annul. (*Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; *Vidal v. Ocean Ins. Co.* 5 Rob. [La.] 68; *Pennington v. Sale & Phelan et al.* 1 B. R. 572; *Jones v. Leach et al.* 1 B. R. 595; *in re Geo. W. Anderson*, 9 B. R. 360; *McLean v. Rocky*, 3 McLean, 235; *Thames v. Miller*, 2 Woods, 564.)

The levy of an attachment after the commencement of proceedings in bankruptcy is absolutely void. (*Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; *Weisenfeld v. Mispelhorn*, 5 W. Va. 46; *Oliver v. Smith*, 5 Mass. 183; *Whitney v. Lodge*, 1 W. N. 170.)

The title of the assignee will prevail over an attachment issued after the commencement of the proceedings in bankruptcy, but before the adjudication. (*Phillips v. Helmbold*, 26 N. J. Eq. 202.)

The issuing of an injunction out of the district court, restraining a purchaser and the sheriff from disposing of goods, does not confer such exclusive jurisdiction over the subject as to prevent the purchaser from instituting an action against the sheriff. (*Hathaway v. Brown*, 18 Minn. 414.)



When money is raised upon an execution, and paid into court for distribution, a party who sets up a title adverse to the proceedings can not come in and claim any share. Thus, if the goods of A. are sold upon an execution against B., A. can not be heard to urge his rights to the proceeds, however clear and indisputable may be his title to the goods. An assignee of the debtor, by a transfer prior to the levy, is an adverse claimant. If a levy is made after the commencement of proceedings in bankruptcy, the assignee can not claim the proceeds of the sale. His remedy is by an action against the sheriff's vendee or the sheriff himself. (*Bush's Appeal*, 65 Penn. 363.)

If the bankrupt is a tenant in possession of land, the landlord can not eject him by summary proceedings instituted in a State court under a statute relating to tenants holding over after the expiration of their terms. (*In re Enoch Steadman*, 8 B. R. 319.)

The omission of the bankrupt to apply for an injunction to prevent any interference with the property will not justify or excuse the parties who are guilty of such interference. (*In re Enoch Steadman*, 8 B. R. 319.)

When the assignee in bankruptcy finds property in the possession of the bankrupt, and takes it into his custody, he becomes possessed of it in the course of his official duties, and can not be deprived of it by a summary proceeding in a State court, under whose *fi. fa.* the sheriff had made a levy previously to the commencement of proceedings in bankruptcy. The sheriff has his remedy by an action of trover, or he may institute the proper proceedings in the bankrupt court, to which the assignee is amenable. (*Hill v. Fleming*, 39 Geo. 662.)

A creditor may proceed in a State court to reach property of the bankrupt which the assignee has abandoned as being a burden rather than a benefit. (*Rugely v. Robinson*, 19 Ala. 404.)

A bankrupt who has received a discharge is not entitled to file an objection to the ratification of a sheriff's sale made after the commencement of the proceedings in bankruptcy, for he has no interest in the fund or in the land. All reasonable presumption is against the existence of any surplus from his estate after the payment of his debts. (*Laird v. Laird*, 3 Penn. L. J. 474.)

When the assignee has lawfully sold the property, the district court is not authorized to interfere at the instance of the purchaser, to vindicate his title. If another sees fit to contest his title, the controversy, like others of a like nature is to be determined by the State tribunals. (*Briggs v. Stephens*, 7 Law Rep. 281.)

Claims against the property of the bankrupt, so long as it remains in the possession of the bankrupt court, can only be enforced in the district court sitting as a court of bankruptcy. (*In re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226; *Jones v. Leach et al.* 1 B. R. 595; *Davis, Assign. of Bittel et al.* 2 B. R. 392; *in re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; *in re Snedaker*, 3 B. R. 629.)

If a party has a claim, lien, or interest in the property in the hands of an assignee in bankruptcy he should apply to the bankrupt court for relief, and that court may grant the relief or allow a suit to be brought either in the district court or the State courts, to determine the same; but without such consent, parties have no right to sue, and are guilty of a contempt of the authority of the bankrupt court if they do sue. The bankrupt court will insist upon its right to administer and distribute the property. Parties should understand that they have no right to commence suits against an assignee to affect the property, for as he is accountable to the bankrupt court for the property, it is the duty of the court to protect him in the possession. The Federal courts sedulously avoid all interference with property held by the State courts or their officers, and they, with equal solicitude and firmness, maintain their right to

hold property which is in their possession or in the custody of their officers, against the process of any State court, and will not permit persons through process issuing from State courts to interfere with impunity with property so in the possession of the Federal courts or their officers. (*In re Cook & Gleason*, 3 Biss. 116.)

A mortgagee has no right to take possession of the mortgaged premises after the commencement of proceedings in bankruptcy. (*Hutchings v. Muzzy Iron Works*, 8 B. R. 458; s. c. 6 C. L. N. 27.)

A subsequent sale, whether under judgment or mortgage, without the consent of the bankrupt court, is subject to be set aside by that court. (*Davis v. Anderson*, 6 B. R. 145.)

Costs incurred in the prosecution of a suit to enforce a lien commenced after the filing of the petition can not be allowed. The creditor who institutes such a suit must give it up before he can be paid the amount of his claim by the bankrupt court. (*In re Cook & Gleason*, 3 Biss. 116.)

A creditor having a mechanic's lien upon the property of the bankrupt, may file a petition to enforce it in a State court, even after the commencement of proceedings in bankruptcy, when such filing may be necessary in order to keep the lien alive. Pending the bankruptcy proceedings, no order can be made on this petition for the sale of the property to satisfy the lien of the petitioner. The rights of the creditor will be preserved, and all interference with the custody or jurisdiction of the bankrupt court avoided by ordering the petition to stand continued in the State court, to await the result of the action of the district court in the proceedings in bankruptcy. (*Clifton et al. v. Foster et al.* 3 B. R. 656; s. c. 103 Mass. 233; *in re Cook & Gleason*, 3 Biss. 116; *Douglass v. St Louis Zinc Co.* 56 Mo. 388.)

Although a creditor has obtained a lien on the personal property of the bankrupt, yet he can not proceed to examine the bankrupt in a State court to discover such property. (*In re Samuel T. Taylor*, 16 B. R. 40.)

The following proceedings, instituted after the commencement of proceedings in bankruptcy, have been enjoined by the district court, to wit:

The sale of property by the sheriff, under an execution issued from a State court upon a levy made after the petition in bankruptcy was filed. (*Pennington v. Sale & Phelan et al.* 1 B. R. 572; *Jones v. Leach et al.* 1 B. R. 595; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re John S. Foster*, 2 Story, 131; *in re Bellows & Peck*, 3 Story, 428.)

Proceedings by a mortgagee to foreclose a mortgage on the property of the bankrupt. (*In re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; *in re Snedaker*, 3 B. R. 629; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497; *Whitman v. Butler*, 8 B. R. 487; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

A libel *in rem*, brought to enforce a lien against a vessel. (*In re People's Mail Steamship Co.* 2 B. R. 553; s. c. 2 Ben. 226; *contra*, *The Ironsides*, 4 Biss. 518.)

Proceedings on the part of a landlord to collect rent by distraint. (*Erock v. Terrel*, 2 B. R. 643; *in re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; s. c. 9 A. L. Reg. 627; *vide Butler v. Morgan*, 8 W. & S. 53.)

Proceedings under a State insolvent law. (*In re Eames*, 2 Story, 322.)

The assignee of a bankrupt is not the assignee of his creditors, nor of all the judgments, executions, liens and mortgages outstanding against his property. He takes only the bankrupt's interest in property, nor has he the right, title, or interest, which other parties have therein, nor any control over the same, further

than is given expressly by the bankrupt act, as auxiliary for the preservation of the bankrupt's interest for the benefit of his general creditors. It would be absurd to contend that the assignee becomes *ipso facto* seized in entirety as trustee of every article of property in which the bankrupt has any interest or share. (*Goddard v. Weaver*, 6 B. R. 440; s. c. 1 Woods, 257.)

Where the levy of an execution is made before the commencement of the proceedings in bankruptcy, the possession of the sheriff can not be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain after the debt for which the execution issued has been satisfied. (*Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Savage v. Best*, 3 How. 111; *Norton v. Boyd*, 3 How. 426; *Doremus v. Walker*, 8 Ala. 194; *Fritsch v. Van Mittledorfer*, 2 Cinn. 261; *Fehley v. Barr*, 66 Penn. 196; *Thompson v. Moses*, 43 Geo. 383; *Goddard v. Weaver*, 6 B. R. 440; s. c. 1 Woods, 257; *Maris v. Duren*, 1 Brews. 428; s. c. 6 Phila. 327; *in re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143; *in re Smith et al.* 1 B. R. 599; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112; *in re Wilbur*, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448; *vide Turner v. The Skylark*, 4 Biss. 388; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *Lewis v. Fisk*, 6 Rob. [La.] 159.)

The sheriff must proceed to sell the property, unless he is prevented by some proceeding instituted in the bankrupt court for the purpose of liquidating the lien and adjusting all claims and equities. (*Sharman v. Howell*, 40 Geo. 257; *Wheeler v. Redding*, 55 Geo. 87.)

The sheriff is liable to the execution creditor if he relinquishes the custody of the property upon the mere demand of the marshal and exhibition of the warrant. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

When a receiver, appointed by a State court before the commencement of proceedings in bankruptcy, has taken possession of the property which belonged to the bankrupt, and the jurisdiction of the State court over the subject-matter of the suit thereon, and over the parties thereto when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver are in no manner impeached or questioned, the district court can not compel the receiver to give up the possession of such property without its being shown that such possession of the property by the State court is void or invalid by reason of the provisions of the bankrupt act. (*In re Clark et al.* 3 B. R. 491; s. c. 4 Ben. 88; *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; *Sedgwick v. Minck et al.* 1 B. R. 675; s. c. 6 Blatch. 156; *Alden v. Boston, Hartford & Erie R. R. Co.* 5 B. R. 230; *Davis v. Railroad Co.* 13 B. R. 258; s. c. 1 Woods, 661.)

Proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which have been obtained by any creditor by the use of diligence. (*In re R. M. Whipple*, 13 B. R. 373; s. c. 6 Biss. 516.)

A creditor who has filed a creditor's bill in the State court and obtained the appointment of a receiver, prior to the commencement of the proceedings in bankruptcy, may be enjoined from proceeding further in the State court. (*In re R. M. Whipple*, 13 B. R. 373; s. c. 6 Biss. 516.)

When a State court has acquired jurisdiction over the parties to a creditor's bill and appointed a receiver, before the commencement of the proceedings in bankruptcy, it will not on a mere motion direct a delivery of the property to the assignee. (*Freeman v. Fort*, 14 B. R. 46; s. c. 52 Geo. 371.)

If a receiver is appointed by a State court in a suit by stockholders against a corporation, the court will not at the instance of creditors, on the subsequent

bankruptcy of the corporation, discharge the receiver and turn the property over to the assignee. (*Myer v. Crystal Works*, 14 B. R. 9; s. c. 8 C. L. N. 197.)

Where a receiver has been appointed by a State court in a proceeding for the dissolution of a partnership prior to the commencement of proceedings in bankruptcy against the firm, the court has the right to finish its proceedings before being interfered with by any other court. If the assignee has rights, or is entitled to the fund, his right and title can be and will be disposed of by the State court as the law shall direct. (*Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253; *Clark v. Binninger*, 39 How. Pr. 363.)

The plaintiff in such a suit for a dissolution of partnership can not have the decree appointing a receiver rescinded and the property turned over to an assignee. (*Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253.)

If the assignee has filed a bill to set aside a sale made by a receiver, he must elect whether he will proceed with it or claim the fund. He can not go upon the property and the fund both. (*Loudon v. Blanford*, 56 Geo. 150.)

If a receiver has been appointed, the State court will retain control of the property until it shall be applied to the partnership debts, although the assignee of the partnership property, who has been subrogated to the rights of both the plaintiff and defendant, asks that the suit may be discontinued, and the property delivered to him. (*Clark v. Binninger*, 39 How. Pr. 363.)

Parties in a State court may be enjoined from obtaining a writ of sequestration to take property from the possession of the assignee, although the suit was instituted before the commencement of the proceedings in bankruptcy. (*Hewitt v. Norton*, 13 B. R. 276; s. c. 1 Woods, 68.)

The district court has no authority to withdraw cases instituted in a State court before the commencement of proceedings in bankruptcy from the State courts, and proceed to settle and adjust the claims of the parties thereto. Congress could, no doubt, have made adjudication in bankruptcy operate *proprio vigore* to withdraw all cases in which the bankrupt should be a party pending in the State courts in the district at the time of the filing of the petition, from those tribunals, and transfer them into the district court. It has not, however, done so. It not only has not deprived the State courts of jurisdiction over such causes, but it has provided for their prosecution and defence in those courts by the assignee. (*Samson v. Burton et al.* 4 B. R. 1; s. c. 5 Ben. 325; *vide Clarke v. Rosenda*, 5 Rob. [La.] 27; *Lewis v. Fisk*, 6 Rob. [La.] 159.)

Full force and efficacy may be given to that clause in the bankrupt act which confers on the district courts of the United States jurisdiction over the ascertainment and liquidation of liens, without taking from the courts under whose process they exist the power of rendering special judgments necessary to complete them. (*Leighton v. Kelsey et al.* 4 B. R. 471; s. c. 57 Me. 85.)

Proceedings to enforce the lien of a creditor pending at the commencement of proceedings in bankruptcy are not affected thereby, but the creditor may proceed to obtain satisfaction of his lien. (*Baum v. Stern*, 1 Rich. [N. S.] 415; *contra*, *Taylor v. Bonnett*, 38 Tex. 521.)

The jurisdiction of the district court over proceedings for the condemnation of property under the internal revenue laws is not divested by the commencement of proceedings in bankruptcy against the distiller. (*U. S. v. Mackoy*, 2 Dillon, 299.)

The State court may distribute the money which the sheriff holds on process which was issued to him before the filing of the petition. (*Weld v. O'Brien*, 4 A. L. J. 364; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445.)

When the State court has jurisdiction to enforce a lien and sell the property, it may distribute any surplus that may remain after the payment of the lien among subsequent lien creditors. The power to enforce the lien gives the right to decree a distribution. (*In re Biddle's Appeal*, 9 B. R. 144; s. c. 68 Penn. 13.)

The assignee takes the rights of the debtor in the same plight and condition as the debtor himself possessed them, and the purchaser from him will be bound by a decree for a partition rendered before the filing of the petition. (*Baum v. Stern*, 1 Rich. [N. S.] 415.)

The assignee of the judgment debtor is the proper party to move to set aside sales made under an execution issued thereon when the same are irregular and void. (*Pardee v. Leitch*, 6 Lans. 303.)

The court where a judgment is rendered is the proper, and indeed, the only court where a motion can be made to amend it, and such amendment may be made, although the defendant has been declared a bankrupt, and the proceedings in bankruptcy are pending at the time when the motion is made. (*Woolfolk v. Gunn*, 10 B. R. 526; s. c. 45 Geo. 117.)

Although a *fi. fa.* is issued prior to the commencement of proceedings in bankruptcy, yet if the property taken thereunder is by the consent of the creditor, the debtor and the sheriff sold after that time, the proceeds must be turned over to the assignee, for they do not come into the State court by final process. (*Morris v. Davidson*, 11 B. R. 454; s. c. 49 Geo. 361.)

Where a sheriff who is selling the goods at private sale with the consent of the mortgagor and mortgagee, under a mortgage *fi. fa.* receives a general *fi. fa.* before the commencement of the proceedings in bankruptcy, the proceeds arising from private sales, after that time are before the State court, as money raised on final process, and may be distributed to the judgment creditor and not to the assignee. (*Dyson v. Harper*, 54 Geo. 282.)

The filing of a petition in bankruptcy, and the execution of an assignment to the assignee after the filing of a bill in equity, is a sufficient excuse for not making an assignment to a receiver appointed by the State court. (*Watkins v. Pinkney*, 3 Edw. Ch. 533.)

The mere filing of the petition in bankruptcy is no ground for refusing to execute an assignment to a receiver appointed in a suit instituted prior to that time, for the debtor may withdraw his petition, and thus defeat the jurisdiction of both courts. (*Watkins v. Pinckney*, 3 Edw. Ch. 533.)

If a creditor prior to the commencement of proceedings in bankruptcy has filed a bill in a State court to reach the equitable assets of the debtor, and has thereby obtained a lien thereon, he may continue the suit. (*Clark v. Rist*, 3 McLean, 494.)

The jurisdiction of a State court over a pending action to enforce a mechanic's lien is not divested by proceedings in bankruptcy. (*Seibel v. Simeon*, 62 Mo. 255.)

A State court is not divested of jurisdiction over a pending action to enforce a vendor's lien by the bankruptcy of the vendee. (*Boone v. Revis*, 44 Tex. 384.)

The district court will not allow a creditor to avail himself of any unjust and unlawful advantage merely because his suit is depending in a State court, for the laws of the United States are to the extent of the constitutional limits paramount to the authority of those of the States. (*In re Bellows & Peck*, 3 Story, 428.)

Where the power of a State court to proceed in a suit is subject to be impeached, it can not be done except upon an intervention by the assignee, who

must state the facts and make the proof necessary to terminate such jurisdiction. (*Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.)

The district court can not entertain an action brought by the assignee against a sheriff to recover the money received on a sale under an execution issued on a judgment which is void under the bankrupt law. (*Atkinson v. Purdy*, Crabbe, 551.)

If the property of the bankrupt has been sold under an execution issued upon a judgment which is void under the bankrupt law, the assignee should apply to the State court. (*Atkinson v. Purdy*, Crabbe, 551; *in re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448.)

# TITLE LXI.

## BANKRUPTCY.

### CHAPTER I.

#### COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

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SEC. 4972.—The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend—

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interest of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.\* *Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount.

Statute Revised—March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statutes—Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

### Construction.

In order to avoid all doubt, the section goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. (*In re William Christy*, 3 How. 292; *in re Dudley*, 1 Penn. L. J. 302; *Mitchell v. Manuf. Co.* 2 Story, 648; *in re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.)

It is more logical to construe this section throughout as giving the most ample powers to the district courts to conduct and settle the proceedings in bankruptcy, but as not relating to suits at law or in equity between the assignee and third persons, which are regulated by the second section. (*Shearman et al. v. Bingham et al.* 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Jobbins v. Montague*, 6 B. R. 509.)

Congress meant to provide a system capable of entire self-execution by the national tribunals without the assistance or co-operation of the States, if the parties interested should choose to rely on the national courts. The jurisdiction given to the district courts is ample for all such purposes. (*Mitchell v. Manuf. Co.* 2 Story, 648; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.)

In the absence of this clause, it might well be doubted whether the district court would have had jurisdiction of an action brought by the assignee for the recovery of a debt due, or property belonging to, the bankrupt, when both parties were citizens of the same State. To remove such doubt was the purpose of the clause, and not at all to deprive State courts of jurisdiction of such actions, when vested in them by the laws and constitutions of the States. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.)

The last clause of this section is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated. (*In re William Christy*, 3 How. 292.)

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\* So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 178.



When creditors are spoken of "who claim a debt or demand under the bankruptcy," the meaning is that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form, whether they have a security by way of pledge or mortgage therefor, or not. The clause is not limited to creditors who prove their debts. (*In re William Christy*, 3 How. 292.)

This clause does not confer jurisdiction on any subject not pointed out in the statute as a part of the proceedings in bankruptcy from its inception to its close. It refers to matters and proceedings as the successive steps to be taken in the progress of the application according to the directions of the statute, over all which it gives plenary jurisdiction; yet it does not give jurisdiction over all persons and things which may be affected by the proceedings in bankruptcy. (*In re Dudley*, 1 Penn. L. J. 302.)

The object of these clauses is to give the district court complete jurisdiction to accomplish of itself all the purposes of the law, and to enable it, independently of any other jurisdiction, to begin, continue and end all such proceedings as may be necessary and proper to accomplish the entire settlement and final distribution of the bankrupt's estate. (*Mitchell v. Manuf. Co.* 2 Story, 648; *in re William Christy*, 3 How. 292.)

The jurisdiction vested in the district court is ample, and reaches every possible controversy which can arise in the collection and distribution of the effects of a bankrupt. (*Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

The district court is vested with full chancery and common law powers to act in all cases arising under the bankrupt law. (*Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

This section confers jurisdiction to entertain suits for the adjustment of all adverse claims and the collection of outstanding debts. (*Mitchell v. Manuf. Co.* 2 Story, 648.)

The district court has jurisdiction of an action at law to collect a debt due to the bankrupt's estate. (*Kelly v. Smith*, 1 Blatch. 290; *Atkinson v. Purdy*, Crabbe, 551.)

The jurisdiction does not depend on the parties to the suit, but on the subject-matter. (*Kelly v. Smith*, 1 Blatch. 290; *Atkinson v. Purdy*, Crabbe, 551.)

The district court has jurisdiction to entertain a bill filed by a mortgagee against an assignee of the mortgagor to reform a mortgage which by mistake does not conform to the intention of the parties. (*Fowler v. Hart*, 13 How. 373.)

Subsequent mortgagees, as well as the assignee, should be made parties to a bill to reform a mortgage. (*Fowler v. Hart*, 13 How. 373.)

The bankrupt court has precisely the same powers in equity over judgments of State courts affecting the bankrupt's estate, as a State court of equity would have under a general creditor's bill, if the debtor were not a bankrupt. (*Fowler v. Dillon*, 12 B. R. 308.)

The bankrupt court has the power to reduce the amount of a judgment at law rendered on confederate contracts to its equivalent in legal money. (*Fowler v. Dillon*, 12 B. R. 308.)

The bankrupt court may require the abatement of war interest embraced in a judgment. (*Fowler v. Dillon*, 12 B. R. 308.)

This clause does not confer or take away jurisdiction of the State courts, but simply allows the Federal courts to decline to entertain actions at common law to which the assignee is a party in which the debt demanded is less than five hundred dollars. (*Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.)

### Injunctions from District Courts.

The district court can not restrain the State courts, but it can restrain parties litigant in the State courts, whenever it becomes necessary in order to give force and effect to the jurisdiction and powers conferred upon it by the bankrupt act. (*In re William Christy*, 3 How. 292; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *Jones v. Leach et al.* 1 B. R. 595; *Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392; *Pennington v. Sale & Phelan et al.* 1 B. R. 572; *Pennington v. Lowenstein et al.* 1 B. R. 570; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *in re R. R. Atkinson*, 7 B. R. 143; s. c. 5 L. T. B. 320; s. c. 4 C. L. N. 359; s. c. 19 Pitts. L. J. 188; *contra, in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448; *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; *Tenth Nat'l Bank v. Sanger*, 42 How. Pr. 179; *in re Dudley*, 1 Penn. L. J. 302.)

Such a course is very familiar in courts of chancery in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court for the purpose of collecting and marshaling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. (*In re William Christy*, 3 How. 292.)

Congress, in the enactment of laws upon the subject of bankruptcies, has complete and plenary power, unrestricted save as to uniformity. It has, in legislating upon the subject, power to take from State courts the administration of remedies for the enforcement of liens. The bankrupt law is, then, the supreme law of the land, binding alike upon Federal and State tribunals, and wherever, by express words or by necessary implication, it affects State laws, the power of State courts or the remedies of suitors therein, it is paramount. When Congress delegated to the district courts the equitable jurisdiction in bankruptcy over the property of the debtor, it by necessary implication also delegated at the same time the power to administer such remedies known to the law as are absolutely indispensable to the complete exercise of the jurisdiction expressly conferred. One power directly given is the power to collect all the assets. The means by which this result is to be reached are not enumerated, but power to accomplish the result is given and the right to employ the proper legal process for effecting the result must follow by necessary implication. Closely connected with the power of collecting the assets is that of ascertaining and liquidating the liens which may be claimed to exist upon those assets. A proceeding to ascertain or liquidate a lien would be idle, unless the court has the power to restrain the parties from liquidating their liens without its intervention, and to preserve the property by restraining its sale until the lien is ascertained to be good or void. The bankrupt law is highly remedial, and ought to have a liberal construction for the purpose of effecting its aim and policy. It gives the bankrupt court an exclusive and original jurisdiction over all the parties to the bankruptcy proceedings, all the assets, and all the liens thereon. The express grant of power to enjoin in proceedings *in invitum* is not a denial of such power in voluntary proceedings, upon the maxim *expressio unius exclusio alterius*. The district court is clothed at once, in voluntary cases, with jurisdiction over the debtor and his property; but where the proceeding is involuntary, the debtor is not adjudged a bankrupt until the return and hearing of the order to show cause. There is, therefore, good reason for giving the court power to enjoin between the time of filing the creditor's petition and the return of the order to show cause, as there is in these cases no voluntary surrender of the property. (*In re Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; *in re Lady Bryan Mining Co.* 6 B. R. 252; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372; *in re Ulrich et al.* 8 B. R. 15; s. c. 6 Ben. 483.)

It makes no difference with the power of the court over the subject that the lien, or alleged lien, is inchoate and incapable of execution until the amount secured thereby is ascertained and settled. Ascertainment and liquidation are expressly authorized, and the subsequent provisions of the act show how fully the whole administration of the estate is confided to the court. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

All the creditors of the bankrupt, secured as well as unsecured, become, and are at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought under and are subject to the sole and exclusive jurisdiction and control of the bankruptcy court. Such jurisdiction and control exist and may be enforced as well before as after proof of debt. (*Phelps v. Sellick*, 8 B. R. 390; *Watson v. Citizens' Savings Bank*, 11 B. R. 161.)

It does not necessarily follow that the district court must in all cases prohibit any proceeding in a State court for the benefit of a creditor having a lien. Often it is quite convenient, and ordinarily it may be quite desirable to permit pending actions to proceed so far as to ascertain the amount due. In one case a foreclosure of a mortgage in the State court was permitted, though begun after petition filed in the district court. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

The power to control creditors in respect to the liquidation of liens is clearly given. Two considerations illustrate the importance of the power which are especially applicable to liens by attachment: 1st. Without such power there is no adequate protection to the other creditors against collusion between the bankrupt and the claimant, not even aided by the authority given to the assignee to defend. 2d. The early settlement of the estate may sometimes require that the court in bankruptcy should take the determination of claims which are in dispute into its own hands. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

The power to liquidate the liens upon the assets necessarily includes the power to ascertain what liens there are, their amount, and to pay them off, and as an incident to payment and distribution, a power of sale for their conversion into cash in order that the liens may be liquidated or paid, and the surplus carried to the general fund. (*In re Ellerhorst et al.* 7 B. R. 49; s. c. 2 Saw. 219.)

Where the property of the bankrupt is invested in the name of a party, he may be restrained from transferring or disposing of the same. (*Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.)

Where a levy has been made before the commencement of proceedings in bankruptcy, the possession of the sheriff can not be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. (*In re David Weamer*, 8 B. R. 527; s. c. 21 Pitts. L. J. 17; 30 Leg. Int. 321; 6 C. L. N. 27; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Peck v. Jenness*, 7 How. 612; *Colby v. Ledden*, 7 How. 626; *in re John Kerlin*, 3 How. 326.)

This doctrine, however, has no application where the pending suits are in the Federal tribunals. There no comity is violated. (*Sutherland v. Lake Superior Canal Co.* 9 B. R. 298; s. c. 1 Cent. L. J. 127.)

If the execution creditor has security on real estate as well as on personal property, he may be enjoined for a brief period, to allow the creditors to pay him and obtain a transfer of his judgment, or to enable them to obtain such other equitable relief as may not impair his rights. (*Eastburn v. Yardley*, 8 Pac. L. R. 127; s. c. 30 Leg. Int. 404.)

Where the judgment was obtained in fraud of the bankrupt law, the bankrupt court may enjoin a sale under an execution issued thereon. (*Suth-*

*erland v. Lake Superior Canal Co.* 9 B. R. 298; s. c. 1 Cent. L. J. 127; *in re Wm. H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248; *Buckingham v. McLean*, 8 McLean, 185; s. c. 13 How. 151; *contra*, *Townsend v. Leonard*, 3 Dillon, 370.)

The district court can not order the property to be taken out of the hands of the sheriff until the levy under the execution is set aside on account of fraud, or for the reason that it is in violation of the bankrupt law. The assignee has no right to the immediate possession of the property seized before the judgment is satisfied. (*In re Wm. H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.)

The lien under an execution is *prima facie* valid. (*In re Wm. H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.)

An injunction which merely restrains the sheriff from disposing of the bankrupt's property, does not prevent a sale of property levied on before that time, for such property is not the bankrupt's property in law except so far as the surplus is concerned. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

If an injunction merely restrains the sheriff from disposing of the property, this does not justify him in releasing it from the levy. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

The court may, in its discretion, before granting an injunction against a judgment creditor who has a lien, require the general creditors to indemnify the judgment creditor. (*In re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143.)

After the process of the State court has been executed, and the property sold thereon, it is too late to interfere. The purchaser at such sale acquires a good title, and this is so even if the judgment is fraudulent, provided the purchaser is an innocent one. For this reason, as well as upon general principles, the district court can not set aside a sale upon the process of a State court, and order the property resold, however apparent it may be that it was sold much below its real value. The remedy is in the State court, upon objections to the confirmation of the sale. (*In re Fuller*, 4 B. R. 115; s. c. 1 Saw. 243; *Thames v. Miller*, 2 Woods, 564.)

If several executions are levied upon the same property, an agreement among the execution creditors to bid the property in for their joint benefit will not render the sale fraudulent if it was fairly conducted and the property brought all it was reasonably worth. (*Thames v. Miller*, 2 Woods, 564.)

Where property of the bankrupt has been sold by the sheriff under an execution issued upon a valid judgment in a State court, the injunction will not be granted. The sheriff will be allowed to use the proceeds to satisfy the judgment and all costs thereon, and will only be required to account for the balance to the proper officer of the bankrupt court. (*In re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Bernstein*, 1 B. R. 199; s. c. 2 Ben. 44.)

If an injunction is served on the sheriff, the State court will not direct him to pay the money over to the execution creditor. (*Mills v. Davis*, 10 B. R. 340; s. c. 35 N. Y. Supr. 355.)

Where an insolvent corporation files a petition in bankruptcy after the filing of a complaint in a State court, but before the appointment of a receiver, and surrenders its assets to the register under an order of the bankrupt court, the district court may enjoin the complainant in the State court from prosecuting his suit, if the State court, notwithstanding a return of the facts, insists upon proceeding with the suit. (*In re Citizens' Savings Bank*, 9 B. R. 152.)

When a creditor who is prosecuting a suit in a State court, has obtained an agreement by which he will obtain an improper advantage, he may be enjoined from prosecuting his suit. (*Sampson v. Burton*, 5 B. R. 459.)

When the creditors of the bankrupt will not be benefited, and the party to be enjoined may be materially injured, the injunction will not be granted. (*In re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *in re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143; *in re Wilbur*, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; *in re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320; *in re Irwin Davis*, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; *in re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re William Christy*, 3 How. 292; *Norton v. Boyd*, 3 How. 426; *in re Peter Hufnagel*, 12 B. R. 554.)

The fact that steps have been taken to enforce the lien, makes no difference. It is not a question of jurisdiction or of right, but of discretion. (*In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490.)

Proceedings in the State court to punish a party for contempt will not be enjoined. (*In re M. W. Hill*, 2 B. R. 140.)

An injunction will not be granted to stay proceedings on a suit instituted in a State court against the marshal, for taking possession of property which did not belong to the debtor, under a warrant in involuntary bankruptcy. (*In re Marks*, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. L. J. 12.)

The district court can not enjoin a suit in the State court by a party who claims under a bill of sale voidable by creditors, against a sheriff who has levied an attachment upon the property, and subsequently turned it over to the assignee, because the sheriff has a valid defense which the State courts are ready to uphold. There is no jurisdiction in the district court to try a case between an attaching officer and a stranger to the bankruptcy, or to enjoin such an action in the court which has jurisdiction of it. (*In re H. S. Evans*, Lowell, 525.)

If the property which was transferred fraudulently, has been seized by the marshal and turned over to the assignee, the circuit court may, as an incident to the relief, restrain the fraudulent grantee from prosecuting suits in the State courts against the assignee and the marshal for such seizure. (*Kellogg v. Russell*, 11 B. R. 121; s. c. 11 Blatch. 519.)

The sheriff of the State court may be made a party to the proceedings for an injunction. (*In re Bernstein*, 1 B. R. 199; s. c. 2 Ben. 44; *Jones v. Leach et al.* 1 B. R. 595; *Pennington v. Sale & Phelan et al.* 1 B. R. 572; *Pennington v. Lowenstein et al.* 1 B. R. 570; *Wilson v. Brinkman et al.* 2 B. R. 468; s. c. 1 C. L. N. 193; *in re Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; *Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 Blatch. 493; *in re Bellows & Peck*, 3 Story, 428.)

If purchasers are reluctant to take the title, on account of the cloud cast upon it by the pendency of proceedings in bankruptcy, this is a sufficient reason for granting an injunction. (*Whitman v. Butler*, 8 B. R. 487.)

If the mortgagee, prior to the commencement of proceedings in bankruptcy, sold the property by virtue of a power contained in the mortgage, but the purchaser refused to accept the title, the bankrupt court may enjoin the mortgagee from attempting to resell after the commencement of proceedings in bankruptcy, the same as if no sale had ever been made. (*Whitman v. Butler*, 8 B. R. 487.)

If the party in possession claims a right to the property, the assignee is not entitled to an injunction to prevent a removal thereof, upon the mere ground that he is unable to give the bond requisite in an action of replevin. (*In re Oregon Iron Works*, 13 Pac. L. R. 50.)

An injunction will lie against a party within the jurisdiction of the court to stay proceedings in any court beyond its territorial limits. (*In re James Martin*, 5 Law Rep. 158; *Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392.)

If the party in whose name the legal proceedings sought to be enjoined are conducted does not reside within the district, the injunction may be issued against him, his agents and attorneys within the district, and in such a case the service of the injunction upon such agents or attorneys will be a service upon the principal, and bind him as well as them personally. (*In re Bellows & Peck*, 3 Story, 428.)

The district court may, in its discretion, direct notice to be given to the adverse party before the granting of an injunction. (*In re Moses Carlton*, 1 N. Y. Leg. Obs. 291; s. c. 5 Law Rep. 120; *in re John Harper Smith*, 1 N. Y. Leg. Obs. 291; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re Muller & Britano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

Before the appointment of an assignee, proceedings for an injunction to protect the property of the bankrupt may be instituted by the bankrupt, or the petitioning creditors. (*Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *Jones v. Leach*, 1 B. R. 595; *in re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 142; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *in re Isaac Ulrich*, 8 B. R. 15; s. c. 6 Ben. 483; *in re John S. Foster*, 2 Story, 131; *in re Bellows & Peck*, 3 Story, 428.)

As soon as the assignee is appointed, he should be made a party to the proceedings by a supplemental bill. (*Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.)

Where an injunction is obtained upon a petition filed in the cause pending in bankruptcy, it may be dissolved on a motion, without resorting to the formality of a demurrer. (*In re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re E. Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247.)

An execution creditor, who has been delayed by an injunction, is entitled to a prompt adjudication of the validity of his judgment as soon as an assignee is appointed. The question, however, can not be determined on *ex parte* affidavits. (*In re Hafer & Bros. (in re Beck)*, 1 B. R. 586; s. c. 6 Phila. 474.)

When the assignee, after his appointment, does not take possession of property levied on by virtue of an execution issued upon a valid judgment, nor make application for leave to discharge the levy by paying the judgment, and there is no evidence that any advantage will be gained by continuing the injunction, it will be dissolved. (*In re Wilbur*, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; *in re J. J. Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.)

When it does not appear that the proceedings under an execution will affect the interests of any party entitled to the protection of the district court under the bankrupt act, the injunction will be dissolved. When the bankrupt claims that the property held under an execution belongs to his wife, and the assignee does not assert any claim thereto, the injunction will not be continued. (*In re Olcott*, 2 Ben. 443.)

When, in a case in equity in the district court, the weight of evidence is rather with the defendants, and there is no suggestion that they are not abundantly responsible pecuniarily, or that the assets are in peril, the injunction will, on motion, be dissolved, and the case will then go to a final hearing on proofs. (*Collins v. Bell*, 3 B. R. 587.)

A decree enjoining a judgment creditor and the maker of a note from enforcing a judgment against the bankrupt, does not restrain the maker of the note upon which the judgment was rendered from proceeding *ex delicto*, at law against the bankrupt for his fraud in disposing of the note. (*Horter v. Harlan*, 7 B. R. 238; s. c. 9 Phila. 63.)

A party who is served with an injunction restraining him from prosecuting a suit must affirmatively take steps adequate to prevent such proceedings. It

is a grave error to suppose that if he personally takes no steps to go on, he can refrain from taking any reasonably adequate measures to stop the proceedings, and leave it in the power of his employees to go on in his name, and yet escape the consequence of disobeying the injunction. (*Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392.)

A party who has violated an injunction may be compelled to pay expenses of the proceeding to punish him for contempt, together with a proper fee for the counsel for the complainant. (*Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392.)

If an injunction prohibiting an application for a receiver is served on an attorney while he is engaged before the State court in making the application, he violates it by handing the motion papers with a draft order for the appointment of a receiver to the judge, if the application is granted and a receiver appointed. (*In re South Side R. R. Co.* 10 B. R. 274; s. c. 7 Ben. 391.)

### **Proceedings in the District Court Sitting as a Court of Bankruptcy.**

An appearance and answer do not waive any question affecting the jurisdiction of the court, for no voluntary act of the defendant can give jurisdiction, and it is never too late, at any stage of the cause, to consider it. (*Jobbins v. Montague*, 6 B. R. 509.)

Courts of bankruptcy are mere creatures of the statute, and derive all their life and vigor from it. Jurisdiction is only given "in their respective districts." The fair legal inference from these words is that jurisdiction was meant to be withheld outside of those districts. (*Jobbins v. Montague*, 6 B. R. 509.)

The case in bankruptcy includes all the summary proceedings. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254.)

The whole proceedings in bankruptcy are on the equity side of the court, and whatever a court of equity may do in the exercise of its general jurisdiction over subjects requiring a like interposition, may properly be done by the district court in cases in bankruptcy. (*In re Benjamin B. Grant*, 5 Law Rep. 303; *in re Moses Carlton*, 1 N. Y. Leg. Obs. 291; s. c. 5 Law Rep. 120.)

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, and these courts, as courts of bankruptcy, are authorized to hear and adjudicate upon the same, according to the provisions of the bankrupt act. Examined separately, the clause which provides that the powers and jurisdiction therein granted and conferred may be exercised as well in vacation as in term time, and that a judge sitting in chambers shall have the same powers and jurisdiction as when sitting in court, would seem to afford some support to the view that all the powers and jurisdiction of the district courts when sitting as courts in bankruptcy may be exercised in a summary way as by a rule to show cause. Most matters and proceedings in bankruptcy may doubtless be heard and adjudicated by the district court in that way, but this general clause must be considered in connection with all the other provisions of the bankrupt act. Superadded to the general clause, and as an exposition of the same, is another and more important clause, in which is given a specific enumeration of the cases and controversies to which that general jurisdiction extends, and it is plain that the enumeration does not include "suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." Cases of that kind fall directly within section 4997, and must be determined by a suit in

equity, or an action at law, as the case may be. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Barstow v. Peckham*, 5 B. R. 72; *in re Kerosene Oil Co.* 3 B. R. 125; s. c. 6 Blatch. 521; *Rogers v. Winsor*, 6 B. R. 246; *in re Masterson*, 4 B. R. 553; *Shaffer v. Fritchery*, 4 B. R. 548; *in re H. S. Evans*, Lowell, 525; *Briggs v. Stephens*, 7 Law Rep. 281; *contra, in re Norris*, 4 B. R. 35; s. c. 1 Abb. O. C. 514; s. c. 1 L. T. B. 227.)

The district court has no jurisdiction or control over a person who is not before the court, and upon whom no process has been served. Such a person is not a party to the proceedings in bankruptcy. (*Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.)

The only parties to the proceedings in bankruptcy are the debtor, his assignee and his creditors. Other persons are not affected by them. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.)

Consent can not confer jurisdiction to adjudicate the question of title to property in a summary proceeding. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.)

If a stranger to the proceedings appears in answer to a summary petition, and consents to a reference of the case to a register, he cannot impeach the decision of the court, in a collateral action for want of jurisdiction. (*People v. Brennan*, 12 B. R. 567; s. c. 6 N. Y. Supr. 120; s. c. 10 N. Y. Supr. [Hun], 66.)

If the execution creditor, who is restrained on a summary petition, appears and asks for an order directing the sheriff to sell the property and bring the proceeds into the bankrupt court, he can not maintain an action against the sheriff to recover the proceeds after the latter has complied with this order. (*O'Brien v. Weld*, 15 B. R. 405; 92 U. S. 81.)

If a creditor claims that a sale of his claim is void, on account of fraud, the controversy may be determined by the bankrupt court that has control of the fund. (*Frank v. Tolman*, 75 Ill. 648.)

The assignee, who is an officer of the bankrupt court, may be proceeded against by summary petition in respect to any funds in his hands if the opposing party chooses to proceed in that way, though the assignee himself has no right to take similar action against third persons. (*In re H. S. Evans*, Lowell, 525; *Ferguson v. Peckham*, 6 B. R. 569; s. c. 29 Leg. Int. 285.)

The court cannot deprive the assignee of the possession of the property of the bankrupt without due process of law, which in general means a trial by jury unless the parties consent to a trial by the court. (*Wood M. & R. Co. v. Brooke*, 9 B. R. 395.)

When the assignee denies the validity of the claim, and asserts title to the property, the claimant can not proceed by a summary petition. (*Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217.)

Where the bankrupt holds property to secure him for indorsements and notes, made by him for the owner, the holder of one of these notes is not entitled to a summary order, directing the payment of his claim out of the property. (*Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217.)

Whatever powers are given by this section are designed to be exercised summarily. When the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the district court is entirely adequate. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372; *in re Isaac Ulrich*, 8 B. R. 15; s. c. 6 Ben. 483.)



When the claimant of property in the possession of the assignee invokes the controlling power of the court over the assignee as its officer, and submits to a trial of the question which he asks the court to determine, no question can be raised whether a more formal suit would or would not have been proper. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

When a party voluntarily appears, and moves for the enforcement of a pretended lien, the district court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way. (*In re Worthington*, 14 B. R. 388; s. c. 8 C. L. N. 362; s. c. 3 Cent. L. J. 526; s. c. 9 C. L. N. 346.)

The district court is legislatively made a court of summary equitable jurisdiction over the assignee and over his trust. Therefore, independently of any special provisions of the bankrupt act, the court can, by way of direction to him, decide any question of legal or equitable right which can be contentiously discussed for opposing interests. (*In re Franklin Fund Saving Society*, 31 Leg. Int. 173.)

A petition to have an order for a sale of property declared null and void, should make the purchaser and those claiming under him parties to the proceeding. (*In re Wm. Major*, 14 B. R. 71.)

The assignee may proceed by a summary petition, to have an order for a sale of property declared null and void. (*In re Wm. Major*, 14 B. R. 71.)

The power to issue an injunction to prevent parties from interfering with the property of the bankrupt, may be exercised summarily without a formal suit. (*In re Isaac Ulrich*, 8 B. R. 15; s. c. 6 Ben. 483.)

If the wife for a debt due to her take a note payable to her husband or bearer, the court will not, in a summary and incidental manner, interfere with the assignee's right to the possession of the property. (*In re George W. Snow*, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.)

Jurisdiction to order a foreclosure in favor of an alleged mortgagee claiming adversely to the assignee and adversely to another mortgagee, where the title of the applicant is disputed, the amount claimed to be due is denied, and where it is insisted that he has already released the lien, is not embraced in the summary jurisdiction. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

Jurisdiction to foreclose mortgages upon the estate of the bankrupt is not included in the powers to be exercised summarily. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

The bankrupt court has jurisdiction over a summary petition to compel the bankrupt to deliver property in the joint possession of himself and wife to the assignee, unless it is shown that she has an adverse interest in the property. (*In re Pierce & Whaling*, 15 B. R. 449; s. c. 9 C. L. N. 300.)

The bankrupt court has no jurisdiction to entertain a summary petition by a creditor against the assignee for a sale of property not in the possession of the assignee but in the possession of another claiming title and not a party to the petition. (*Bradley v. Healey*, 1 Holmes, 451.)

When a bill in equity is pending between the parties in which a right to a set-off is at issue, the proceedings on a petition of a creditor against the assignee for the ascertainment of his claim, may be stayed to abide the event of that suit. (*Bradley v. Healey*, 1 Holmes, 451.)

The court in a summary proceeding may direct the sale of property free from all incumbrances, although the assignee disputes the validity of a mortgage thereon. The right of the mortgagee is not affected thereby. His lien, if any he has, is transferred to the fund, and must be asserted, and, if contested, settled in an appropriate proceeding to be subsequently taken. (*In re Frederick S. Kirtland*, 10 Blatch. 515.)

If the attorney of the mortgagee appears and answers the petition, the court has jurisdiction to direct a sale of the property free from incumbrances. (*In re Frederick S. Kirtland*, 10 Blatch. 515.)

The grant of jurisdiction to collect the assets impliedly confers upon the courts of bankruptcy, the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to such grant. This is a universal rule of construction, and without such a rule, many rights would go unredressed; for it is not unusual for legislative bodies to leave with the courts the power to devise and adopt a remedy commensurate with the exigencies of the case, in the execution of the authority conferred; the restriction being that they must not be such as are in violation of the provisions of the fundamental law, or in derogation of the constitutional rights of the citizen. (*Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.)

Jurisdiction over the debtors and adverse claimants is not obtained by the bankruptcy proceedings, and they can not be treated as parties to the proceedings like creditors. The power to collect the assets is therefore necessarily an additional and independent authority. (*Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.)

The fullest and most comprehensive authority is given to the district court in respect to all matters relating to a proceeding in bankruptcy. The power is in its nature an equity power, and may be exercised by proceedings in the nature of equity proceedings. It is undoubtedly the object and policy of the bankrupt act, that proceedings under it shall be summary; that matters shall be settled as speedily as possible. In no other way can the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success is dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action can be safely relied on where the whole jurisdiction is confided to a single court: in the collection of assets; in the ascertainment and liquidation of liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing the sales at such times and in such manner as shall best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights or remedies in the State tribunals; and, finally, in making a due distribution of the assets, and bringing to a close within a reasonable time the whole proceedings in bankruptcy. (*Buil v. Beckwith*, 2 B. R. 241; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 Ben. 35; s. c. 2 L. T. B. 79; *in re J. O. Smith*, 2 B. R. 297; *in re Marks*, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. L. J. 12; *in re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226; *in re Geo. J. G. Davidson*, 2 B. R. 114; s. c. 2 Ben. 506; *in re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *in re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.)

This power is not a wanton power. It is not a power to order this or that because it may. It is a judicial discretion to be carefully exercised in view of the rights of all; to be exercised so far as may be in accordance with sound precedent, and is so to mold itself to, and meet the necessarily new questions, not of practice alone, but of right, as they arise, that while, on the one hand, it administers the law in the true intent and spirit of its enactment, so as to effectuate the really equitable and beneficial ends it seeks to attain, it does not, on the other, abrogate those useful and striking analogies so well known to the profession, nor those rules of practice and judicial procedure now so interwoven with our system of jurisprudence as to have become an almost inherent and essential part thereof. Hence, in its discretion, the court may

require parties to resort to more formal proceedings, where no loss or detriment will be occasioned thereby. (*In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *Bill v. Beckwith*, 2 B. R. 241; *in re Betts*, 15 B. R. 536; s. c. 4 Cent. L. J. 558; s. c. 13 Pac. L. R. 203.)

Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, can not be compelled to come into court, under a petition for a rule to show cause. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.)

An appearance by attorney is effective to give jurisdiction over a party, even though there has been no previous service of process upon him. The object of process in a suit *in personam* is to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction so far as the person is concerned. That jurisdiction, when once thus conferred, can not be withdrawn by the act of the party who has so appeared, without the consent of the court or of the prosecuting party. If the right to withdraw depends upon questions of fact, the court will pass upon the existence and pertinence of the facts, and allow or refuse the withdrawal on previous notice to the prosecuting party. (*In re Ulrich et al.* 3 B. R. 133; s. c. 3 Ben. 355.)

When property is sold under an agreement that the proceeds shall be brought into court, they are paid into the registry, and the court is its legal and only custodian. The fund is lodged in court without prejudice to the rights of any of the parties, and it is an essential part of the agreement between the parties in legal intendment that their claims shall be adjudicated by the court according to the law and usage of the court in cases of deposits in its registry. Either party can, at any time, by petition or motion, prefer his claim to it, whereupon it will become the court's duty, causing proper notice to be given to whomsoever it may deem proper, to act upon such petition or motion. The dismissal of it will not necessarily establish the title of any contesting party. The court may well adjudge that one petitioner has failed to establish his right, and dismiss his petition, retaining custody of the fund until some other petitioner, it may be a second or it may be a fiftieth, shall establish his right satisfactorily to the court. (*In re Masterson*, 4 B. R. 553.)

An application to the summary jurisdiction of the court to be exercised by an order to show cause, as upon a motion, is not a suit, and can not be treated as a suit. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

The objection that the proceeding should be by a bill in equity, or an action at law, may be taken at the hearing, or in the appellate court. (*In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135; *contra, in re Ulrich et al.* 3 B. R. 133; s. c. 3 Ben. 355.)

The petition may be converted into a bill in equity, but the only advantage to be gained by so doing will be a saving of the service of a new subpoena, as the answers filed and the testimony taken, if any, can not be used, except by consent, in the prosecution of the suit in its amended form. (*In re Kerosene Oil Co.* 3 B. R. 125; s. c. 6 Blatch. 521; *Barstow v. Peckham*, 5 B. R. 72; *Starkweather v. Cleveland Ins. Co.* 4 B. R. 341; s. c. 2 Abb. C. C. 67; *in re H. S. Evans*, Lowell 525.)

When a party has made a mistake in selecting his remedy, the summary petition may, in the discretion of the court, be dismissed without costs to either party, with leave to the petitioner to pursue the appropriate remedy. (*In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135.)

The summary jurisdiction may be exercised upon the ordinary processes,

orders to show cause, notices of motions, &c., therein, or upon petitions where special aid or relief is sought in any matter embraced in that jurisdiction. (*In re* Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch, 376.)

A party seeking relief in the bankrupt court should come in by petition and not by motion. The petitioner should sign and verify the petition. Coming into court as he does, in an original manner, seeking affirmative relief, and not brought in by another party, he must come in in person in the first instance, and not by an attorney. (*In re* J. O. Smith, 2 B. R. 297; *in re* Davidson, 2 B. R. 114; s. c. 2 Ben. 506; *in re* Philo R. Sabin, 9 B. R. 388.)

The oath to a petition must be administered by the same officers and in the same manner as oaths in other cases to be used in the courts of the United States. (*In re* Philo R. Sabin, 9 B. R. 388.)

When the oath is administered by a notary public, the signature and notarial seal of the notary constitute a sufficient authentication. When not accompanied by such seal, the signature and official character of the notary must be authenticated in the usual manner. (*In re* Philo R. Sabin, 9 B. R. 388.)

It is not necessary or proper that resort should be had to the formal and plenary proceedings common to suits in equity in the circuit court. A petition stating the facts relied on for relief, and praying for the order, relief, or proceeding sought for, is sufficient. (*In re* Wallace, 2 B. R. 134; s. c. 1 Dedy, 433; *in re* J. O. Smith, 2 B. R. 297.)

When the district court has jurisdiction of the subject-matter and of the question at issue, and both parties submit themselves to its exercise and invoke it in the form of a summary proceeding, the court is not called upon to consider whether the determination of the question should have been sought by a summary proceeding or by a proceeding more formally commenced. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

If the adverse party goes to a hearing without objecting to the right or interest of the petitioner, this is a waiver of the form of filing a new petition to set up an interest subsequently acquired. (*In re* Robert Morris, Crabbe, 70.)

A summary petition is not like a suit at common law in which the party must have his right of action when he commences it. If he subsequently acquires an interest, he may file a new petition. (*In re* Robert Morris, Crabbe, 70.)

If the assignee is not chargeable with a personal knowledge of the subject, his omission to deny an averment will not enable the petitioner to use it as if admitted. (*In re* George W. Snow, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.)

A party who acquiesces in a reference to an auditor, and appears before him and contests the claim, waives the right to a jury trial. (*Kelly v. Smith*, 1 Blatch. 290.)

If the district judge shall be satisfied, in conducting such a proceeding, that justice will be subserved by a jury trial, he can direct the issue to be so tried. (*Bill v. Beckwith*, 2 B. R. 241.)

When a petition is filed claiming rent for possession of premises by the assignee after the commencement of the proceedings in bankruptcy, a jury trial may be allowed. (*Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220.)

The testimony may be taken *ore tenus* at the hearing. (*Wilson v. Stoddard*, 4 B. R. 254; s. c. 2 C. L. N. 161.)

If the mortgagee is dead, the mortgagor can not testify in favor of his assignee in a proceeding against the executors of the mortgagee. (*Bromley v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511.)

The declarations of the bankrupt in aid and in partial execution of a transfer which is impeached, are admissible as the declarations of a co-conspirator and as a part of the *res gestæ*. (*Samson v. Clarke*, 6 B. R. 410; s. c. 9 Blatch, 379.)

Even in a formal suit in equity the court may qualify the decree so that it shall not operate to prevent a new suit, and nothing is more common in disposing of motions than to give leave to renew or apply upon new and further evidence for additional relief. The highly equitable and remedial powers conferred upon the court in bankruptcy are not less free from restriction, nor are they hampered by such technical rules as will prevent the doing of what is just and for the protection of the estate, even if it required the revocation of an order once made. An order dismissing a petition with leave to renew the application upon the discovery of additional facts, is not final and conclusive as *res adjudicata*. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

Where property has been delivered to the plaintiff in a replevin suit brought in a State court, and has been subsequently taken from the possession of the plaintiff by the marshal, there is no conflict or interference on the part of the marshal with the officers of the State court. (*In re Geo. J. G. Davidson*, 2 B. R. 114; s. c. 2 Ben. 506.)

Where a petition assumes the form of a regular suit or proceeding, and testimony is introduced as upon an ordinary trial, a docket fee of twenty dollars may be taxed in favor of the attorney for the assignee when the petition is dismissed. (*In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.)

### **Jurisdiction of State Courts over Suits by Assignees.**

The jurisdiction of the district court is not exclusive over the entire execution of the law. (*Lucas v. Morris*, 1 Paine, 396.)

Congress has no right to require that the State courts shall entertain suits for the purpose of carrying out the provisions of the bankrupt law. The States in providing their own judicial tribunals have a right to limit, control and restrict their judicial functions and jurisdiction according to their own mere pleasure. (*Mitchell v. Manuf. Co.* 2 Story, 648; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

An assignee under the bankrupt law of the United States may sue in his own name in the State courts to enforce the rights of property vested in him by the assignment in bankruptcy, and the courts of the United States have not exclusive jurisdiction of such actions. (*Stevens v. Mechanics' Savings Bank*, 101 Mass. 109; *Peiper v. Harmer*, 5 B. R. 252; s. c. 8 Phila. 100; s. c. 4 L. T. B. [C. R.] 166; *Boone v. Hall*, 7 Bush, 66; *State v. Trustees*, 5 B. R. 466; *in re Central Bank*, 6 B. R. 207; *Cogdell v. Exum*, 10 B. R. 327; s. c. 69 N. C. 464; *Hoover v. Robinson*, 3 Neb. 437; *Mitchell v. Manuf. Co.* 2 Story, 648; *Hastings v. Fowler*, 2 Ind. 216; *Ward v. Jenkins*, 51 Mass. 583; *Russell v. Owen*, 15 B. R. 322; s. c. 61 Mo. 185; *contra*, *Frost v. Hotchkiss*, 14 B. R. 443; s. c. 1 Abb. N. C. 27.)

In an action brought by an assignee, the defendant may deny the jurisdiction of the district court over the bankrupt in the proceedings in which the assignee was appointed. (*Stuart v. Aumüller*, 8 B. R. 541.)

The State courts have jurisdiction of questions arising between persons within their jurisdiction, whether they arise under the laws of any other State or any foreign nation. If they arise under the law of the United States, they have the same jurisdiction, unless deprived of it by some competent authority. The fact that the Federal courts may have jurisdiction of the same question, does not deprive the State courts of jurisdiction. The Federal and State courts may and do have concurrent jurisdiction of various questions. When, however, the right of action is created by an act of Congress, it being a matter within the

power conferred upon the Federal government, Congress may prescribe, in the exercise of its rightful powers, the manner and the tribunal in which alone that right may be enforced. Congress may confer exclusive jurisdiction in these cases upon the Federal courts; but when it does not prescribe the tribunal in which alone they are to be prosecuted, the Federal and State courts have concurrent jurisdiction over them. The fact that Congress confers jurisdiction upon the Federal courts, is no evidence that Congress intended to clothe them with exclusive jurisdiction, because they have no jurisdiction except such as is conferred upon them by Congress. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150; *Gilbert v. Priest*, 8 B. R. 159; s. c. 63 Barb. 339; s. c. 65 Barb. 444; s. c. 14 Abb. Pr. [N. S.] 165; *Gilbert v. Cranford*, 46 How. Pr. 222; *Jordan v. Downey*, 12 B. R. 427; s. c. 40 Md. 401; *Lewis v. Sloan*, 68 N. C. 557; *Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439; *Kemmerer v. Tool*, 12 B. R. 334; s. c. 78 Penn. 147; *Otis v. Hadley*, 112 Mass. 100; *Rison v. Powell*, 28 Ark. 427; *Clafin v. Houseman*, 15 B. R. 49; s. c. 93 U. S. 130; *Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429; *McKiernan v. King*, 2 Mont. 72; *contra*, *Bromley v. Goodrich*, 15 B. R. 289; s. c. 40 Wis. 131; *Voorhees v. Frisbie*, 8 B. R. 152; s. c. 25 Mich. 476; s. c. 6 L. T. B. 85; *Brigham v. Clafin*, 7 B. R. 412; s. c. 31 Wis. 607; *Fenlon v. Lonergan*, 29 Penn. 471.)

If the State courts have jurisdiction, it is not in their discretion whether or not to exercise it. It is their duty to do so when called upon in the mode prescribed by law. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.)

If Congress had intended by this section of the act to make the jurisdiction of the district courts exclusive in the collection of assets, and to deprive all other courts of jurisdiction over any action by or against assignees in bankruptcy, it would have been as easy as it would have been natural to employ language to express this purpose. But it will be observed that the word exclusive, as descriptive of the jurisdiction, is not only not used, but seems to have been carefully avoided. (*Payson v. Dietz*, 8 B. R. 193; s. c. 2 Dillon, 504.)

A bankrupt is not a necessary party to a suit brought to enjoin a judgment fraudulently recovered by him. (*Weakly v. Miller*, 1 Tenn. Ch. 523.)

The assignee can properly institute a suit in a State court only under the direction of the district court. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254.)

The jurisdiction of the circuit and district courts over controversies with a debtor of the bankrupt or a person who disputes the right to real or personal property with him, is concurrent with and does not divest that of the State courts. (*Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28; *vide in re Geo. W. Anderson*, 9 B. R. 360.)

A person whose property has been seized under a warrant, may sue the marshal in a State court. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81; *in re Isaac Marks*, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. L. J. 12.)

Whenever State courts have jurisdiction over controversies between the assignee and third parties, the circuit courts have it independent of the bankrupt law if the proper citizenship of the parties exist. (*Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179.)

An assignee who is a citizen of one State may maintain an action in the circuit court of another State against a party who is a citizen of that State, to enforce a right which may be enforced at common law or in equity. The jurisdiction is conferred by the judiciary act, and is not taken away by mere affirmative legislation conferring like jurisdiction upon another court. The mere grant of jurisdiction to a particular court has never been held to oust any other court of the powers which it before possessed. (*Payson v. Dietz*, 8 B. R. 193; s. c. 2 Dillon, 504; *Spaulding v. McGovern*, 10 B. R. 188; *Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179; *Post v. Rouse*, 1 W. N. 39.)

If an assignee appears in a State court in an action brought to enforce a lien against the bankrupt's estate, execution may be stayed in order to give the parties an opportunity to apply to the district court. (*Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.)

SEC. 4973.—The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

Statute Revised—March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statute—Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

A proceeding in bankruptcy, from the time of its commencement until the final settlement of the estate, is but one suit. (*Sandusky v. First Nat'l Bank*, 12 B. R. 176; s. c. 23 Wall. 289; *in re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290; *Alabama R. R. Co. v. Jones*, 5 B. R. 97.)

The district court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The statute provides that "the courts shall be always open for the transaction of business," so that from the beginning of a proceeding in bankruptcy to its termination there is but one term. (*Sandusky v. Nat'l Bank*, 12 B. R. 176; s. c. 23 Wall. 289; *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

Its proceedings in any pending suit are at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation. Application for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one. (*Sandusky v. Nat'l Bank*, 12 B. R. 176; s. c. 23 Wall. 289)

Every court has power to alter and amend its records so as to conform to the truth, during the term to which the record relates. During the pendency of proceedings in a particular case, the court, upon the representation of the clerk that he had omitted to file-mark a particular paper, or had filed it of a wrong date, and upon being satisfied of the truth of the representation, may order him to file the paper as of the date when lodged in his office. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

The bankrupt court may be a movable court. It is said the clerk's office and the clerk follow the court, but for the transaction of other than bankruptcy business, the clerk's office is stationary at the place designated by law. But the holding of court necessitates the filing of papers and the issue of process. The one can make little progress without the other. Hence it appears that Congress contemplated the necessity of filing papers otherwise than by delivering them to the clerk at his stationary office, although it provided that such office should be their final place of custody. A petition presented to the judge at chambers, and acted upon by him, will be deemed to be filed on the day of its presentation, although not actually deposited in the clerk's office until a subsequent day. (*Frank v. Houston*, 9 Kans. 406.)

District courts, in the exercise of their exclusive original jurisdiction, may act in administrative matters, or matters of mere discretion, as well in vacation

as in term time, and a judge sitting at chambers in such matters has the same power and jurisdiction as when sitting in court. (*Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.)

Actions at law or suits in equity can not be heard and determined by the district court at chambers, or in vacation. (*Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.)

SEC. 4974.—A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

Statute Revised—March 2, 1867, ch. 176, § 1, 14 Stat. 517.

SEC. 4975.—The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Statute Revised—March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statute—Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

The proceedings to punish a party for contempt in violating an injunction issued in a case of involuntary bankruptcy must be separate and distinct from those against the bankrupt. (*Creditors v. Cozzens & Hall*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.)

Where a firm is enjoined, one party will not be liable to punishment for a violation of the injunction by his copartner. (*In re South Side R. R. Co.* 10 B. R. 274; s. c. 7 Ben. 391.)

When the action does not tend to enforce any demand against the bankrupt, nor deprive the assignee of any property or right, there is no contempt. (*In re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.)

It is not a sufficient justification for the violation of an injunction that the party was acting under a *fi. fa.* issued upon a judgment rendered in a State court. (*In re R. Atkinson*, 7 B. R. 143; s. c. 5 L. T. B. 320; s. c. 4 C. L. N. 359; s. c. 19 Pitts. L. J. 188.)

SEC. 4976.—In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Statute Revised—June 30, 1870, ch. 177, § 2, 16 Stat. 174.

SEC. 4977.—The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bank-



ruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that District.

Statute Revised—March 2, 1867, ch. 176, § 49, 14 Stat. 541. Prior Statute—Aug. 19, 1841, ch. 9, § 16, 5 Stat. 448.

SEC. 4978.—The same jurisdiction, power, and authority which, are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the\* district courts of the several Territories,† subject to the general superintendence and jurisdiction conferred upon circuit courts by section *four thousand nine hundred and eighty-six* [two], when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

Statutes Revised—March 2, 1867, ch. 176, § 49, 14 Stat. 541; June 30, 1870, ch. 177, § 1, 16 Stat. 173. Prior Statute—Aug. 19, 1841, ch. 9, § 16, 5 Stat. 448.

SEC. 4978 A (Act of April 14, 1876, § 1, 19 Stat. 33).—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases in bankruptcy commenced in the supreme courts of any of the Territories of the United States prior to the twenty-second day of June, Anno Domini eighteen hundred and seventy-four, and now undetermined therein, the clerks of the said several courts shall immediately transmit to the clerks of the district courts of the several districts of said Territories, all the papers in, and a certified transcript of, all the proceedings had in each of said cases; and the said clerks of the district courts shall immediately file the said papers and transcripts as papers and transcripts in the said district courts.

SEC. 4978 B (Act of April 14, 1876, § 2, 19 Stat. 33).—That the clerks of the said several supreme courts shall transmit the papers and transcripts provided for in section one of this act, in each case, to the clerk of the district court of the district wherein the bankrupt or bankrupts, or some one of them, resided at the time of the filing of the petition in bankruptcy in said case; and as soon as the said papers and transcript in any case shall have been transmitted and filed, as herein provided, the district court in which the same shall have been so filed shall have jurisdiction of the said case, to hear and determine all questions arising therein, and to finally adjudicate and determine the same in all respects as contemplated in other bankruptcy cases by the act entitled "An act to establish a uniform system of bankruptcy

\* So amended by act of 22 June, 1874, ch. 390, § 16, 18 Stat. 182.

† So amended by act of 22 June, 1874, ch. 390, § 16, 18 Stat. 182.

throughout the United States," and approved March second, eighteen hundred and sixty-seven, and amendments thereto.

SEC. 4979.—The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of\* any district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest,† or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.

Statutes Revised—March 2, 1867, ch. 176, § 2, 14 Stat. 518; June 8, 1872, ch. 340, 17 Stat. 334. Prior Statute—Aug. 19, 1841, ch. 9, § 8, 5 Stat. 446.

### Construction.

No jurisdiction of cases at law or in equity relating to the estate, rights or liabilities of the bankrupt is expressly given to the district court elsewhere than by this clause, though the jurisdiction may be well enough held to be included in the general grant of section 4972. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *in re William Christy*, 3 How. 292.)

Independent of the bankrupt act the district courts possess no equity jurisdiction whatever. Whatever jurisdiction they possess in that behalf is wholly derived from the bankrupt act now in force. (*Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *in re William Christy*, 3 How. 292.)

The jurisdiction of the district court over suits at law or in equity is conferred by the general grant of power to collect all the assets of the bankrupt. (*Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.)

Congress in framing the bankrupt law intended to provide Federal instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. Jurisdiction over an action brought by an assignee to collect a debt due to the estate is not limited to the district court where the proceedings in bankruptcy are pending, but is conferred upon all the district courts. (*Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 7 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516; *contra*, *in re H. Richardson*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497; *Jobbins v. Montague*, 6 B. R. 509; *Lamb v. Damron*, 7 B. R. 509; s. c. 5 C. L. N. 290.)

Controversies, in order that they may be cognizable under this clause, upon the ground of an adverse interest, either in the circuit or district court, must have respect to some property or rights of the bankrupt, transferable to or vested in the assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in this clause, and against the other. All three of these conditions must concur to give the jurisdiction. The jurisdiction conferred by this clause is other and different from the special jurisdiction and superintendence described in section 4986. (*Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Woods v. Forsyth*, 2 W. J. 348; s. c. 16 Pitts. L. J. 234;

\*So amended by act of 22 June, 1874, ch. 390, § 3, 18 Stat. 178.

†So amended by act of 22 June, 1874, ch. 390, § 3, 18 Stat. 178.

*Bachman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264; *in re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.)

The term interest, as used in this section, signifies an estate, share or part, and a suit to be maintained in the circuit court by or against an assignee must be concerning some property or right of property derived from the bankrupt, and in which it must appear that one party or the other claims an interest adversely to—that is, against—the other. (*Bachman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264.)

A claim of a lien and to possession by way of pledge under the lien is adverse to the assignee. The claim to the right of possession may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is in fact a species of property in the thing just as much the subject of litigation as the thing itself. (*Marshall v. Knox*, 8 B. R. 97; s. c. 2 Wall. 551.)

Where a party claims a right to part of the proceeds of a judgment, and the assignee denies this claim, this is a controversy over which the circuit court has jurisdiction under the bankrupt law. (*Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179.)

The jurisdiction over controversies between an assignee and adverse claimants may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the circuit court of the district in which the decree of bankruptcy was made. (*Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179; *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.)

The United States may file a bill in the circuit court to obtain payment out of a trust fund held by a trustee appointed in proceedings in bankruptcy. (*Lewis v. U. S.* 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.)

The circuit court has no jurisdiction of a bill in equity filed by a creditor before the appointment of an assignee, to restrain a mortgagee from disposing of the goods of the bankrupt covered by the mortgage. (*Johnson v. Price*, 13 B. R. 523; *contra*, *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.)

The circuit court may entertain a bill brought to obtain an injunction against parties who are interfering with the bankrupt's estate under a claim adverse to that of the assignee. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.)

The circuit court has jurisdiction of an action to collect a debt due to the bankrupt. (*Mitchell v. Manuf. Co.* 2 Story, 648; *Pritchard v. Chandler*, 2 Curt. 488; *McLean v. Lafayette Bank*, 3 McLean, 185; *Allen v. Binswanger*, 2 Cent. L. J. 724; *contra*, *Bachman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264.)

In all cases where an assignee may pursue the remedies provided by this section, a fair interpretation requires that he shall do so. He can not adopt another remedy, as, for instance, summary proceedings. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *in re Kerosene Oil Co.* 3 B. R. 125; s. c. 6 Blatch. 521; *in re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135; *in re Masterson*, 4 B. R. 553; *contra*, *in re Norris*, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.)

A State can not bring a suit in the circuit court. (*State v. Trustees*, 5 B. R. 466.)

### Subpœna.

The conferring of the jurisdiction on the two courts concurrently by this section, in the same terms, indicates plainly that one of them can not exercise such jurisdiction to an extent or in a manner different from the other. The jurisdiction conferred on both courts is a regular jurisdiction between party and

party, of the same character as that conferred on the circuit courts by section 629, and is to be pursued as to forms and modes of process under the same rules which obtain as to suits brought in the circuit court in pursuance of that section. There is nothing in the bankrupt act indicating an intention on the part of Congress that process in the suits specified in this section shall be served or made effective in any different manner from that required in suits brought in a circuit court under the jurisdiction in "suits of a civil nature at common law or in equity," conferred on such court by section 629. There is nothing in the acts of Congress, or in the rules in bankruptcy, or in the rules in equity prescribed by the supreme court which authorizes a marshal to serve a subpoena to appear and answer in an equity suit at a place outside of the territorial limits of the district for which he is appointed. (*Jobbins v. Montague*, 6 B. R. 117; s. c. 5 Ben. 422; *Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284; *Lewis v. Gibson*, 32 Leg. Int. 22.)

Rule thirteen in equity does not permit the service to be made by leaving the subpoena at the last place of abode or at the last usual place of abode, but the subpoena is to be left at the existing present dwelling-house or the existing present usual customary place of abode. Although the party may have fled from the jurisdiction of the court to avoid the consequences of frauds committed by him on the creditors, yet the district court does not acquire jurisdiction over him by means of a subpoena left at a place which is not his actual abode, though it may be his last place of abode. (*Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.)

The whole subject of the service of a subpoena in a suit in equity is regulated by act of Congress and by the rules in equity established by the Supreme court. If a party is not an inhabitant of the district, and is not found within the district, the district court can not obtain jurisdiction over his person by any service of process made otherwise than in accordance with rule thirteen in equity. No order can be passed for the service of process by publication, or by a substituted service on a receiver of rents. (*Hyslop v. Hoppock*, 6 B. R. 557; s. c. 5 Ben. 533.)

The recovery of an inequitable judgment in the State court by a citizen of another State does not confer jurisdiction over him upon the Federal courts of the district where the judgment is recovered, with authority to sustain a bill in equity against him by service of a subpoena upon the attorney who acted for him in obtaining the judgment. (*Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284.)

Where a new term of the district court in equity is held on the first Tuesday of each month, a subpoena may be made returnable on the first Tuesday instead of the first Monday of the month. (*Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.)

Where the defendants in a bill for an injunction reside in different districts in the same State they may be served with process (§ 740) in their respective districts. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

### Actions at Law.

Parties seeking redress in the district court in matters relating to bankruptcy, have used the following remedies, to wit :

**Replevin :** brought by an assignee against a sheriff to recover property held under executions issued upon judgments obtained contrary to the bankrupt act. (*Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47.)

**Trover :** brought by an assignee to recover the value of property transferred by the bankrupt to a creditor contrary to the bankrupt act. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wadsworth v.*

*Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *Babbitt v. Walbrun & Co.* 4 B. R. 121; s. c. 6 B. R. 359; s. c. 1 Dillon, 19; *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412; *Brooke v. McCracken*, 10 B. R. 461; s. c. 7 C. L. N. 10; s. c. 8 Pac. L. R. 102; *contra*, *Gayles v. American*, 14 B. R. 141; s. c. 5 Biss. 86.)

The assignee may bring trover to recover the value of property of the bankrupt converted by another to his use. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

A demand and refusal of the value of the property is not sufficient. (*Schuman v. Fleckenstein*, 9 C. L. N. 174.)

Before the assignee can recover the value, he must show a demand and refusal to deliver the property. (*Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 9 C. L. N. 174.)

A complaint in an action to recover the value of property transferred as a preference, must allege a demand and refusal to deliver the same. (*Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 9 C. L. N. 174.)

If the bankrupt co-operates in trying to secure the adverse claims of third persons by removing the property from the reach of his creditors, he may be made a party defendant with them in an action for the tort. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

An agent who attempts to aid his principal in enforcing a tortious claim against the bankrupt's goods, claims an adverse interest. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

If the bankrupt aids another in converting his goods to the latter's use he is liable, not in his capacity as a bankrupt, but as a person, and may be sued by the assignee like any other person for a tort in his private and individual capacity. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

If the title to the property was in the bankrupt, and the pretense of title in a third person was fraudulent, then the removal of the property to another place by the bankrupt and such third party, as if it belonged to the latter, is a conversion. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

If the assignee, in an action of trover, chooses to set out the manner in which he acquired title, his declaration must show that the proceedings are such as make the transfer to him legal and valid. An omission to allege an adjudication of bankruptcy renders the declaration defective. (*Wright v. Johnson*, 4 B. R. 627; s. c. 8 Blatch. 150.)

If a person sell property, to a part of which he is entitled, and makes no distinct appropriation of either part, the assignee may elect for which he will sue. An action of trover is such an election when the conversion occurs before the suit and after the time to which his title relates. (*Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.)

Trover is not the proper form of action to recover money that may be due under a contract made by the bankrupt with a third party. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.)

If a party in possession of property, claiming an exclusive right in himself to the whole of it, sells it with an existing intent to appropriate the whole avails to his own exclusive use, the sale is a wrongful conversion of the part to which he is not entitled. (*Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.)

The assignee can not recover in an action of trover any more than the value of the corporeal movable effects. He can not recover the profits received from a business, or the value of the good will. (*Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.)

Where one count of the answer is a general denial, a special affirmative defense set up in the answer can not be relied on as a separate ground of recovery when no such ground is alleged in the petition. (*Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519.)

The assignee can only recover upon the allegations contained in his petition. If he assails a transfer as void under the bankrupt law, he can not recover upon the ground that the transfer is void under the State law. (*Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519.)

**Assumpsit:** brought by an assignee to recover the money received by a preferred creditor upon a judgment given contrary to the bankrupt act. (*Street v. Dawson*, 4 B. R. 207.)

The absence of the counsel originally retained is no ground for a new trial where no postponement was asked on that ground. (*Van Dyke v. Tinker*, 11 B. R. 308.)

The non-joinder of the copartners where the preference was given to the firm, can not be raised at the trial on the merits. (*Van Dyke v. Tinker*, 11 B. R. 308.)

A new trial will not be granted to let in testimony which is merely cumulative. (*Van Dyke v. Tinker*, 11 B. R. 308.)

To a writ of *scire facias* to have execution of a judgment rendered against the assignee, the defendant may plead that he has no effects. The judgment for costs in the original suit might have been entered against the assignee personally, and not against the effects of the bankrupt in his hands. (*Amblard v. Heard*, 9 Mass. 489.)

### Suits in Equity.

The district court has full and adequate jurisdiction over all matters relating to the settlement of the bankrupt estate, either at law or in equity, by way of petition or bill. Whenever a case is presented which shows that the relief sought is absolutely necessary to protect the interests of the general creditors, such relief will be granted. (*In re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Jones v. Leach*, 1 B. R. 595; *Pennington v. Sale & Phelan*, 1 B. R. 572; *March v. Heaton*, 2 B. R. 180; s. c. Lowell, 278; *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193; *Davis, Assign. of Bittel et al.* 2 B. R. 392.)

A bill in equity has been used for the following purposes, to wit:

To enjoin proceedings upon executions issued upon judgments rendered in a State court. (*In re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Pennington v. Lowenstein et al.* 1 B. R. 570; *Pennington v. Sale & Phelan*, 1 B. R. 572; *Jones v. Leach*, 1 B. R. 595.)

To set aside a sale of the bankrupt's property on the ground of fraud. (*March v. Heaton*, 2 B. R. 180; s. c. Lowell, 278.)

To review and set aside a sale, made after the commencement of proceedings in bankruptcy, by virtue of a deed of trust executed to secure a creditor. (*Davis, Assign. of Bittel et al.* 2 B. R. 392; *Lee v. Franklin Av. S. Inst.* 3 B. R. 218; s. c. 1 C. L. N. 370; *Phelps v. Sellick*, 8 B. R. 390.)

To recover property conveyed by the bankrupt in fraud of creditors. (*Bradshaw v. Alcin*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *Pratt v. Curtis*, 6 B. R. 139.)

To recover money obtained upon a judgment given contrary to the bankrupt act. (*Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193)

To enforce a right of redemption in mortgaged property. (*Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313.)

To recover money paid secretly by the debtor to a creditor, to induce him to sign a compromise agreement in fraud of the rights of other creditors. (*Bean v. Brookmire*, 7 B. R. 568; s. c. 1 *Dillon*, 151; s. c. 2 *Dillon*, 108; s. c. 6 *L. T. B.* 114.)

To set aside a mortgage on the property of the bankrupt made by him with intent to prefer a creditor. (*Scammon v. Cole*, 3 B. R. 393; s. c. 2 *L. T. B.* 103; *McLean v. Lafayette Bank*, 3 *McLean*, 415.)

To remove a cloud on the title of the assignee arising from official acts done by an officer, under color of law and in the execution of legal process. (*Beers v. Place & Co.* 4 B. R. 459; s. c. 36 *Conn.* 579; s. c. 1 *L. T. B.* 162.)

To ascertain what liens exist, and pass upon their validity, although an order has been previously passed by the bankrupt court for the sale of the property. (*Shaffer v. Fritchery*, 4 B. R. 548.)

To recover the amount demanded by a corporation as interest upon a loan above what its charter allowed it to receive, when the collaterals have been sold by it and applied to the debt. (*Tiffany v. Boatman's Savings Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 *Dillon*, 14; s. c. 18 *Wall.* 376.)

To recover the value of property transferred by one partner in fraud of the partnership. (*Taylor v. Rasch*, 5 B. R. 399.)

To discharge incumbrances and ascertain their amount and priority. (*McLean v. Lafayette Bank*, 3 *McLean*, 415.)

For an account brought by an assignee against the bankrupt's principal. (*Mitchell v. Manuf. Co.* 2 *Story*, 648.)

To set aside an assignment and reach dividends paid to a creditor thereunder. (*Chemung Canal Bank v. Judson*, 8 *N. Y.* 254.)

To set aside a pretended lien upon the bankrupt's estate. (*Stickney v. Wilt*, 11 B. R. 97; s. c. 23 *Wall.* 150.)

To recover money paid by the bankrupt to the defendant as a preference. (*Flanders v. Abbey*, 6 *Biss.* 16; *Harmanson v. Bain*, 15 B. R. 173.)

A bill in equity is the most convenient and effectual remedy to remove the lien of an execution or judgment. It enables the court to settle the rights of all the parties in one suit, and not leave the sheriff to a further litigation with the judgment creditor. The sheriff ought not to be proceeded against or called upon to settle the question in conflict on his own responsibility, nor without such a proceeding as will, by concluding the execution creditor, protect him in delivering the property levied upon to the assignee. (*Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 *Blatch.* 493.)

Where an assignee has a claim in part as a beneficiary to the proceeds of property placed in the hands of an agent, and in part as a creditor, but can not ascertain the exact limits of each claim without a discovery, he may file a bill asserting both claims, and make it a general creditor's bill. (*Stotesbury v. Cadwallader*, 31 *Leg. Int.* 229.)

If an assignee with knowledge or with reason to believe that one claiming to be a creditor of the bankrupt has proved a debt against the estate which has no existence, or which is tainted with fraud, neglects or refuses to contest the allowance of such debt, other creditors who have proved their debts may seek the aid of a court of equity to annul the allowance. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 *Wall.* 171.)

A creditor can not maintain a bill in equity to have the claim of another creditor disallowed, without averring more than that the district court drew a

wrong conclusion from the evidence. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

After two trials on all the evidence that can be produced, the assignee is not bound to enter an appeal to the circuit court, nor to allow an appeal in his name. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

A bill in equity can not be maintained to set aside a transfer on the ground of preference, when the remedy at law is plain, adequate, and complete. (*Garrison v. Markley*, 7 B. R. 246.)

Even if the complainant could get a larger and more satisfactory measure of relief, that would not justify the circuit court in an interference with the jurisdiction and proceedings of another court of concurrent power. No case can be found where a court of chancery has undertaken to wrest property from another court of chancery of concurrent jurisdiction, because it thought its own power better fitted to give complete and ample relief. (*Blake v. Ala. & Chat. R. R. Co.* 6 B. R. 331.)

The fact that the complainant raises questions in the circuit court which are not raised in a suit in another court, does not authorize the circuit court to take from the latter the property which it has under its control. The circuit court may pass upon questions not raised in the other court, even between the same parties, and relating to the same; but no case can be found authorizing the circuit court to interfere with property in the possession of another court of concurrent jurisdiction. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

The fact that the receiver appointed by another court is not doing his duty, or has in any degree abandoned the property, does not authorize the circuit court to interfere. The receiver is responsible to the court which appointed him, and to that court alone. Appeals should be made to the court which appointed him, and any redress for his misconduct must be sought there. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

The jurisdiction of another court can not be questioned in the circuit court, so as to deprive the former of the custody of property. That question should be first made to the court exercising jurisdiction. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

Where a bill in equity has been filed prior to the commencement of proceedings in bankruptcy, by a prior mortgagee, to which subsequent mortgagees are made parties, the assignee, upon his appointment, should not file an original bill to sell the property free from all incumbrances, where the subsequent mortgages cover some property not included in the prior mortgage; but he should file a cross bill in the suit in equity. (*Sutherland v. Lake Superior Canal Co.* 9 B. R. 298; s. c. 1 Cent. L. J. 127.)

After the proceeds of property sold upon an execution are in the hands of the sheriff, the assignee who is pursuing the assets of the bankrupt in the hands of a third party, is not bound to resort to the State court. He has a right to proceed against the party directly in the Federal courts for the proceeds, and is not obliged to resort to the State court, where the matter is substantially ended, for relief. (*Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.)

Independent of the question whether the assignee may not always, if he sees fit, seek the aid of a court of chancery to set aside a fraudulent conveyance or illegal transfer, the right to call for an account is not questionable. (*Verselius v. Verselius*, 9 Blatch. 189.)

The assignee has the right, as ancillary to relief by an account, to have a discovery from the defendant to supply the deficiency in his own knowledge, and his ignorance of the particulars sought not only entitles him to a discovery, but excuses the want of more precise specification of the particular fraud alleged. (*Verselius v. Verselius*, 9 Blatch. 189.)



There is no ground for proceeding in the circuit court by a bill in equity against the bankrupt himself, to obtain affirmative relief by injunction or otherwise. The summary jurisdiction of the district court embraces ample power to compel obedience by him to all orders and decrees necessary to enforce the surrender and appropriation of his property. (*Beecher v. Binninger*, 7 Blatch. 170.)

The claim to relief on the grounds of the right to a discovery can not be maintained when the complainant knows that the property transferred consists in a stock of merchandise, for this constitutes data amply sufficient to enable a competent pleader to frame a declaration at law, with all the particularity necessary in such a case. It would, no doubt, be convenient to know the exact items and quantities and numbers of each kind, but this is not necessary, because the pleader may cover the whole range of items of each kind, and may state the numbers, quantities, and values broad enough to cover any possible proofs that may be made. (*Garrison v. Markley*, 7 B. R. 246.)

The assignee, by an examination of the grantee, may obtain all the information which he could possibly obtain by an answer to a bill in equity. (*Garrison v. Markley*, 7 B. R. 246.)

Since the law has been changed, so as to allow parties to be called and examined as witnesses in trials at law, bills for discovery in aid of trials at law, or to enforce purely legal rights, have become entirely unnecessary—have, in fact, fallen into disuse, and may be considered practically obsolete. (*Garrison v. Markley*, 7 B. R. 246.)

A bill for discovery should allege that the facts can not be proven by any other witness, and this allegation can not be truthfully made in the case of a transfer by the bankrupt, for the bankrupt is a competent witness. (*Garrison v. Markley*, 7 B. R. 246.)

A mortgagee may file a bill to foreclose a mortgage in the circuit court. (*Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

The assignee may file a bill to vacate a transfer of property, although he is in possession thereof. (*Kellogg v. Russell*, 11 B. R. 121; s. c. 11 Blatch. 519.)

### Parties.

Prior to the adjudication, the petitioning creditor may file a bill in equity in the district court to enjoin a preferred creditor from disposing of the property. (*In re J. J. Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.)

If the assignee is dead, and no one has been appointed in his stead, a creditor has a right to file a bill to detain property of the bankrupt, to be administered by an assignee subsequently appointed. (*Clark v. Clark*, 17 How. 315.)

It is immaterial whether the creditor who files the bill has proved his debt or not, for he may subsequently prove it. (*Clark v. Clark*, 17 How. 315.)

The assignee has the right to file a bill in the circuit court against all the encumbrancers claiming liens on a piece of property, to test the validity, priority, and amount of their claims. (*McLean v. Lafayette Bank*, 3 McLean, 415.)

Where the bill alleges preferences, several creditors claiming by distinct conveyances may be joined if they have a common interest in one or more leading facts in the bill, though in some other things there is no common interest. (*McLean v. Lafayette Bank*, 3 McLean, 415.)

Parties who have received the property of the bankrupt under fraudulent conveyances may be joined, although the conveyances were separate and distinct acts. (*Spaulding v. McGovern*, 10 B. R. 188.)

If the object of the suit is to affect property held by a trustee in trust for a

minor or *feme covert*, the trustee is a necessary party. (*O'Hara v. MacConnell*, 98 U. S. 150.)

If a junior mortgagee merely seeks to obtain a sale of the equity of redemption, a prior mortgagee is not a necessary party. (*Jerome v. McCarter*, 15 B. R. 546.)

If two executions have been levied upon the property of the bankrupt, under such circumstances as make them void as a preference, and the proceeds placed in the possession of one of the execution creditors, the court will require the other creditor to be made a party to the suit, if he is within its jurisdiction, and his interest and absence are formally brought to the attention of the court; but if this can not be done, it will proceed to administer such relief as may be in its power between the parties before it. The organization of the Federal courts has always required them to dispense with parties in chancery not within their jurisdiction, unless their presence is an absolute necessity. (*Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

In a proceeding to set a transfer aside for fraud or illegality, the bankrupt has a direct interest in the question whether the property shall be taken from the grantee, and is therefore a proper party. (*Verselius v. Verselius*, 9 Blatch. 189.)

The holder of a part of the mortgage notes is a necessary party to a suit in equity to foreclose the mortgage. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

The district court has jurisdiction over a party who is served with process in the district, although he does not reside therein. (*Babbit v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

If a party, who is out of the district, voluntarily appears and answers, he thereby makes himself a party to the suit. (*McLean v. Lafayette Bank*, 3 McLean, 415.)

The appearance of a party who was personally served with process can not be withdrawn. (*Fenton v. Colterd*, 11 B. R. 535.)

Whether the bankrupt is a proper party to a bill in equity, filed by the mortgagee against the assignee and the bankrupt, will not be considered where the bankrupt has appeared and answered. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

### Pleadings.

The bill need not point out the particular section of the bankrupt law which gives the complainant a right to assail a transfer. The bill is to set out facts, and it would be bad pleading to allege the law. (*Pratt v. Curtiss*, 6 B. R. 139.)

Affirmative relief will not be granted in equity on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings. (*Voorhees v. Bonesteel*, 7 Blatch. 495; s. c. 16 Wall. 16.)

A bill to set aside a preference must allege that the preferred creditor knew that the preference was made in fraud of the provisions of the bankrupt law. (*Crump v. Chapman*, 15 B. R. 571.)

When the bill seeks to set aside a preference, all the persons connected with the transactions should be made parties. (*Harmanson v. Bain*, 15 B. R. 173.)

A bill to set aside a preference should pray in terms for a recovery of the property, or should allege the value and pray in terms for the recovery of the value. (*Harmanson v. Bain*, 15 B. R. 173.)

An assignee in his bill need not allege the details of the facts by which he becomes entitled to maintain the suit. (*Lakin v. First National Bank*, 15 B. R. 476; s. c. 18 Blatch. 88.)

When fraud is a necessary part of a complainant's case, the facts constituting the fraud should be set forth so that the opposite party may be advised of the case he has to meet. (*Smith v. Auerbach*, 2 Mont. 348.)

An allegation that a transfer is void under the bankrupt law is not sufficiently specific. The pleading should set forth the clause under which it is void, and state the necessary facts. (*Smith v. Auerbach*, 2 Mont. 348.)

A charge of fraud or illegality in the alternative is sufficient. (*Verselius v. Verselius*, 9 Blatch. 189.)

If the bankrupt, being the owner of a vessel, transferred a part thereof, an action to set aside the transfer can not be united with an action for the appointment of a receiver, on the ground that there is an irreconcilable difference between the assignee and transferee, because they proceed on entirely different grounds, and are repugnant to each other. (*Wilkinson v. Dobbie*, 12 Blatch. 298.)

A bill in equity may be verified by the oath of the agent or attorney in fact of the petitioning creditor. (*In re J. J. Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.)

If the bill alleges the consideration for a transfer, the respondent should, if the allegation is not true, deny it positively, and set up the real consideration. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

A general denial of fraud in an answer is equivalent to nothing more than a denial of a conclusion of law. (*Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.)

If a respondent, on information and belief, denies an allegation of matters which may be, or can be, assumed to be within his personal knowledge, the allegation will be taken to be true. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

The rule that a respondent can not deny on information and belief those matters which may be, or can be, assumed to be within his personal knowledge, applies to a corporation. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

Any informality in the answer may be overlooked on final hearing, if the answer denies the material allegations of the bill in such a manner as to constitute an issue within the established rules of equity pleading. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

A denial on information and belief, of matters that are within the personal knowledge of the respondent, does not meet the charge in the bill. If he does not know anything on the subject he should say so directly. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

If the respondent may not know, or can not be assumed to know, the matters charged in the bill, he may answer on information and belief. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

The rule in chancery pleading is not that every allegation of a bill be taken as true, simply because it is not denied in the answer. If any allegation is to be taken as true, simply because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering. (*White v. Jones*, 6 B. R. 175.)

When the answer denies certain allegations of the bill, and the plaintiff does not contest the denial by a replication, the truth of the denial is to be

taken as admitted, and the denied allegations as entirely unsustained. (*Vogle v. Lathrop et al.* 4 B. R. 439; s. c. 4 Brews. 253.)

No defendant is bound to answer any interrogatories, except such as by the note at the foot of the bill he is required to answer. (*French v. First Nat'l Bank*, 11 B. R. 189; s. c. 7 Ben. 488.)

A corporation must answer a bill under its common seal, and not on oath; but the answer must be stated therein to be according to the knowledge, information and belief of its officers, ascertained from all proper sources of information. (*French v. First Nat'l Bank*, 11 B. R. 189; s. c. 7 Ben. 488.)

The officers and agents of a corporation can not be compelled to answer the interrogatories in a bill unless they are parties to the cause. (*French v. First Nat'l Bank*, 11 B. R. 189; s. c. 7 Ben. 488.)

If a party in his answer lays no claim to the property in controversy, he in effect makes none in the cause, and can not complain of a decree for not awarding to him what he did not claim. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

An answer by a creditor in respect to a debtor's state of mind, though responsive to the bill, is entitled to but little weight, unless the reasons for the belief are given. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

An answer which is responsive to the bill, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and other attending circumstances. (*Loneragan v. Fenlon*, 7 Pitts. L. J. 266.)

The answer of one defendant is not evidence against his co-defendant. (*Phoenix v. Ingraham*, 5 Johns. 412.)

A demurrer for the misjoinder of parties defendants can only be taken by those who are improperly joined. (*Spaulding v. McGovern*, 10 B. R. 188.)

A plea to the jurisdiction averring that the cause of action occurred out of the district, and that the defendant resided out of the district, is bad where the cause of action is not local, unless it avers that the defendant was not found and served in the district. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

An objection that the complainant has a complete remedy at law can not be taken at the hearing. It can only be taken by demurrer, or by way of answer. (*Post v. Corbin*, 5 B. R. 11.)

If an assignee files a bill for a satisfaction of a mortgage given to two parties, and a reconveyance from one of them, who took an absolute deed of a portion of the property as security for a debt, when both debts are paid, the party who took the absolute deed can not demur on the ground of multifariousness. (*Hill v. Bonaffon*, 2 W. N. 356.)

### Practice.

If the answer sets up a title to certain property which the assignee seeks to reach by his bill, and no evidence is introduced by either party, his claim can not be allowed. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

Where there is a co-assignee who is not made a party complainant, and the complainant absconds, the bill will not be dismissed until proper proceedings are taken on notice to the co-assignee to bring him in and compel him to elect whether he will or not be made a party complainant. (*Fenton v. Collierd*, 11 B. R. 535.)

If the loan on which a corporation reserved a greater rate of interest than was allowed by its charter, has been repaid, the assignee of the borrower in a

court of equity can only recover the excess. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

A contract whereby a corporation reserves a greater interest than is permitted by its charter, is void, and can not be enforced in a court of justice. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

If the execution creditor consents, the sheriff may be allowed to sell the property and deposit the proceeds, less the amount of his fees, in the district court, to abide the result of the litigation to determine the validity of his lien. (*In re William H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.)

When the creditors have requested the assignee to contest the validity of a levy under an execution, an injunction granted upon the petition of a creditor will be continued until the assignee can file a bill in equity. (*In re William H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.)

If the court decides that the assignee has no title to the property, it will dismiss the bill, and not retain it to decide controversies between other parties to the cause. (*Smith v. Little*, 9 B. R. 111; s. c. 5 Biss. 269.)

If the assignee, acting under an order of the district court in a case where it had no jurisdiction, takes possession of goods and sells them, the claimant, under a bill in equity is entitled to recover the full value of the goods, clear of all expenses, whether the assignee realized that full value or not. (*Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.)

A receiver may be appointed where the apparent titles to property are such on their face that the marshal can not act efficiently under the usual warrant. He will be limited to collecting rents and the interest on securities. (*Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.)

No notice of a motion for the appointment of a receiver is necessary where the parties to be affected by the appointment are in court represented by counsel who appear to resist the motion. (*McLean v. Lafayette Bank*, 3 McLean, 503.)

A receiver may be appointed when such appointment is proper and necessary. (*Sedgwick v. Place*, 3 B. R. 139; s. c. 3 Ben. 360; *McLean v. Lafayette Bank*, 3 McLean, 503.)

A receiver may be appointed to take charge of property in the hands of a receiver appointed by a State court, in a proceeding against an insolvent corporation. (*Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.)

If the party alleged to hold the property adversely to the complainant is not served with process, a receiver will not be appointed. (*Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.)

A receiver will not be appointed where, upon the hearing of the motion, it is not apparent that the ultimate determination of the suit in favor of the complainants is probable. (*Wilkinson v. Dobbie*, 12 Blatch. 298.)

The opinion of a portion of the creditors in regard to the management of the estate may be disregarded, unless they offer to indemnify the other creditors. There may be a class of creditors willing to assume risks which they have no right to ask others to incur. The former class can not dictate to the latter. (*Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.)

An order may be passed requiring the defendant to account before a master for the moneys, notes, and other property received by him. (*Benjamin v. Graham*, 4 B. R. 391.)

Courts, in collateral actions, will not listen to any argument which proceeds upon the allegation that the adjudication of bankruptcy was erroneous in fact

or in law; but will, on the contrary, presume that the decree is correct. (*Beecher v. Binninger*, 7 Blatch. 170; *Clark v. Binninger*, 39 How. Pr. 363.)

Where the assignee proceeds, by bill in equity, against parties claiming an adverse interest, his suit is subject to the ordinary rules governing courts of equity, and regulating its discretion in other cases. Therefore, on an application for an injunction and a receivership in the first instance, where the plaintiff insists that it be granted before the merits of the controversy shall be examined and considered, on the proofs of both parties, on all the questions of law and fact, he must not only show a cause of adverse and conflicting claims, and that the case is one of equitable cognizance, but he must show some emergency, some peril of loss, which the court will be unable completely to redress; and the danger must be clear, and the right, in general, free from reasonable doubt. (*Beecher v. Binninger*, 7 Blatch. 170.)

In cases of voluntary assignments, it is by no means of course to make, on motion, an order for a preliminary injunction before the filing of the answer. Cases have occurred in which the voluntary assignment protected equities which, without it, could not be protected under the bankrupt law itself. In one case, a judgment binding the debtor's land had, by due course of law, been obtained against him between the execution of the voluntary assignment and the commencement of the proceedings in bankruptcy. In another case, the bankrupt's father had, with his own concurrence, been expressly excluded from the benefit of the voluntary assignment, which had created a trust for all the other creditors. In each case, the voluntary assignment was an act of bankruptcy; but the assignee, asking the aid of equity, was not in either case at liberty to disregard the palpable existing equities, which could not be made available without the aid of the prior assignment. In such cases, if the trustee is not an unworthy person, his trust may be usefully administered in his own name until the final decree. Of course, it can not be administered without the permission of the circuit court, or independently of supervision by the assignee. Where disposal by him is allowed, but distribution prohibited, he ordinarily receives his reasonable charges, including an equitable proportion, usually one half, of the commission which would otherwise be chargeable. (*Barnes v. Rettew*, 8 Phila. 133.)

Where the bill on its face shows that the defendant is a minor and a *feme covert*, a guardian *ad litem* must be appointed before a decree *pro confesso* can be entered against her for failure to appear and answer. (*O'Hara v. MacConnell*, 93 U. S. 150.)

A decree *pro confesso* for failure to appear and answer can not be made until the term next succeeding the day of default. (*O'Hara v. MacConnell*, 93 U. S. 150.)

### Evidence.

Proof of false and fraudulent statements in regard to the condition of the company at the time of subscribing for stock is not admissible in a suit by the assignee against the subscriber to recover the amount unpaid under such subscription. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.)

The burden of proof rests upon the complainant. (*Scammon v. Cole*, 5 B. R. 257.)

The rules in equity of the supreme court have not taken away the power which the district court has as a court of equity to have the testimony of witnesses taken in open court. That power is expressly reserved in the 78th rule, which implies its existence and its perpetuation. It is there left to the discretion of the court. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

The exclusion of husband and wife as witnesses for each other in civil suits is not based solely on interest, but rests on principles of public policy, and as the statute only removes the ground of interest, the ground of public policy still renders them incompetent. (*In re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.)

The bankrupt's schedule is not admissible in favor of a fraudulent grantee to establish the validity of his title. (*Carr v. Gale*, 2 Ware, 330; s. c. 3 W. & M. 38.)

An admission made by the bankrupt before the commencement of the proceedings in bankruptcy is competent evidence against his assignee. (*Marks v. Barker*, 1 Wash. 178.)

The declarations of a party to a sale or transfer, going to destroy and take away the vested rights of another, are not competent evidence against the vendee or assignee, when made after such sale or transfer. (*Phoenix v. Ingraham*, 5 Johns. 412.)

The subsequent acts of a party to a sale or transfer are not competent evidence. (*Phoenix v. Ingraham*, 5 Johns. 412.)

SEC. 4980.—Appeals may be taken from the district to the circuit courts, in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

Statute Revised—March 2, 1867, ch. 176, § 8, 14 Stat. 520.

### Construction.

Under this section, when the matter decided is of an equitable character, and is, therefore, one which is usually reviewed in the Federal courts by appeal, it may be carried to the circuit court by that mode of transferring cases. When it is a question which, by the system of Federal jurisprudence, is treated as a question of law, it may be carried to the circuit court by a writ of error; but, in either case, the debt or damages claimed must amount to more than five hundred dollars. (*Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330.)

*Quære.* How are the words "debts or damages claimed," to be construed? (*Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330.)

Judgments in actions at law rendered in the district court, if founded upon the verdict of a jury, can never be reversed in a summary way, as the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law." Two modes only were known to the common law to re-examine such facts, to wit, the granting of a new trial by the court where the issue was tried or to which the record was returnable; or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law, which intervened in the proceeding. Congress could not provide that a judgment of the district court, founded upon the verdict of a jury in a civil action, whether for a less or greater sum than five hundred dollars, should be revised in the circuit court in a summary way, and inasmuch as suits in equity are placed in the same category as actions at law, no provision for an appeal is made where the debt or damage claimed does not exceed five hundred dollars, and the decrees of the district court in such case are final and conclusive. (*Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.)

Appellate jurisdiction of decisions of the district court is conferred upon the circuit court in four classes of cases; 1st. By appeal in cases in equity decided

in the district court under the jurisdiction created by the act; 2d. By writs of error in cases at law decided in the exercise of that jurisdiction; 3d. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4th. By appeal from decisions allowing such claims. In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee. The suits belonging to the first two classes of cases are those of which concurrent jurisdiction is given to the circuit and district courts by section 4979, and hence the appellate jurisdiction in such cases, by appeal or writ of error, is limited to suits at law or in equity by assignees against persons claiming an adverse interest, or owing a debt to the bankrupt, or by such persons against assignees. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *in re O'Brien*, 1 B. R. 176; *Street v. Dawson*, 4 B. R. 207; *in re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205.)

The judgments or decrees of the district court rendered in the exercise of the regular jurisdiction between party and party can not be reviewed or revised in any other manner than that provided in the twenty-second section of the judiciary act and subsequent acts. (*Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

The removal of such cases into the circuit court must be effected under the regulations prescribed in the twenty-second section of the judiciary act and subsequent acts. (*Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

Mere questions are not re-examinable under those regulations, nor will any judgment or decree be regarded as a regular final judgment or decree for such a purpose, unless it is rendered in term time when the court is in session. (*Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

### Appeals.

The phrase "case in equity," means a suit in equity. Courts of law frequently pass upon questions purely equitable on motion or rule, but the nature of the question has never been held to make such motion or rule a case in equity. It is a very common practice for courts of law, on motion, to set aside sales made by a sheriff on execution, on account of some fraud or unfairness on the part of the sheriff or purchaser, yet he would be a bold man who would insist that such a motion was a case in equity. When money is brought into court—the proceeds of a sale on execution—courts of law do not hesitate, on motion, to direct how the money shall be distributed, assuming to pass upon the priorities of claimants to the fund; yet, it has never been supposed that, by so doing, they were rendering a decree in chancery, or that the motion to distribute the fund according to the rights of the parties made a case in equity. When the district court passes upon the validity of a sale, and directs the distribution of the fund arising therefrom, on motion or rule to show cause, the motion is not a case in equity, nor the ruling of the court a decree in equity. It is the simple exercise of a power incident to courts of law as well as equity, to regulate the proceedings in a case pending before it, to control its own process and to distribute funds brought into court. (*In re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.)

Summary proceedings in the district court can not be revised by an appeal to the circuit court. (*Samson v. Blake*, 6 B. R. 401; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

An appeal can not be taken to revise a decision on a question relating to the bankrupt's discharge. (*In re J. M. Reed*, 2 B. R. 9; *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)



An appeal will not lie from a decision in a case of involuntary bankrupt declaring the debtor a bankrupt. (*In re O'Brien*, 1 B. R. 176.)

An appeal to the circuit court does not lie by the petitioning creditor from an order of the district court vacating an order adjudicating the debtor a bankrupt at the instance of another creditor. The remedy of the petitioning creditor in such a case is under section 4986. (*In re Hall*, 1 Dillon, 586.)

The appeal in cases in equity must be from the final decree, and from that only. The language of the section plainly indicates that it is to be from a decree, and not from any and every order in the progress of the cause. (*Clark v. Iselin*, 9 Blatch. 196; *Platt v. Stewart*, 47 How. Pr. 206.)

This section provides for an appeal in two classes of cases, namely, in "cases in equity" and on a "decision" allowing or rejecting a claim. It is therefore appropriate to use the expression "decree or decision appealed from." The language refers to and is apt to describe each class, and only indicates that cases in equity a decree may be the subject of appeal, and that where a claim allowed or rejected, the appeal is to be taken within ten days after the "decision" referring to the immediately preceding language, giving an appeal "from that decision" of the district court allowing or rejecting such claim. (*Clark v. Iselin*, 9 Blatch. 196.)

An order which directs the ascertainment of the amount due under a mortgage, without fixing the terms and conditions of the foreclosure of the equity of redemption, or the time at which the foreclosure shall be final and operative is interlocutory merely, and not a final decree. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

A decree which merely declares a conveyance void, but directs a reference to the master to take an account of the rents and profits, and to make allowance affecting the rights of the parties, is not a final decree. (*Platt v. Stewart*, 47 How. Pr. 206.)

The decree must be final as to all parties, and as to all rights claimed in the litigation sought to be reviewed. If the decree is not final as to one party, the appeal of others will not be entertained. (*Platt v. Stewart*, 47 How. Pr. 206.)

Where the omission to take the appeal in time arose from a mistake in the selection of the remedy, the district court may grant a review of the decree that a regular appeal may be taken. (*Stickney v. Wilt*, 11 B. R. 97; s. c. 1 Wall. 150.)

When an appeal is taken to revise summary proceedings, the decree may be affirmed if the circuit court finds it to be correct upon the facts of the case. (*Samson v. Blake*, 6 B. R. 401.)

When the question raised on an appeal is doubtful, no costs will be allowed. (*Clark v. Iselin*, 9 Blatch. 196; *in re Place & Sparkman*, 9 Blatch. 369.)

### Writ of Error.

It is the right of the excepting party in a case of involuntary bankruptcy which is tried before a jury, to have the questions arising during the trial, duly presented by a bill of exceptions, re-examined by the circuit court on writ of error. (*Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258; *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204; *Lehman v. Strassberger*, 2 Wool. 554.)

A writ of error lies in a case of involuntary bankruptcy, although the case was tried before a jury during a vacation. (*Lehman v. Strassberger*, 2 Wool. 554.)

No writ of error lies from the circuit court to the district court where the case is tried before the court without the intervention of a jury. (*Blair v. Allen*, 3 Dillon, 101.)

A bill of exceptions which on its face does not appear to have been taken at the trial is insufficient. (*Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

A bill of exceptions to the rejection of certain evidence is insufficient if it does not set out the evidence so rejected. (*Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

A petition for a writ of error which is not made a part of the bill of exceptions forms no part of the record, although it purports to set out all the evidence in the case. (*Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

If the errors in the instruction did not materially affect the merits of the action, and the court could have properly told the jury to find the verdict as they did, the judgment will be affirmed. (*Schulenberg v. Kabureck*, 2 Dillon, 132; *Walbrun v. Babbitt*, 6 B. R. 539; s. c. 9 B. R. 1; s. c. 16 Wall. 577.)

A denial of a motion for a nonsuit is not reviewable in error. (*Miller v. Jones*, 15 B. R. 150.)

Questions of fact can not be re-examined on a writ of error. It may be necessary, to enable the court to see the principle of law that was decided, to make the facts, to some extent, a part of the record by bill of exceptions, but it is always the law decided that is subject to review, and not the facts. (*Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Oragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513.)

It is no ground for reversing a judgment that it is rendered payable in gold coin, without finding any such state of facts as would justify that kind of judgment. It would be the regular mode in the absence of a stipulation by the parties to find the value in currency, but this would only involve the necessity of ascertaining the difference in value between coin and currency, and adding it to the coin value. The result would practically be the same, for the amount of currency would be increased so as to equal the value as actually found in coin. The party would be required to pay exactly the same value, although the number of dollars in currency would be greater. He is therefore in no way injured by the judgment for coin. (*Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380.)

If a case is tried without a jury, the circuit court can not, on a writ of error go behind the general finding for the party to inquire into the weight or sufficiency of the evidence. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

Parties litigant should, if they so desire, interpose their technical objections in the district court, and if they do not, they ought not to be heard for the first time in the appellate court upon such points, especially where it is obvious that the judgment was such as the law and facts demanded. Technical and formal defects should be assailed in order that they may be corrected in the court of original jurisdiction. Such defects are no ground for the reversal of a judgment in the appellate court. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

Objection to the pleadings can not be entertained in the circuit court (§ 954), unless they were raised by a special demurrer in the district court. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

A motion to dismiss a writ of error will be overruled if it is made before the day on which the writ is returnable. (*Globe Ins. Co. v. Cleveland Ins. Co.* 21 I. R. R. 14.)

Instructions are entitled to a reasonable construction, and if correct when applied to the facts submitted to the jury, they will be sustained in an appellate

court, even though if standing alone or without any explanation they would be incomplete in respect to some matter sufficiently explained in the evidence. (*Willis v. Carpenter et al.* 14 B. R. 521.)

### Proof of Claims.

A decision that the claim of one creditor is not entitled to priority, and the claim of another is, is not a rejection of the first claim. A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt. There is a distinction between the claim of a debt or demand against the bankrupt, and the claim of priority as to other creditors. A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors. (*In re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.)

When an investigation has been had and a decision as to the validity of a claim has been made by the district court, the right of an objecting creditor to contest the claim ceases, and any further proceedings to review the decision must be taken by the assignee. (*In re Troy Woolen Co.* 9 B. R. 329; s. c. 9 Blatch. 191.)

If the appellant does not file his appeal in the office of the clerk of the circuit court, at the term which is held next after the expiration of ten days from the time of claiming the same, and does not set forth a statement, in writing, of his claim, to which the assignee can plead or answer, and thereby form an issue to be tried, the appeal will be dismissed, although he claimed an appeal within the proper time, and gave due notice thereof to the clerk of the district court and the opposite party. (*In re Coleman*, 2 B. R. 671; s. c. 7 Blatch. 192; *in re Place et al.* 4 B. R. 541; s. c. 8 Blatch. 302.)

A decree rejecting a claim, and directing that the assignee recover costs against the claimant, to be taxed by the clerk, and have execution therefor, is final in such a sense that an appeal will lie therefrom. It settles the rights of the parties, finally rejects the claim, and awards a recovery of costs and execution therefor. No act of the court is necessary to the full and final effect of its order. The ten days begin to run from the entry of the decree, and not from the taxation of the costs. (*In re Place & Sparkman*, 9 Blatch. 369.)

An objection which goes to the jurisdiction of the court does not rest in discretion. (*In re Place & Sparkman*, 9 Blatch. 369.)

If no bond is given within the required ten days, no appeal can be allowed. Still, if the bond is in proper form, and properly executed, and is in a proper amount, and the sureties are sufficient, the judge of the district court may approve it as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal if such a course shall seem proper to him. The bond must clearly and accurately state by what court the decree appealed from was rendered. (*Benjamin v. Hart*, 4 B. R. 408.)

SEC. 4981.—No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity;

nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

Statute Revised—March 2, 1867, ch. 176, § 8, 14 Stat. 520.

The failure to give notice to the adverse party within ten days, whether claimant or assignee, is equally fatal to the appeal as the failure to give the notice to the clerk that the appeal is claimed. (*Wood v. Bailey*, 12 B. R. 132; s. c. 21 Wall. 640.)

The words "defeated party" must be construed as "opposite party," or "successful party," or "adverse party." (*Wood v. Bailey*, 12 B. R. 132; s. c. 21 Wall. 640.)

SEC. 4982.—Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

Statute Revised—March 2, 1867, ch. 176, § 8, 14 Stat. 520.

The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district or the circuit court. The regulation of appeals is a regulation of jurisdiction. The circuit court has no jurisdiction of any appeal in any case under the bankrupt act from the district court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by this section, within ten days after the entry of the decree or decision appealed from; and unless it is entered at the term of the circuit court first held within and for the proper district next after the expiration of ten days from the time it was claimed. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *in re Kyler*, 3 B. R. 46; s. c. 6 Blatch. 514; *Hawkins v. Hastings Nat'l Bank*, 1 Dillon, 453; *Sedgwick v. Fridenberg*, 11 Blatch. 77.)

Although the circuit court will not and can not get any jurisdiction of the appeal if the same is not taken in ten days, yet by the filing and serving of the notice of the appeal the court does obtain jurisdiction, and the words which refer to the entering of the appeal at the next circuit are merely directory, and the time for filing the transmiss may be enlarged by agreement. (*Baldwin v. Rapplee*, 5 B. R. 19; *Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

The district judge or a circuit judge may, in a proper case, enlarge the time for entering an appeal, and an application for that purpose should be made as soon as the parties are apprehensive that they will not have time sufficient to prepare proper pleadings. (*Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

Although the rule in regard to entering the appeal is merely directory, still if it is disregarded, the appellee has a *prima facie* ground of dismissal. (*Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

What is required to be filed in the circuit court within ten days from the time of taking the appeal, is the appeal containing a statement of the appellant's claim, and a brief account of what has been done in the district court, and the grounds of appeal. It is not necessary that the transcript of the proceedings in the district court shall be filed within ten days. (*Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

When an appeal has not been properly taken, a motion for a re-argument, so that an appeal may be taken from the decree when re-entered, will not be granted, unless the case is one of unquestionable mistake, evincing perfect good faith, and is meritorious; and even then, to grant such relief is going to the extreme verge of judicial decisions. A court should not do indirectly what it has

no power to do directly, except, perhaps in such extraordinary and extra cases as ought to be considered as exceptions to an almost inflexible and absolute general rule. (*In re Troy Woolen Co.* 6 B. R. 16; s. c. 5 Ben. 413.)

Taken literally, the ten days' limitation does not extend to writs of error but the better opinion is in view of the fact that writs of error and appeals associated together in the preceding sections, that the word appeal in this section means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate more expeditious disposition of the cause in the appellate court than that prescribed in the judiciary act or the act to amend the judiciary system. (*Ins. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258; *Coit v. Robinson*, 9 B. R. 289 c. 19 Wall. 274.)

SEC. 4983.—If the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

Statute Revised—March 2, 1867, ch. 176, § 8, 14 Stat. 520.

SEC. 4984.—A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof, a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor.

Statute Revised—March 2, 1867, ch. 176, § 24, 14 Stat. 528. Prior Statute April 4, 1800, ch. 19, § 58, 2 Stat. 35.

A creditor can not demand payment of his debt until he makes and presents to the assignee the proper proof. This provision is analogous in purpose to a proceeding to the probate of the debts against the estate of a decedent before being presented to or allowed by an administrator. When this is done, parties interested may object to the claim, and the court—the district judge without jury in a summary manner—may reject the claim as not being duly proved, as being founded in fraud, illegality, or mistake. Then, and not before, the supposed creditor may bring an action in the circuit court against the assignee and have his right to payment regularly tried. But this action can only be maintained by the creditor's first-taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner and to a particular court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circumstances and conditions. But they are not adjudications, but only proceedings preliminary to adjudication. (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. 192.)

The statement must be in form and substance a declaration of the supposed cause of action, to which the adverse party can plead and go to trial. (*H. Place et al.* 4 B. R. 541; s. c. 8 Blatch. 302.)

The provisions of this section seem to be made for ordinary debts, and if taken literally, the case of an equitable debt is overlooked. But the circuit court has full appellate power, and may make such order in relation to appeals, not fully provided for in this section, as may be necessary to conform the proceedings to the nature of the case. (*In re Blandin*, 5 B. R. 39; s. c. *Lowell*, 543; s. c. 2 L. T. B. 198.)

The circuit court has no original jurisdiction to receive and allow debts against the estate of a bankrupt. The claims of creditors must first be presented in the district court. It is not proper to present one claim in the district court and under cover of an appeal transform the claim into a new and distinct cause of action. In other words, the circuit court on appeal ought not to be called upon to decide questions either of law or of fact that were not raised and involved in the decision of the district court. The same cause of action is to be pursued, though it may happen that new or further proofs in support of that cause of action may establish facts not proved below, and new questions of law may arise thereupon. (*In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.)

Where the proof in the district court is on a note, the creditor can not in the circuit court rely on a claim for money loaned. (*In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.)

SEC. 4985.—The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the lists of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

Statute Revised—March 2, 1867, ch. 176, § 24, 14 Stat. 528.

SEC. 4986.—The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

Statutes Revised—March 2, 1867, ch. 176, § 2, 14 Stat. 518; June 8, 1872, ch. 340, 17 Stat. 334. Prior Statute—August 19, 1841, ch. 9, § 6, 5 Stat. 445.

### Construction.

It would be difficult to use language capable of conferring a more complete supervision over all the proceedings of the district court in bankruptcy. There is not only a general superintendence; but, lest that word might not include everything, there is a general jurisdiction conferred. This extends not only to all cases, but to all questions arising under the act. In other words, the circuit court may review the whole case and decide on it, or it may assume jurisdiction

of any particular question arising in the progress of the case. This jurisdiction can only be exercised over proceedings in bankruptcy already pending in district court. (*Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *in re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *Bill v. Beckwith*, B. R. 241; *Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257.)

The revision contemplated by this clause is evidently of a special and summary character, substantially the same as that given in the prior bankruptcy: as sufficiently appears from the words "general superintendence" preceding: qualifying the word jurisdiction, and more clearly, from the fact that the jurisdiction extends to mere questions, as contradistinguished from judgments or decrees, as well as to cases, showing that it includes the latter as well as former, and that the jurisdiction may be exercised in chambers as well as court, and in vacation as well as in term time. (*Morgan v. Thornhill*, 5 B. R. s. c. 11 Wall. 65; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

The only construction, which gives due effect to all parts of the act relating to revisory jurisdiction, is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit court, the appellate jurisdiction defined by section 4980; and, on the other, brings within that category all decisions of the district court, or the district judge at chambers, which can not be reviewed upon appeal or writ of error under the provisions of that section. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81.)

Power to revise all cases and questions which arise in the district courts in a proceeding in bankruptcy, "except when special provision is otherwise made" is conferred upon the circuit courts; but this power does not extend to a case where special provision for the revision of the case is otherwise made, where it is provided that an appeal will lie from the district court to the circuit court, or where a writ of error will lie from the circuit court to the district court, in the manner provided in the laws of Congress allowing appeals and writs of error. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.)

The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding. In the conduct of the case a large number of questions may arise. Before the assets of the bankrupt can be collected and distributed, it will frequently occur that the assignee or a creditor will be driven to a regular bill in equity or action at law. In these cases, the circuit court has no supervisory jurisdiction, nor has it where the claim of a supposed creditor has been rejected in whole or in part, or where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. But other cases and questions arising in the progress of a case of bankruptcy through the bankrupt court, whether the matter is of legal or equitable cognizance, and when the matter is not the subject of a regular suit in equity or law, or the allowance or disallowance of a claim, fall within the supervisory jurisdiction, and may upon bill, petition or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity. (*In re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 508; s. c. 1 L. T. B. 290.)

Jurisdiction is conferred upon "the circuit court within the district where the proceedings shall be pending," but the meaning of Congress, in employing that language, is to describe the particular circuit court in which the jurisdiction shall be exercised, and not the state of the matter to be revised, as it is clearly the intention of Congress that all such matters should be subject to revision in the circuit court, whether interlocutory or final. Revision must be sought in the circuit court of the district where the proceedings took place, which the petitioner asks to have revised; but he is not deprived of a rem

because the decree is in its nature final. It was the intention of Congress to subject every ruling, order and decree of the district court, in bankrupt cases, to the examination and revision of the circuit court. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257.)

It is not every proceeding in a bankrupt case that the circuit court is authorized to review. The circuit court is not empowered to pass upon the doings and actings of the registers, or assignees, or creditors. The case or question presented for revision must be a case or question fairly presented to and passed upon by the bankrupt court. That is the court of first resort. To that court first must the question and proofs be presented, and if that court errs upon the question presented, then, and then only, can resort be had to the circuit court. A party can not go into the circuit court in the first instance to make his case or question. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

The circuit court will not set aside an alleged fraudulent sale of real estate ordered by the bankrupt court and made by the assignee, unless the motion is first presented to the bankrupt court, because it can only review the action of the court, and not the action of the assignee. (*Bailey v. Whitfield*, 7 B. R. 173.)

There is no warrant for limiting the jurisdiction of the circuit court to review summary proceedings in bankruptcy by any measure of the value of the property involved. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

If there is nothing in the record to show that the district court found anything upon a particular point, the circuit court can not consider that as a question properly before it for revision. (*In re McGilton et al.* 7 B. R. 294; s. c. 3 Biss. 144.)

The bankrupt act does not contemplate the bringing of cases relating to the election of an assignee, and the qualifications of voters before the circuit court for review. To decide upon the legality of the votes or qualifications of creditors involves no principle of equity unless fraud in the election is alleged. The district courts are vested with large discretionary powers in reference to the appointment and approval of assignees, and the circuit courts will decline to interfere with them. (*Woods v. Luckwell*, 7 B. R. 405; s. c. 2 Dillon, 38; *in re Adler Brothers*, 2 Woods, 571.)

The action of the district court in removing an assignee or consenting to a removal by a vote of the creditors is not subject to review under this section. (*In re Adler Brothers*, 2 Woods, 571.)

The circuit court has jurisdiction to revise the proceedings of the district court for the middle district of Alabama. (*Alabama R. R. Co. v. Jones*, 5 B. R. 97.)

Decrees of the district court are final, in the constitutional sense, although they are rendered under an act of Congress which makes them subject to revision by the circuit court, and consequently the right of such revision is not inconsistent with the interest which the opposite party acquires in the decree. Rendered as the decree is, subject to revision in the circuit court, no party acquires or can acquire any interest in the decree to defeat the right of such revision. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257.)

The superintendence and jurisdiction conferred by this clause are revisory of cases and questions arising in the district court, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which, in a special and perhaps more restricted form, was given in the sixth section of the bankrupt act of 1841, wherein authority was given to adjourn any point or question arising in any case in bankruptcy, into the circuit court, to be there heard and determined; and it may be that, under the present act, the presentation of such questions, and the jurisdiction of the circuit court over them, does not, as in the former, depend upon the



discretion of the district court. But, in either view, the question, or cases presenting such questions, must arise in the district court; and their determination in the circuit court is either for the guidance or control of the district court. This is not a jurisdiction to assume the conduct of the proceedings, or to specifically enforce or execute the orders or decrees of that court. For that purpose the district court has ample and exclusive power. The act does not blend or confound the two courts in the administration of the bankrupt law. The courts are distinct under that act, as under all others, and exercise a separate jurisdiction, each in its own sphere. The proceedings for a review of the decree of the district court bring the decree, and whatever orders are involved therein, before the circuit court; but do not operate to transfer the entire proceedings in bankruptcy into the circuit court, to be there continued as in a court of first instance. If the decree is affirmed, it stands as the decree of the district court, and not of the circuit court; and is to be carried into due execution by the former, and not the latter. (*In re Binninger et al.* 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183; *in re Binninger et al.* 3 B. R. 489; s. c. 7 Blatch. 165; s. c. 1 L. T. B. 186.)

The exercise of this jurisdiction is not placed by the act under specific regulations and restrictions like the proceeding by appeal or writ of error, nor has the supreme court prescribed any rule concerning it. It must depend on the sound discretion of the court. Unreasonable delay in invoking the superintending jurisdiction should not be allowed, nor should such excessive rigor be exercised that the ends of justice will probably be defeated. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *Littlefield v. Del. & Hudson Canal Co.* 4 B. R. 257; *Sutherland v. Kellogg*, 2 Biss. 405; *in re Work, McCough & Co.* 30 Leg. Int. 361; *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

What is a reasonable time depends on the circumstances of each case. Generally it should be fixed in analogy to the period designated within which appeals must be taken. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

A review may be applied for at any time before the supposed erroneous order is carried into execution. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

If a party delays unreasonably to file the petition for a review, he may be required to pay the costs which have been incurred in executing the decree. (*Thames v. Miller*, 2 Woods, 564.)

Power to make rules for the orderly conducting of business in court is vested in the circuit court as well as in the supreme court, provided such rules are not repugnant to the laws of the United States, and are not inconsistent with the rules relating to the same subject established by the supreme court. (*Sweatt v. Boston R. R. Co.* 5 B. R. 234; s. c. 1 L. T. B. 273.)

The jurisdiction conferred by this clause can only be exercised within and for the district "where the proceedings in bankruptcy shall be pending." (*Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.)

If the judge was a creditor at the time when the proceedings were commenced, and has since assigned his claim, he is not legally disqualified to act in the case, and, being qualified, he is not at liberty, upon a matter of mere personal feeling or preference, to decline the responsibility thrown upon him by official position. (*In re Sime & Co.* 7 B. R. 407; s. c. 5 Pac. L. R. 217.)

This section does not declare in terms that the party aggrieved, or any party, shall have the right to invoke that superintendence and jurisdiction; but that is necessarily implied. A court of justice is not at liberty to disown its jurisdiction, or to refuse to entertain parties who apply in due form for its exercise. Where the jurisdiction is itself discretionary, it may be declined; and where parties do

not apply in the legal or prescribed manner, or in due season, or are otherwise in fault in the matter of the review sought, doubtless the court may dismiss their application. And the control of the court over frivolous and vexatious appeals of any kind is not questionable. But the court can not impose compulsory dismissal as a penalty or consequence of alleged or supposed misconduct elsewhere, which has no effect to delay or impede the exercise of the power of the court in the matter of the relief sought. It will not compel a party to elect whether he will further prosecute his petition of review or an action commenced in a State court against the appellee to restrain him from prosecuting the proceedings in bankruptcy. (*In re Binninger et al.* 3 B. R. 489; s. c. 7 Blatch. 168; s. c. 1 L. T. B. 187.)

There is one class of cases where, by the provisions of the bankrupt act, issues may be framed and tried by a jury, to wit, where the debtor opposes the petition that he may be adjudged a bankrupt. Such cases, when tried by a jury, if the circuit court has any jurisdiction upon the subject, must be removed into the circuit court by a writ of error, as they, when tried by a jury, are excluded from the special jurisdiction conferred under this clause by the very words of the clause. Where "special provision is otherwise made," the case is excluded from the general superintendence and jurisdiction of the circuit court by the exception introduced as a parenthesis into the body of this part of the section. Special provision is made in such cases within the meaning of that exception when the case is tried by a jury, and there is not a word in the act having the slightest tendency to show that Congress intended that a fact found by a jury in a district court should be re-examined in a summary way by the circuit court. Such cases may be tried by the district court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the circuit court. (*Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65.)

Special provision is not otherwise made for the re-examination by the circuit of the decision of the district court in granting or refusing a discharge, and hence it can only be done under the power conferred by this clause. (*Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

If a claim is allowed in spite of the opposition of a contesting creditor, he may take the question to the circuit court by a revisory petition. (*In re Adolph Joseph*, 2 Woods, 390; *contra*, *in re Troy Woolen Co.* 9 B. R. 329; s. c. 9 Blatch. 191.)

If an assignee appeals from the allowance of a claim, and an opposing creditor files a petition of review, the circuit court may determine which form of proceeding shall be retained. (*In re Adolph Joseph*, 2 Woods, 390.)

If a fund recovered in an action instituted before the commencement of the proceedings in bankruptcy is deposited in the registry of the district court, an order upon a petition of the bankrupt, praying that a certain part thereof be awarded to him and his attorney, is reviewable by a supervisory petition. (*Maybin v. Raymond*, 15 B. R. 358; 4 A. L. T. [N. S.] 21.)

Even if the circuit court can review an interlocutory order made by the district court in a suit in equity before a final decree has been made in the cause, the review can only be had by means of an appeal, and not by means of a petition of review. (*Warren v. Tenth Nat'l Bank*, 9 Blatch. 193.)

Questions of law which arise in the progress of a proceeding in involuntary bankruptcy, where a jury trial has been demanded, can only be reviewed by a writ of error after a final adjudication. (*In re Oregon B. P. & P. Co.* 14 B. R. 394; s. c. 3 Saw. 529.)

The granting or refusing of a motion for a new trial is a matter resting in the sound discretion of the district court, under all the circumstances of the case, and can not be revised by the circuit court, and the statute intended to provide

for the revision of questions of law and not questions of discretion. (*Daniel Marsh*, 6 Law Rep. 67.)

The circuit court will not decide whether a new trial ought to be granted, unless all the evidence which was given at the trial and all the circumstances of the whole case are brought before it by a complete report. (*In re Daniel Marsh*, 6 Law Rep. 67.)

It has been decided that the following proceedings may be reviewed in any way, to wit:

Proceedings in involuntary bankruptcy to have a debtor declared a bankrupt where there is no trial by a jury. (*Perry v. Langley*, 2 B. R. 596; s. c. 8 A. Reg. 427; *Farrin v. Crawford*, 2 B. R. 602; *in re Craft*, 1 B. R. 378; s. B. R. 111; s. c. 6 Blatch. 177; s. c. 2 Ben. 214; *Sutherland v. Kellogg*, 2 F. 405; *Thornhill v. Bank*, 5 B. R. 367; s. c. 1 Woods, 1; *in re Picton*, 11 B. 420; s. c. 2 Dillon, 548.)

Proceedings on the bankrupt's application for a discharge. (*In re J. Reed*, 2 B. R. 9; *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Little v. Del. & Hudson Canal Co.* 4 B. R. 257; *Coit v. Robinson*, 9 B. R. 289; s. c. Wall. 274.)

A decision refusing to stay proceedings on a suit in a State court against a bankrupt. (*In re W. E. Robinson*, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. How. Pr. 176; s. c. 2 L. T. B. 18.)

Proceedings instituted by an assignee to sell property belonging to the bankrupt's estate. (*In re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *Markson v. Heaney*, 1 Dillon, 511, note.)

Proceedings on a summary petition filed in the cause in bankruptcy to cover property held contrary to the bankrupt act. (*Bill v. Beckwith*, 2 B. 241; *in re Kerosene Oil Co.* 3 B. R. 125; s. c. 6 Blatch. 521.)

Proceedings upon a petition for release from arrest. (*In re J. H. Kimb* 2 B. R. 354; s. c. 6 Blatch. 292; s. c. 2 Ben. 554.)

Proceedings for the purpose of ascertaining and liquidating liens. (*Ir York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.)

But a decision allowing or disallowing a claim can not be reviewed. (*In Place et al.* 4 B. R. 541; s. c. 8 Blatch. 302.)

When the proceedings in the district court are founded on a bill in equity they can only be reviewed and revised by an appeal under section 4980, and not by a petition under this section. (*In re Bonesteel*, 3 B. R. 517; s. c. Blatch. 175.)

The circuit court will not issue a writ of prohibition to a State court, prohibiting it from entertaining suits instituted by persons who are parties to proceedings in bankruptcy when such suits do not interfere with the exercise of its own jurisdiction. (*In re Binninger et al.* 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.)

The circuit court will not, during the pendency of proceedings to review the decree of the district court, direct the marshal to take possession of the property of the bankrupt, nor proceed to ascertain and liquidate the assets. The circuit court can not assume the primary exercise of the summary jurisdiction conferred upon the district court. (*Clark et al.* 3 B. R. 489; s. c. 7 Blatch. 165; s. c. 1 L. T. B. 186.)

### Proceedings for Review.

The only way in which the circuit court can exercise its supervisory jurisdiction in such cases is by a petition addressed to the circuit court, stating

clearly and specifically the point or question decided in the district court, charging that the petitioner is aggrieved thereby, and praying the circuit court to review and reverse the decision of the court below. The adverse party should be duly notified of the pendency and prayer of the petition, and of the day assigned for hearing the same. The circuit court will hear and act upon such petition in chambers or elsewhere. (*In re J. M. Reed*, 2 B. R. 9; *Ruddick v. Billings*, 8 B. R. 61; s. c. 1 Wool. 330; *in re Edward A. C. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

The revisory jurisdiction of the circuit court may be exercised by bill as well as by petition. If a regular bill in equity seeks to review the proceedings and decision of the district court, it is a proper proceeding, and ought to be entertained by the circuit court. (*Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.)

A bill of review may be treated as a petition for review. (*Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217.)

A notice of appeal is not a proper process for invoking a review of a summary proceeding. (*In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

A creditor may file a bill to revise an adjudication of bankruptcy rendered upon the petition of another creditor. (*Sweatt v. Boston R. R. Co.* 5 B. R. 234; s. c. 1 L. T. B. 273; *contra*, *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

Commissioners appointed by a State court in a proceeding to forfeit the charter of a corporation do not represent the corporation, and have no right or authority to interfere in a proceeding against the corporation. (*Thornhill v. Bank*, 5 B. R. 367; s. c. 1 Woods, 1.)

An allegation by the petitioner that he is aggrieved is not sufficient, unless it is also alleged in what the error consists, whether of law or of fact, and the nature of the error should be distinctly stated for the information of the appellate court, and as a matter of notice to the opposite party. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. Matters of fact, as well as matters of law, may, doubtless, be revised in the circuit court, but it was not the intention of Congress in this form of proceeding to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the district courts, and for the reversal of the same in case they are found to be erroneous. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257; *Sutherland v. Kellogg*, 2 Biss. 405; *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379; *in re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.)

In ordinary cases, it may be sufficient if a statement is made by counsel, under the direction of the judge of the district court, setting forth the order or ruling complained of, and sufficient facts to enable the appellate court to form an opinion upon the point. This, verified by the judge or clerk, would form the basis of the petition or bill in the circuit court. The whole case may also be brought up by bill of exceptions, or otherwise. (*Sutherland v. Kellogg*, 2 Biss. 405.)

Appeals in equity suits and in causes of admiralty and maritime jurisdiction, vacate the respective decrees in the subordinate courts, and remove the whole record into the court of paramount jurisdiction, but nothing of the kind is done in a proceeding by petition under this section. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257.)

The filing of a petition for the exercise of the revisory power of the circuit court does not ordinarily operate as a stay of the proceedings in the subordinate court. (*Adams v. Railroad Co.* 4 B. R. 314; s. c. 1 Holmes, 5; s. c. 6 A. L. Rev. 365.)

The petition may be amended. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257; *Sutherland v. Kellogg*, 2 Biss. 405.)

The statement of an attorney that he is duly authorized by the petitioner to institute and prosecute the proceeding, is conclusive evidence of the fact, unless some proof to the contrary is shown. (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97.)

A service of the petition upon the person who acted as counsel for the appellee in the original proceeding is sufficient. The proceeding in review is a part of the original case, and for the purpose of the review the parties are still in court. The proceeding in review is intended to be speedy and summary, and a reasonable notice to counsel accomplishes the ends of justice. (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97.)

If the service of the petition is defective, it is cured by an appearance and the filing of an answer. (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97.)

The respondent may demur to the petition. Objections available under a general demurrer are open to a party under a special demurrer, as every special demurrer is also a general demurrer, and it is a universal rule that a demurrer, whether special or general, admits only what is well pleaded. (*Littlefield v. Del. & Hud. Canal Co.* 4 B. R. 257.)

Objections to the answer for insufficiency may be taken by an exception. (*Sutherland v. Kellogg*, 2 Biss. 405.)

The circuit court has territorial jurisdiction to hear the petition in review in chambers at any place within the district. (*Thornhill v. Bank*, 5 B. R. 367; s. c. 1 Woods, 1.)

The district judge can not sit as a member of the circuit court in the exercise of his revisory powers. (*Nelson v. Carland*, 1 How. 265.)

The circuit judge has power in vacation at his chambers, though outside of the district, to entertain and act upon the petition of review. (*Markson v. Heaney*, 1 Dillon, 511, note.)

When the revisory jurisdiction of the circuit court is invoked over the decision of the district court, upon a question of fact, the burden is on the petitioner for review to show error in the decision. It is not sufficient merely to show such a condition of the testimony in the case, that different minds, with equal fairness, might possibly arrive at different conclusions; but to show more nearly in analogy to the case of a motion for a new trial that the evidence can not support the finding. (*Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75; *Wells v. Dalrymple*, 15 I. R. R. 59; *in re Joseph Mooney*, 15 B. R. 456.)

A finding of fact upon an examination of witnesses in the presence of the district court, where the opportunity for judging correctly of the credibility of the witnesses and weight of the testimony is better than can ordinarily be afforded by an inspection of the testimony when reduced to writing, should not be reversed without a very clear and decided conviction that it is erroneous. (*Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372; *in re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; *in re Picton*, 11 B. R. 420; s. c. 2 Dillon, 548.)

When it appears from the record that an amendment of the record was made upon proofs satisfactory to the district court, the circuit court is bound to presume that the evidence offered in support of the amendment was legal and sufficient. It must presume that the bankrupt court acted in good faith. The amended record can not be impeached in a circuit court. (*Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

The circuit court sits as a court of equity, and on an inquiry into questions of fact, is not bound to reverse upon strictly legal grounds, if satisfied that the

facts are correctly found, and that no injustice has been done. (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.)

The jurisdiction conferred upon the circuit court is summary in its nature, and is not to be hampered by technical rules. The court has ample power to permit subsequent occurrences to be brought before it, so as to deal with the case as it exists at the time of hearing. (*In re Boston R. R. Co.* 6 B. R. 209; s. c. 9 Blatch. 101.)

The circuit court, in cases presented for review, is not a court of original jurisdiction, and can not act as if it had original jurisdiction *de facto*. Its only power over proceedings in the district court is that of superintendence and revision simply. No additional evidence can be produced in the circuit court. (*In re Great West. Tel. Co.* 5 Biss. 359.)

The statute does not make it obligatory upon the circuit court to retry every decision of the district court which a creditor, supposing himself aggrieved, may ask the court to retry. The circuit court, in its discretionary power, may properly conclude that no sufficient case is presented calling for a retrial of the facts. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

If the question relates to the removal of an assignee, the circuit court can not appoint an assignee if it decides in favor of a removal, but must remit the matter to the district court, requiring that court to remove the assignee and to appoint another in his place. (*In re Perkins*, 8 B. R. 56; s. c. 5 Biss. 254.)

If a sale is made free from incumbrances in a case where the district court had no jurisdiction over the party holding the incumbrance, the money will be returned to the purchaser if the sale is set aside. (*Davis v. Railroad Co.* 13 B. R. 258; s. c. 1 Woods, 661.)

Where property is unlawfully taken from the possession of a receiver and sold, the circuit court, on reversing the decree of the district court, will declare the sale void. (*Davis v. Railroad Co.* 13 B. R. 258; s. c. 1 Woods, 661.)

The power to stay proceedings in the district court pending a review is a matter in the discretion of the court, and ought not to be exercised unless it is shown that the plaintiff in the review will otherwise be prejudiced or seriously endangered in his rights. (*In re Oregon B. P. & P. Co.* 14 B. R. 394; s. c. 3 Saw. 529.)

SEC. 4987.—The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.\*

Statute Revised—June 30, 1870, ch. 177, § 1, 16 Stat. 173.

SEC. 4988.—In districts which are not within any organized circuit of the United States, the powers and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

Statute Revised—March 2, 1867, § 49, 14 Stat. 541.

SEC. 4989.—No appeal or writ of error shall be allowed in any case arising under this Title from the circuit courts to the

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\* *Vide* sec. 4978.

supreme court, unless the matter in dispute in such case exceeds\* five thousand dollars.

Statute Revised—March 2, 1867, ch. 176, § 9, 14 Stat. 520.

Decrees in equity, in order that they may be re-examined in the supreme court, must be final decrees rendered in term time as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court are still subject to revision at the final hearing. No appeal lies to the supreme court from a decree of the circuit court rendered in the exercise of its special supervisory jurisdiction. (*Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Hall v. Allen*, 9 B. R. 6; s. c. 12 Wall. 452; *Mead v. Thompson*, 8 B. R. 529; s. c. 15 Wall. 635; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274; *Nelson v. Carland*, 1 How. 265.)

The judgment of the circuit court in allowing or rejecting a claim is final, and no appeal lies therefrom. (*Wiswall v. Campbell*, 5 B. R. 421; s. c. 93 U. S. 347.)

An appeal does not lie from a decision of the circuit court affirming a decision of the district court upon a motion to set aside an adjudication. (*Sandusky v. National Bank*, 12 B. R. 176; s. c. 23 Wall. 289.)

If the circuit court decides that it has no jurisdiction to entertain a bill of review, the supreme court may entertain an appeal from such decision, not for the purpose of reviewing, but for the purpose of correcting an erroneous decision respecting the power of the circuit court, and enabling the party to be heard on his application. (*Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.)

Concurrent jurisdiction with the district courts of all suits at law or in equity, are the words of section 4979, showing conclusively that the jurisdiction intended to be conferred upon the district courts is the regular jurisdiction between party and party, as described in the judiciary act and the third article of the Constitution. Cases arising under that clause, where the amount is sufficient, are plainly within the section, and may be removed to the supreme court for re-examination. The jurisdiction is of the same character as that conferred upon the circuit courts by the eleventh section of the judiciary act, and it follows that final judgments in civil actions and final decrees in suits in equity may be re-examined in the supreme court, under this section, when properly removed by writ of error or appeal, as required by existing laws. (*Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.)

In all cases where concurrent jurisdiction is vested in the circuit and district courts, either party, where the proceeding is correct, may remove the cause in a proper case, when it has proceeded to final judgment or decree, into the supreme court for re-examination, as provided in other controversies outside of the bankrupt act. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65.)

Suits in equity, as well as actions at law, may be commenced and maintained in the district courts, and final decrees in such suits in equity, as well as final judgments in such civil actions, where the debt or damage as claimed amounts to more than five hundred dollars, may be re-examined in the circuit courts, and the final decrees and judgments rendered in the circuit courts in such cases, where the sum or value exceeds five thousand dollars, may be re-examined in the supreme court, by appeal or writ of error, as provided in the

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\* So amended by act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316.

judiciary act, and the act allowing appeals in cases of equity, and of admiralty and maritime jurisdiction. (*Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.)

The supreme court can not entertain an appeal from the district court, although there is no circuit court for the district. (*Crawford v. Points*, 13 How. 11.)

The supreme court possesses no revising power over the decrees of the district court sitting in bankruptcy. (*In re William Christy*, 3 How. 292; *Crawford v. Points*, 13 How. 11.)

On an application for a prohibition against the district court, allegations of facts, not found in the proceedings of the district court, can not be considered, for the application must be made on the ground that the district court has transcended its jurisdiction in entertaining those proceedings, and whether it has or not must depend, not upon facts stated *dehors* the record, but upon those stated in the record upon which the district court was called to act, and by which alone it could regulate its judgment. (*In re William Christy*, 3 How. 292.)

When the judgment is joint, all the parties against whom it is rendered must join in the writ of error, and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal. The remedy by summons and severance, when one party refuses to join in a writ of error, has fallen into disuse in modern practice, but formerly it was allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order of judgment of severance was made by the court, whereby the party who wished to do so could sue alone. This remedy was applied to writs of error, when one of the plaintiffs refused to join in assigning errors, and, in principle, is applicable to cases where there is a refusal to join in an appeal. No importance is attached to the technical mode of proceeding called summons and severance. It is sufficient if it appears in any way by the record, that the other party has in any way been notified in writing to appear, and that he has failed to appear, or if appearing, has refused to join. The record must show a written notice and due service, or his appearance and refusal, and that the court, on that ground, granted an appeal to the party who prayed for it as to his own interest. (*Masterson v. Hern- don*, 5 B. R. 130; s. c. 10 Wall. 416.)

It is evident that section 1007, so far as it affects a supersedeas and stay of execution, can not be literally complied with in cases of appeal. Only the spirit of the act can in many particulars be carried out. In cases of appeal, the appeal may be taken orally in court. No written application need be made either in court or to the judge. In such a case a copy of the writ of error, or a copy of anything like a writ of error, or analogous to it can not be filed. But it is evident that something must be done by the appellant within sixty days, in order to comply with the spirit of the act—that is, he must take his appeal, and present his bond to the court or judge within that time, and he must file in the clerk's office, either the bond or some other paper, or an entry must be made upon the minutes of the court, or something else must be done to show that the appeal has been taken within sixty days. The allowance of the appeal relates back to the time when the original application was made for an appeal. The appeal suspends the operation of the judgment of the circuit court rendered on an appeal from the district court, and consequently holds the matter in *statu quo*, as if the judge of the circuit court were holding the matter under advisement, and had not made any order in the case. This is the effect of the appeal as a supersedeas; consequently all facts made or done by either court, after the appeal has been applied for, are vacated by an allowance of the appeal. (*Thornhill v. Bank*, 5 B. R. 377; s. c. 1 L. T. B. 287.)



The object of a citation is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it should, at the first term as he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. After the lapse of the term the motion is too late. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

Want of notice of an appeal comes too late after a general appearance. (*Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7.)

No appeal lies unless the decree is final, and a decree which directs an account to be taken of certain rents and profits is not final. (*Crawford v. Points*, 13 How. 11.)

A case can not be properly taken to the supreme court until a final decree is entered as between all the parties. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

Where a portion of the evidence has been lost, and is not inserted in the record, the supreme court will decide the case upon what remains. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

If the circuit court renders a judgment or decree in favor of the party instituting the suit, in a case where it is without jurisdiction, the supreme court will reverse the judgment or decree and remand the cause with directions to dismiss the suit. (*Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.)

If the circuit court dismiss a writ of error for want of jurisdiction, a writ of error will not lie from the supreme court to the circuit court. Appellate courts under such circumstances do not determine the question presented in the bill of exceptions filed in the district court, as those questions have not been re-examined in the circuit court, and the supreme court is not inclined to re-examine any such questions coming up from the district court until they have first been passed upon by the circuit court. Consequently the question whether a writ of error will lie from the supreme court to the circuit court, to examine the rulings of the circuit court, in a case removed into that court from the district court, does not arise, as the record shows that the circuit court never passed upon the questions as to the correctness or incorrectness of the rulings of the district court. (*Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.)

If the circuit court dismisses a writ of error for want of jurisdiction, a writ of mandamus is the proper remedy, and a writ of error will not lie. (*Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.)

A defendant may appeal, although he has complied with the decree, by executing a deed as he was thereby directed to do. (*O'Hara v. MacConnell*, 93 U. S. 150.)

A deed executed after a decree and apart from it, is no bar to an appeal, although it gives the appellee the same right as the decree. (*O'Hara v. MacConnell*, 93 U. S. 150.)

If no order, decree or action is had on a petition and answer filed after the decree, but before the entry of the appeal, they can not be considered on appeal. (*O'Hara v. MacConnell*, 93 U. S. 150.)

SEC. 4990.—The general orders in bankruptcy heretofore adopted by the justices of the supreme court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind and vary any of those general orders, and may frame, rescind, or vary other general orders for the following purposes:

. First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed,\* with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings. .

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

† And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.

Statute Revised—March 2, 1867, ch. 176, § 10, 14 Stat. 521. Prior Statute—August 19, 1841, ch. 9, § 6, 5 Stat. 445.

### Practice in Bankruptcy.

A court of bankruptcy is *sui generis* in its nature, and its practice is controlled by the laws which created it, aided by such light as may be thrown upon them by the reported decisions under similar statutes. (*In re Strauss*, 2 B. R. 43; *in re Julius L. Adams*, 2 B. R. 95; s. c. 35 How. Pr. 51; s. c. 2 Ben. 503.)

Proceedings in the bankrupt case proper are regarded as proceedings in equity, and are to be governed by the rules and analogies of equity jurisprudence. (*In re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.)

The justices of the supreme court are required, subject to the provisions of the act, to frame general orders for carrying the provisions of the act into effect, but they are not authorized to extend their operation beyond the limits prescribed by the act itself. (*In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.)

This section does not confer on the justices the power to create or cause to be created a new office and to confer upon such officer powers which by the letter of the act are expressly conferred upon officers created thereby. (*In re Philip Rein*, 49 How. Pr. 301.)

### Establishment of Fees.

The justices can not allow larger fees than those now given for similar

\* So amended by act of 22 June, 1874, ch. 390, § 18, 18 Stat. 184.

† So amended by act of 22 June, 1874, ch. 390, § 18, 18 Stat. 184.

services in other proceedings. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *in re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

The power of the justices of the supreme court to prescribe fees, commissions, charges, and allowances for the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy is plenary, with the limitation that the fees can not exceed the rate allowed by law at the time of the enactment of the revised statutes for similar service in other proceedings. (*In re Johnson & Hall*, 12 B. R. 345.)

The supreme court can not regulate the reasonable compensation to be allowed to the assignee for his services. (*In re Colwell*, 15 B. R. 92.)

SEC. 4991.—The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

Statute Revised—March 2, 1867, ch. 176, § 38, 14 Stat. 535.

The order referred to in this provision must mean the order adjudicating the debtor a bankrupt. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

The filing of the petition is the commencement of the proceedings. The deposit of fifty dollars to secure the register's fees, is merely an act preliminary to the issue of the warrant. (*In re C. H. Preston*, 6 B. R. 545.)

The proceedings in bankruptcy are not commenced until the petition is actually filed, although it was previously made, signed, and verified. (*Wells v. Brackett*, 30 Me. 61; *in re Hill & Van Valkenberg*, 5 Law Rep. 326.)

Where the petition in involuntary bankruptcy is presented to the judge, and the orders signed by him on one day, but are not actually deposited in the clerk's office until the following day, when the papers are marked as filed upon the preceding day, it will be deemed to have been filed on such preceding day. (*Frank v. Houston*, 9 Kans. 406.)

It is not the filing of every petition that is deemed the commencement of proceedings, but the filing of a petition upon which an order of adjudication may be made by the court. (*In re Davis Rogers*, 10 B. R. 444; s. c. 1 Cent. L. J. 470.)

The filing of a petition in involuntary bankruptcy, unsupported by any proof of the act of bankruptcy or of the creditor's claim, does not constitute the commencement of proceedings in bankruptcy. (*In re Davis Rogers*, 10 B. R. 444; s. c. 1 Cent. L. J. 470.)

SEC. 4992.—The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts stated therein.

Statute Revised—March 2, 1867, ch. 176, § 38, 14 Stat. 535. Prior Statutes—April 4, 1800, ch. 19, § 51, 2 Stat. 34; Aug. 19, 1841, ch. 9, § 13, 5 Stat. 448.

A copy of an order of adjudication certified to by a register is not properly authenticated, and is not admissible as evidence in a collateral action. (*Adams v. Wait*, 42 Vt. 16.)

A copy of the record is only *prima facie* and not conclusive evidence of a fact, and may be contradicted by parol or any other competent testimony. (*Fehley v. Barr*, 66 Penn. 196; *Rugan v. West*, 1 Binn. 263; *Blythe v. Johns*, 5 Binn. 247; *vide Wood v. Grundy*, 3 H. & J. 18; *Barney v. Patterson*, 6 H. & J. 182.)

The original papers in proceedings in bankruptcy are admissible in evidence for the purpose of proving the declarations of the bankrupt. (*Clayton v. Siebert*, 3 Brews. 176.)

The certificate may be made by the clerk of the court. (*Clayton v. Hamilton*, 37 Tex. 269.)

Where all the papers given in evidence during the trial of the cause, except depositions, are sent out with the jury, the record of the proceedings in bankruptcy may be sent out, although it contains depositions, for the record can not be divided. (*Shomo v. Zeigler*, 78 Penn. 357.)

A duly certified copy of the inventory is competent evidence against the bankrupt, without the production of the entire record. (*Dupuy v. Harris*, 6 B. Mon. 534.)

The transcript of the proceedings in bankruptcy, under the seal of the district court and attested by the clerk, and accompanied by a certificate of the district judge that the attestation is in due form, is admissible as evidence in the courts of another State. (*Redman v. Gould*, 7 Blackf. 361.)

A copy of the docket entries is competent evidence, for the short memorandum is the recording required by the statute, and, consequently, is the documentary evidence of the proceedings. (*Berghaus v. Alter*, 5 Penn. 507.)

A copy of the record which purports to give a full record of everything which had transpired in the court up to its date, is admissible in evidence, although the proceedings are not finished, where the only object of the record is to prove the time of the filing of the petition. (*State v. Rollins*, 13 Mo. 179.)

If a fraudulent vendee sells the goods to a third person, his subsequent petition and adjudication are not competent evidence against such purchaser. (*Haskins v. Warren*, 115 Mass. 514.)

The record of the proceedings in bankruptcy, attested by the clerk of the district court, without any certificate of the presiding judge, is sufficient. (*Murray v. Marsh*, 2 Hay [N. C.] 290.)

In actions depending upon the bankruptcy of a stranger, there must be proof of the proceedings in bankruptcy, the act of bankruptcy, and the petitioning creditor's debt. (*Waterman v. Robinson*, 5 Mass. 303; *Belden v. Edwards*, 2 Day, 246; *Farrington v. Farrington*, 4 Mass. 237.)

The proceedings in bankruptcy do not constitute an integral record, but a copy of any portion thereof duly authenticated as a separate record, is *prima facie* evidence of the facts stated therein. (*Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.)

A copy of part of the record is not competent evidence against a person who was not a party to the record. (*Wilson v. Harper*, 5 Rich. [N. S.] 294.)

To prove an order in a particular proceeding in a bankrupt case, it is not necessary to produce the whole record of that case, but only the whole record of that particular proceeding. (*Payson v. Brooke*, 1 W. N. 89.)

A copy of a bankrupt's schedule containing an admission of his liability on a note is not competent evidence against a joint obligor. (*Wilson v. Harper*, 5 Rich. [N. S.] 294.)

To establish the bankruptcy of the debtor, the production of the proceedings against him as a bankrupt is not alone sufficient. Proof of his being a trader,

of the act of bankruptcy, and of the petitioning creditor's debt is also necessary. (*Hart v. Strode*, 2 A. K. Marsh. 115; *Den v. Wright*, Pet. C. C. 64.)

When an adjudication of bankruptcy is proved, the party who alleges that the proceedings have been dismissed, must prove the time of dismissal. (*Wills v. Clafin*, 13 B. R. 437; s. c. 92 U. S. 135.)

If several papers are attached to the clerk's certificate by ordinary tape, without any mark by which their identity can be established, the transcript is not admissible. (*Pike v. Crehore*, 40 Me. 503.)

SEC. 4993.—Each district judge shall appoint upon the nomination and recommendation of the Chief Justice of the supreme court, one or more registers in bankruptcy when any vacancy occurs in such office, to assist him in the performance of his duties under this Title, unless he shall deem the continuance of the particular office unnecessary.

Statute Revised—March 2, 1867, ch. 176, § 3, 14 Stat. 518. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

SEC. 4994.—No person shall be eligible for appointment as register in bankruptcy, unless he is a counsellor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

Statute Revised—March 2, 1867, ch. 176, § 3, 14 Stat. 518.

SEC. 4995.—Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS, and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Statute Revised—March 2, 1867, ch. 176, § 3, 14 Stat. 518.

SEC. 4996.\*—No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of, or upon any estate within

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\* So amended by act of 22 June, 1874, ch. 390, § 18, 18 Stat. 184.

the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

The formal receipting for a dividend check, or the filing of the blanks in a case of involuntary bankruptcy, when done gratuitously as a favor to a friend, is not within the spirit of this provision. (*Ex parte Binswanger*, E. D. Mo.)

A register may purchase property at a sale made by an assignee. (*Ex parte Binswanger*, E. D. Mo.)

SEC. 4997.—Registers are subject to removal from office by the judge of the district court.

Statute Revised—March 2, 1867, ch. 176, § 5, 14 Stat. 518.

On the suggestion of a credible person, that any officer of the court whom the court has power to remove, has been guilty of offenses either of omission or commission, it is necessary that an inquiry should be made, so that the purity of judicial administration shall be maintained. Ordinarily, investigations instituted for public ends, as in criminal cases, are conducted at public expense. But if a party who institutes a private complaint fails to sustain it, he must pay the costs. (*Ex parte Binswanger*, E. D. Mo.)

It is impossible to prescribe a standard of official courtesy. It is only when a register is unfitted by temper or otherwise to observe the manners and bearing due his office, or fails to observe them, that his official conduct calls for review. (*Ex parte Binswanger*, E. D. Mo.)

There is no objection to a register's employing a short-hand reporter to reduce examinations to writing when he pays him out of his own fees. (*Ex parte Binswanger*, E. D. Mo.)

SEC. 4998.—Every register in bankruptcy has power: (a)

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender (b) of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit (c) and pass accounts of assignees.

Ninth. To grant protection. (d)

Tenth. To pass the last examination (e) of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part (f) of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 518.

(a) A register can not delegate to his clerk any authority to take and pass upon proofs, or to determine the sufficiency of schedules, or to do any other act than such as is purely clerical. (*Ex parte Binswanger*, E. D. Mo.)

(b) After passing the order of adjudication, the register, in voluntary cases, upon the request of the bankrupt, is authorized and required to receive the surrender of the property, and keep it safely until it can be turned over to the assignee. (*In re Hasbrouck*, 1 B. R. 75; s. c. 1 Ben. 402.)

The fact that the bankrupt has a prospect of effecting a settlement with his creditors, is not a sufficient reason for delaying to make a surrender of his property. The court may, in a proper case, order such surrender to be made. (*In re Shafer & Hamilton*, 2 B. R. 586.)

In proper cases the register may appoint a watchman to take charge of the property. (*In re Bogert & Evans*, 2 B. R. 585; *in re Shafer & Hamilton*, 2 B. R. 586.)

The register may pass an order directing the bankrupt to deliver all cash on hand to the custodian appointed by him, and in case of refusal, the court will enforce it by an attachment for contempt. (*In re F. & A. Speyer*, 6 B. R. 255; s. c. 42 How. Pr. 397; *in re Kempner*, 6 B. R. 521.)

If the marshal has property in his possession and actual custody as the property of the bankrupt, it is proper that it should be insured in such sums and for such time as shall seem proper to the register, and an order of the court will, upon application, be passed for that purpose. (*In re Carow*, 4 B. R. 543; s. c. 41 How. Pr. 112.)

The register, by special order may be directed to sell property and execute a conveyance therefor. A sale may also be made by authority of the court under a disputed judgment, and the deed may be made by the referee. (*In re Hannah*, 5 B. R. 292.)

(c) Under the power conferred by this clause and Rule V, the register is authorized to pass an order requiring the assignee to make his return. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.)

The duty enjoined upon the register is to audit, not simply to adjudicate—to hear and examine, not on one side only, but on both sides. The duty is not only judicial, but ministerial, administrative. There is no statute or judicial writing in which the word “audit” is applied to the action of a court. *Ex vi termini* it implies executive as well as judicial action. If the act of auditing implied only judicial action, no more would be required of the register than that he take such evidence as the parties see fit to submit, and pass upon the same, basing his decision upon such evidence alone. But an auditing officer proceeds to examine an account for the purpose of ascertaining in any way he may be able, without regard to established forms or technical rules, what sum ought in fairness be allowed. This is the course universally pursued by the auditing officers of corporations, civil or municipal, and it has grown into an established usage or custom. The word, as used in the act and rules, is used in this accepted sense, as there is no other established sense in which it can be used. The court, as its first act, seizes upon the estate of the debtor, brings the same within its jurisdiction and control, and thereby charges itself with the duty of a just, full, and complete administration of the estate in the interests of all concerned. The duties executive in their character devolve upon the courts in bankruptcy. To relieve the judge of the variant and sometimes apparently conflicting duties of a judicial and ministerial officer, a new class of officers is called into being, who are especially charged with the administrative duties of the court. These officers are deprived of the strict judicial function of deciding an issue duly framed, but upon them are devolved only those *quasi* judicial functions which the act calls “administrative duties.” Auditing the accounts of an assignee is among those administrative acts which pertain thus peculiarly

to the register. In auditing an account, the register may, therefore, cross-examine all witnesses, and summon such other witnesses as he may deem proper. (*In re John J. Staff*, 43 How. Pr. 110; s. c. 5 Ben. 574; *in re Abraham B. Clark*, 9 B. R. 67.)

An account to which a witness refers in his testimony may properly be regarded as evidence of the items of alleged services and disbursements, but the items must be explained as to the occasion and necessity and value of the services, and the occasion and necessity and amount of the disbursements, and how they came to be rendered and made, and whether they are in any part proper items for the account, or whether they ought to be compensated through some other form of proceeding. (*In re John J. Staff*, 43 How. Pr. 110; s. c. 5 Ben. 574.)

*Quære.* Can an attorney for the assignee retain moneys collected by him until his fees are paid? (*In re John J. Staff*, 42 How. Pr. 414.)

The register should proceed to audit the accounts without first requiring that moneys in dispute shall be deposited in bank. When the accounts are audited, such order may be made as may seem necessary. (*In re J. J. Staff*, 42 How. Pr. 414.)

When no reason is shown why an assignee should make an amendment to his return, how such an amendment is proper or necessary, or what particular object is to be subserved by his making it, or what interest of the bankrupt is to be promoted by making it, or to be injured by not making it, he will not be required to make it. (*In re Kingon*, 3 B. R. 446; s. c. 38 How. Pr. 392.)

The register has the power to order the payment of fees and expenses incurred in the proceedings, out of funds in the hands of the assignee. (*In re Lane*, 2 B. R. 309; s. c. 3 Ben. 98.)

(d) This undoubtedly means protection to the bankrupt from being arrested in cases where he is not liable to arrest. (*In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.)

(e) In some districts it is the practice of the registers, where no party demands the examination of the bankrupt, to examine him of their own accord. For a specimen of such an examination, see 1 B. R. 135. (*In re Sherwood* [note], 1 B. R. 344; s. c. 6 Phila. 461. See, also, Rule VII; *in re Brandt*, 2 B. R. 215; *in re Wm. H. Long*, 3 B. R. quarto, 66.)

When the bankrupt asks to be discharged, he must submit himself, if required, to be examined, with a view to show whether he has made a full and fair surrender. (*In re Brandt*, 2 B. R. 215.)

There is no last examination in bankruptcy, nor any examination at all, unless specially ordered. (*U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.)

(f) Under this clause and Form No. 4, the register to whom a case is referred has all the powers of the district court, except to commit for contempt, or decide any question concerning the allowance of a discharge, unless an issue of law or fact is raised and contested by a party to the proceedings. (*In re Gattleson*, 1 B. R. 604; *in re Lanier*, 2 B. R. 154; *in re Brandt*, 2 B. R. 215.)

The proceedings before a register are to be conducted by him with the exercise of proper legal discretion, and, subject to that rule, are entirely within his control. If a party refuses to proceed, the case must proceed without him. No general inflexible law can be laid down in respect to adjournments or postponements. Every case must be treated on its own merits, and according to the best judgment of the register. (*In re Hyman*, 2 B. R. 333; s. c. 36 How. Pr. 282; s. c. 3 Ben. 28.)

When a matter is specifically referred to the register for examination, he can not inquire into the capacity of the parties to litigate. His duty is to take the



proofs under the order of reference, and he is bound to consider that every question as to the competency of the party to present the objections, and of regularity in their reception and reference, has been acted on and disposed of by the court. (*In re Brown King*, 1 N. Y. Leg. Obs. 22; s. c. 4 Law Rep. 320.)

If the bankrupt is a party to a submission of a controversy to a register, he is bound by the decision in a collateral action. (*Johnson v. Worden*, 13 B. R. 335; s. c. 47 Vt. 457.)

If a register determines the amount due on a claim without hearing the claimant, or appointing a time for hearing, his determination is not conclusive, although the claimant and the assignee agreed to leave it to him for adjustment. (*Moran v. Bogert*, 14 B. R. 393; s. c. 16 Abb. Pr. [N. S.] 303; s. c. 10 N. Y. Supr. 603.)

SEC. 4999.—No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

SEC. 5000.—Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in a proper minute-book to be kept in his office.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

SEC. 5001.—The judge of a district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proof of debt, and generally, for the prosecution of any proceedings under this Title.

Statute Revised—March 2, 1867, ch. 176, § 5, 14 Stat. 519.

The register can not fulfil the requirements of his official duty by holding occasional monthly sessions, in a county of his district in which he does not reside, on days of his own appointment. He should have an office, attended by himself or resident clerk, where the docket, minutes, and papers of every bankruptcy in such county are securely kept, and are always open during the hours of business to the inspection of those interested. (*In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.)

For improper conduct, a case may be transferred from one register to another. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113.)

SEC. 5002.—Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

Statute Revised—March 2, 1867, ch. 176, § 5, 14 Stat. 519.

A witness is bound to attend although the summons is served on him in her district, if he does not live more than one hundred miles from the place where the register requires him to attend. (*In re Wm. S. Woodward*, 12 B. R. s. c. 10 Pac. L. R. 214.)

SEC. 5003.—Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, *viva voce* or in writing, before a commissioner of circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Statute Revised—March 2, 1867, ch. 176, § 38, 14 Stat. 535. Prior Statute—April 19, 1841, ch. 9, § 7, 5 Stat. 446.

The provisions of this section in regard to the taking of testimony, regulate proceedings with such minute detail that they must be held exclusive. Testimony to be used in a case of involuntary bankruptcy can not be taken on mere oath, but must be taken on commission. (*In re Dunn et al.* 9 B. R. 487; 12 Blatch. 42.)

A commission may, on the application of the assignee, be issued to take the examination of a witness in another State, and if the witness refuses to testify, the circuit court for that State may punish him for a refusal to testify. (*In re John Johnston*, 14 B. R. 569; s. c. 13 Pac. L. R. 54.)

SEC. 5004.—All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases, and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

Statute Revised—March 2, 1867, ch. 176, § 5, 14 Stat. 519.

SEC. 5005.—Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena.

Statute Revised—March 2, 1867, ch. 176, § 7, 14 Stat. 520. Prior Statute—April 4, 1800, ch. 19, § 15, 2 Stat. 25.

SEC. 5006.—Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such

person be compellable by law to answer such question or to sign such examination.

Statute Revised—March 2, 1867, ch. 176, § 7, 14 Stat. 520. Prior Statute—April 4, 1800, ch. 19, §§ 14, 25, 2 Stat. 25, 28.

Where a commission issued by another court is not accompanied by interrogatories, and does not furnish any information as to what the inquiry is to which the examination of the witness is to be directed, it is impossible to determine whether the questions which the witness refuses to answer are or are not pertinent to the inquiry, and an attachment can not be granted. (*In re S. Glaser*, 2 B. R. 398.)

SEC. 5007. Any register may act in the place of any other register appointed by and for the same district court.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

SEC. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

Under the provisions of this section and Rule XXIX, where the assignee examines the bankrupt before the register, the assignee must pay the fees of the register for such examination, whether he has any assets of the estate or not. (*In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; *in re Eidom*, 3 B. R. 160.)

Parties who call for the examination of the bankrupt or other witnesses, can only be required to pay the fees and expenses for the direct examination. Those who cross-examine the witnesses must pay the fees and expenses of the cross-examination. The rule applies to the matter only as between the register and the parties for whom he renders the services. The court, in the final disposition of the case, will pass such an order in regard to costs as equity shall demand. (*Schofield v. Moorehead*, 2 B. R. 1; *in re Mealy*, 2 B. R. 128; *in re Eidom*, 3 B. R. 160.)

The fees for the cross-examination, so far as it may be necessary to explain or qualify any matters brought out on the direct examination, which may seem to bear unfavorably upon his conduct or dealings, or which are obscure, must be paid by the party seeking the examination. (*In re G. N. Noyes*, 11 B. R. 111.)

If the bankrupt makes further statements after the close of his direct examination, he does so as a witness in his own behalf, and must pay the expenses incurred thereby. (*In re Mealy*, 2 B. R. 128; *contra*, *in re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277.)

If a creditor desires that a final examination shall be reduced to writing by the register, he must pay for the services. (*In re Alfred Jackson*, 8 B. R. 424.)

The fees to be paid by a creditor for a final examination made at his request, will not embrace the *per diem* compensation to the register, nor his fee for administering the final oath, or for the certificate of conformity, as these are required to be performed if no creditor appears. (*In re Alfred Jackson*, 8 B. R. 424.)

A register has a lien for fees on the fund in court which has been awarded to the party for whom the services were rendered. (*In re Breck & Schermerhorn*, 13 B. R. 216.)

If the register improperly refuses to countersign a check, he is not entitled to

a lien on the fund for the services rendered in making up the certificate which the party is thus compelled to take. (*In re Philip Rein*, 13 B. R. 551.)

The fees of the register for services under a reference procured by the bankrupt before the appointment of an assignee, for the purpose of contesting a claim offered for proof, may be paid out of the estate. (*In re Clementina T. Richardson*, 7 Ben. 155.)

SEC. 5009.—In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

Statute Revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

The issue of fact or law must be an issue actually raised and existing, and one which has arisen out of proceedings which have taken place, and not an issue likely to arise, or which may be raised thereafter. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.)

It is the duty of the register to adjourn the issue into court without any request to that effect by a contesting party. But still such an adjournment is a proceeding which a contesting party may waive, and where he does waive it, by submitting the decision of the issue to the register, he can not, after finding that the question is decided against him, then ask leave to have it adjourned into court. (*In re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.)

The ground of objection should be stated, otherwise no point or question or issue is presented or raised. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re Fredenburg*, 1 B. R. 268; s. c. 2 Ben. 133.)

An objection to a question or answer, in the course of an examination before a register, does not raise a question or issue of law which can be adjourned into court. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.)

As the application by a bankrupt for leave to amend can not be opposed, no issue of fact or law within this section can be raised or contested in regard to it. (*In re Watts*, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.)

An objection to an application for the examination of the bankrupt raises an issue of law which should be adjourned. (*In re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.)

An issue of fact or of law raised upon testimony taken in opposition to the proof of a debt, must be adjourned into court. (*In re Clark & Binninger*, 6 B. R. 202.)

A party who seeks to review the act of a register must do so in a respectful manner, and if he makes a wanton attack upon his character, he is liable to be punished for contempt. (*In re Breck & Schermerhorn*, 13 B. R. 216.)

SEC. 5010.—Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate so signed, shall be binding on all the parties to the proceed-

ing; but every such certificate may be discharged or varied by the judge at chambers or in open court.

Statute Revised—March 2, 1867, ch. 176, § 6, 14 Stat. 520.

It is only a party to the proceedings who can take the opinion of the district judge on a certificate of the register. The word "party" means the bankrupt or a creditor. It does not mean a witness who is not the bankrupt or a creditor. (*In re Fredenburgh*, 1 B. R. 268; s. c. 2 Ben. 133; *in re Comstock & Co.* 13 B. R. 193; s. c. 3 Saw. 517.)

The act only contemplates the certifying of questions which actually arise. The questions which can be certified are: 1. Any issue of fact or of law raised and contested by any party to the proceedings; but it must be an issue actually raised and existing, and one which has arisen out of the proceedings which have taken place, and not an issue likely to arise or which may be raised thereafter. 2. Any point or matter arising in the course of the proceedings, or upon the result of the proceedings; but it must be a point or matter which has arisen in the course of the proceedings which have taken place, or a point or matter which has arisen upon and after the result of the proceedings which have taken place, and not a point or matter likely to arise or which may be raised thereafter, or after a result shall have been arrived at. 3. Any question stated by consent of the parties concerned in a special case; but it must be a question to which there are two parties, and one which has arisen out of the proceedings which have taken place. Nothing is to be certified or decided except what is necessary to be decided to enable the case to progress properly. Questions which thus necessarily arise are to be decided as and when they thus arise, and are not to be anticipated. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381; *in re J. W. Wright*, 1 B. R. 393; *in re Sturgeon*, 1 B. R. 498; *in re Bray*, 2 B. R. 139; *in re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.)

Objections to questions and answers in the course of an examination, when put in proper form, may be certified. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.)

Where the register desires to receive instructions as to his official duty, or in regard to matters pending before him, there is no objection to his adopting a course analogous to that prescribed by this section. (*In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.)

If a register improperly refuse an application for leave to amend, the bankrupt can, under this section, take the opinion of the judge on the question, by means of a certificate from the register. (*In re Watts*, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.)

No opinion will be given on a question improperly certified. (*In re Sturgeon*, 1 B. R. 498; *in re J. W. Wright*, 1 B. R. 393; *in re Bray*, 2 B. R. 139.)

It has been decided that the following questions can not be certified under this section:

No question concerning the right of a bankrupt to his discharge. (*In re Mawson*, 1 B. R. 265; s. c. 2 Ben. 122.)

No question concerning the effect of a discharge to release a particular debt. (*In re Bray*, 2 B. R. 139.)

No question as to the disposition that an assignee shall make of certain property before his application for a settlement of his final accounts. (*In re Sturgeon*, 1 B. R. 498.)

No question concerning the title to property not arising in a proceeding concerning such property, or in which the assignee is a party. (*In re J. W. Wright*, 1 B. R. 393.)

No question concerning the duty of a creditor, claiming security, who has proved his claim as unsecured, not arising on a motion or proceeding before the register. (*In re Peck*, 3 B. R. 757.)

No question as to whether it is necessary for a secured creditor to prove his claim before making application to have the security sold; the secured debt not having been proved. (*In re Stephen V. Haskell*, 4 B. R. 558.)

SEC. 5011.—In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

Statute Revised—March 2, 1867, ch. 176, § 6, 14 Stat. 520.

Questions agreed upon and stated do not of themselves make a special case within the meaning of this section. This is not the proviso of the section. It is not that parties may make a special case, but it is that they may "state any question or questions in a special case." There must, of course, be, 1st, parties; and 2d, a case in which questions can arise and be stated. Questions are to be decided only when they necessarily arise, and are not to be anticipated. (*In re Stephen V. Haskell*, 4 B. R. 558.)

SEC. 5012.—If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

Statute Revised—March 2, 1867, ch. 176, § 45, 14 Stat. 539.

SEC. 5013.—In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" (*a*) shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of

days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, (b) Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

Statute Revised—March 2, 1867, ch. 176, § 48, 14 Stat. 540.

(a) This section is not to be construed as applying the word person to include any other corporations as subject to the provisions of the act than those described in section 5122. (*Adams v. Railroad Company*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30; *Sweatt v. Boston R. R. Company*, 5 B. R. 234; s. c. 1 L. T. B. 273; *in re Ala. & Chat. R. R. Co.* 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.)

(b) Unless Sundays are especially excepted in the statute, they are to be counted. The fair and unavoidable inference from this clause is, that when Sunday is not the last day, it is not to be excluded. (*In re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.)

Adjudication of bankruptcy made November 26, 1867. Application filed November 27, 1868. Held to be in time, as being within the equity and fair construction of section 5013. (*In re Lang*, 2 B. R. 480.)

## CHAPTER TWO.

### VOLUNTARY BANKRUPTCY.

Sec.  
5014.—Petition and schedules.  
5015.—Schedule of debts.  
5016.—Inventory of property.  
5017.—Oath to petition and schedules.

Sec.  
5018.—Oath of allegiance.  
5019.—Warrant to marshal.  
5020.—Amendment of schedule.

Sec. 5014.—If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain his discharge from his debts, and shall annex to his petition a schedule, and inventory \* and valuation, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

Statue Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

#### Who may File a Petition.

Resident aliens may take the benefit of the act. This section makes every person residing within the jurisdiction of the United States, who owes a certain amount of debts, subject to the act, and it is not denied that resident aliens are here included. If confirmation were needed, it is found in the latter part of the section, which prescribes a special form of oath for citizens of the United States; clearly showing that some others than citizens are capable of becoming petitioners. (*In re Goodfellow*, 3 B. R. 452; [s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69].)

A person who is a partner in a foreign firm may apply for the benefit of the bankrupt law. (*Cutter v. Folsom*, 17 N. H. 139.)

The statute embraces not merely those who resided in the United States at the time when the bankrupt law was passed, but such as at any subsequent period become resident in the United States. (*Cutter v. Folsom*, 17 N. H. 139.)

An infant may file a petition in his own name. (*In re Samuel Book*, 3 McLean, 317; *in re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370.)

If a person, while sane, has committed an act of bankruptcy, he may be made bankrupt after he has become lunatic. The rights of the bankrupt will be fully protected by his guardian. (*In re D. Pratt*, 6 B. R. 276.)

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\* So amended by act of 22 June, 1874, ch. 390, § 15, 18 Stat. 182.



A *feme covert* who is a sole trader may apply for the benefit of the bankrupt law. (*In re Harriet E. Collins*, 10 B. R. 335; s. c. 3 Biss. 415.)

The making of a fraudulent conveyance does not prevent the debtor from filing a voluntary petition. (*In re Chas. P. Houghton*, 4 Law Rep. 482.)

### Petitions in Voluntary Bankruptcy.

An illegible petition will not be allowed to be filed. (Anon. 1 B. R. 215; s. c. 15 Pitts. L. J. 81.)

A petition containing the required averments, and having a sworn schedule of debts and sworn inventory of property annexed to it, constitutes the petition required by the act. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

The petition is sufficient although the jurat does not specify the particular day on which the oath was taken, if it gives the month and year. (*In re Chas. P. Houghton*, 4 Law Rep. 482.)

The petition need not be presented to the court simultaneously with its attestation. The lapse of nine days between the taking of the oath and the filing of the petition is no bar to the proceedings. (*In re Aaron Abrahams*, 5 Law Rep. 328.)

No provision is made by the bankrupt act enabling parties to conduct proceedings *in forma pauperis*, and the act evidently contemplates that they shall discharge all expenses incident to the prosecution of their application. (*In re Alexander Graves*, 1 N. Y. Leg. Obs. 213; s. c. 3 Law Rep. 25.)

The petition and schedules are three papers. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

The provisions of the act and the rules serve to show that the petition is filed once for all in any case; that if it is amended, such amendment does not alter the date of its filing, or postpone the effective vigor of such filing to the time the amendment to it is filed; or that any petition or schedule that is amended is merely amended, leaving the original that is amended to stand, so far as the question of jurisdiction or commencement of the proceedings is concerned, in regard to the time when it was filed, the same as if it were not amended. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

The commencement of proceedings in bankruptcy on the part of the petitioner, is the commencement of a suit in the district court by the petitioner against his creditors, in which action the petitioner is plaintiff and the creditors defendants; the petitioner asking the court for a judgment against his creditors, the defendants, discharging him from his indebtedness to them. The defendants have their day in court, are entitled to be heard at all stages of the proceedings, and when the bankrupt files his application for a discharge from the payment of his debts, any single creditor may make opposition thereto, by entering his appearance and putting on file specifications against the discharge. Each defendant has the right to appear separately and put in a separate plea or answer. (*In re Julius L. Adams*, 2 B. R. 272; s. c. 36 How. Pr. 270; s. c. 3 Ben. 7; *in re Farrell*, 5 B. R. 125.)

While one petition is still pending, without any discharge or any discontinuance, a stay will be entered of all proceedings upon another petition subsequently filed, setting forth the same debts and the same creditors. (*In re Wierlaski*, 4 B. R. 390; s. c. 4 Ben. 468.)

When the discharge is refused, because the bankrupt did not apply within the prescribed time, the result in principle is the same as where the plaintiff in a suit at law is non pressed; he has the costs of the first proceedings to pay, but is allowed to commence again and to continue until he reaches a judgment upon the merits of his case. (*In re Farrell*, 5 B. R. 125.)

A voluntary bankrupt who has contracted new debts since the filing of his petition, may file a new petition in bankruptcy. (*In re* P. C. Drisko, 13 B. R. 112; s. c. 14 B. R. 551.)

The petition is conclusive evidence that the debtor is insolvent, and desires to take the benefit of the act, and perhaps the fact that he owes \$300 may be conclusively found by the adjudication; but upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt, it can not be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it can not be that the only exception is of the court in which the void proceedings themselves are pending, nor is the adjudication binding as a judicial decree which must be impeached, if at all, in a higher court. It is made *ex parte* without notice to creditors, and is entirely under the control of the court, upon proof that it ought to be annulled, at least before the first meeting of creditors. (*In re* Goodfellow, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.)

If several persons, alleging themselves to be partners, file a voluntary petition, the creditors can not compel them to amend it by joining other persons who are also alleged to be partners. (*In re* Harbaugh, Matthias & Co. 15 Pitts. L. J. 246; s. c. 24 Pitts. L. J. 100.)

If several persons file a voluntary petition as partners, without joining others who are also partners, the court, on the motion of any creditor, can annul the adjudication at any time up to the first meeting of creditors, and perhaps at any time until the effects of the firm have become so fixed that the estate can not be put in *statu quo*. (*In re* Harbaugh, Matthias & Co. 15 Pitts. L. J. 246; s. c. 24 Pitts. L. J. 100.)

The bankrupt by filing his petition submits himself personally to the jurisdiction of the court, and he becomes bound to obey its orders and directions in the matter of his petition as well before as after an adjudication. The mere filing of his petition in conformity with the statute constitutes him a bankrupt, within the purview of the act, before the adjudication or any action on his petition by the court. This jurisdiction is exercised on the ground that other persons besides the bankrupt have an interest in the matter at this stage of the proceedings. (*In re* Samuel Harris, 3 N. Y. Leg. Obs. 152.)

A voluntary bankrupt can not withdraw his petition at his own pleasure, but must show good reason for doing so. In all cases, a party coming as a volunteer into court in a matter where others may have an interest must move for liberty to discontinue, and when other parties have acquired an interest in the proceedings, the court will either grant the liberty on terms or refuse it altogether as justice may require. The creditors have an interest in the proceedings from the moment that the petition is filed. (*In re* Samuel Harris, 3 N. Y. Leg. Obs. 152.)

The dismissal of the petition prior to an adjudication is in the nature of a *supersedeas*, and is ordinarily a matter of sound discretion in the court. . (*In re* Randall & Reed, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115.)

A voluntary bankrupt may, for good reasons, be allowed to withdraw his petition at any time before adjudication. (*In re* Bennet, 1 Penn. L. J. 145; *in re* Randall & Reed, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115; *in re* Anon. 1 Penn. L. J. 323; *in re* Dudley, 1 Penn. L. J. 302; *in re* John Gile, 1 N. Y. Leg. Obs. 87; 5 Law Rep. 224.)

If the debtor has made a compromise and composition of all his debts, the petition may be dismissed on payment of costs. (*In re* Randall & Reed, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115.)

If the debtor does not choose to proceed with his petition, but lets it remain in suspense, with his property locked up from his creditors, they may intervene for their own interest by a motion for an adjudication, or for any other matter

necessary for the protection of their rights. (*In re Samuel Harris*, 3 N. Y. Leg. Obs. 152.)

If the assignee refuses to consent to a dismissal of the proceedings, the court, with the consent of the creditors, may order the adjudication to be vacated, and all further proceedings stayed, on notice to him to show cause against the motion. (*In re John Gile*, 1 N. Y. Leg. Obs. 87; s. c. 5 Law Rep. 224.)

After an adjudication, the petition can not be dismissed without the concurrence and consent of all the creditors. (*In re John Gile*, 1 N. Y. Leg. Obs. 87; s. c. 5 Law Rep. 224.)

Formal pleading in opposition to a petition is not usual or necessary. Objection to the person of the petitioner may be made by a plea in abatement, but the plea will be treated merely as a written objection. (*In re Samuel Book*, 3 McLean, 817.)

The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The act contemplates that voluntary petitions may sometimes be contested, for it provides that the register may make adjudication if there be no opposing party. But it is not the intent of the act that the court shall inquire whether the petitioner is insolvent or not. When the debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy, and any creditor may then carry on the proceedings if the debtor shall fail to do so. His act is for the benefit of all persons interested, and can not be retracted on the application of only one of them, with or without the debtor's consent. No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes three hundred dollars. That he is unable to pay his debt in full, and is willing to surrender all his property is conclusively proved by his petition so far as a decree of bankruptcy is concerned. The only questions open upon a voluntary petition are those which go to the jurisdiction, such as residence, and a sum total of provable debts of three hundred dollars. (*In re James L. Fowler*, 1 B. R. 681; s. c. Lowell, 161.)

A creditor can not prevent an adjudication by proving that the debtor is able to pay his debts, and that the only object in filing the petition is to delay the collection of certain executions. (*In re James L. Fowler*, 1 B. R. 681; s. c. Lowell, 161.)

A motion to set aside the adjudication on account of the absence of certain jurisdictional averments in the petition can not be entertained. The proper way to raise such a question as to the jurisdiction of the court is by specifications against the discharge of the bankrupt. (*In re Penn et al.* 3 B. R. 582; s. c. 4 Ben. 99.)

### **In what District Petitions must be filed.**

The bankrupt act uses the term "residence" specifically, as contradistinguished from "domicile," so as to free cases under it from the difficult and embarrassing presumptions and circumstances upon which the distinctions between "domicile" and "residence" rest. Congress, as if *ex industria* designing to escape that region of dispute, used a legal term, about which there is no difficulty, either as to its accurate meaning, or as to the facilities of proof connected with it. "Residence" is a fact easily ascertained; "domicile," a question difficult of proof. It is true that the two terms are often used as synonymous, but in law they have distinct meanings. Proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business, and not with reference to his domicile. If a party has actually resided in one State during the greater part of the six months next immediately preceding the filing of the petition, the petition must be filed in the district court for that State, al-

though his family may have resided in another State during the whole period. (*In re Watson*, 4 B. R. 613.)

The residence of the bankrupt is the place where his family reside, although he may make a temporary sojourn in another State. (*Stiles v. Lay*, 9 Ala. 795.)

Residence denotes an actual domicile or inhabitancy, in contradistinction to a mere temporary abode in lodging. (*In re Israel Kinsman*, 1 N. Y. Leg. Obs. 309.)

Upon the hearing of a petition filed by a creditor to vacate the whole proceedings in bankruptcy, for want of jurisdiction, it was held that where a person leaves a foreign domicile, with the intention of returning to his native domicile, and does so return, his residence in his native domicile dates from the day on which he left the foreign domicile. (*In re W. S. Walker*, 1 B. R. 386; s. c. Lowell, 237; s. c. 1 L. T. B. 38.)

A corporation can have no residence out of a State by whose laws it was created, and therefore, in virtue of residence, no jurisdiction can be acquired by any district court outside of such State. (*In re Ala. & Chat. R. R. Co.* 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.)

In a certain sense, the place of the most transient stoppage, a mere purchase, a bargain made by a man on his transit through a place, would render it for the time being his place of business. Persons resorting to market towns to dispose of produce or make purchases would have, in a literal acceptation, their places of business there in conducting such transactions. It can not, however, satisfy this provision of the law to prove the fact that the bankrupt is doing some kind of business at the place where he makes his application, if his legal residence is in a different district. More must be shown. It must appear distinctly that he has a fixed and notorious employment, pursued by him in such manner as to denote a place of business established by him distinct from his place of residence. A fugitive or equivocal occupation that may continue for a long period or may terminate instantaneously, without any outward change or indications calculated to mark its continuance or character, will not be sufficient to satisfy this provision of the law. (*In re Israel Kinsman*, 1 N. Y. Leg. Obs. 309.)

An agent who is merely temporarily executing his agency in a district does not have a place of business in the district. (*In re Israel Kinsman*, 1 N. Y. Leg. Obs. 309.)

In its broadest sense, the term "business" includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion may be exceptions in the case of an individual, but the employment of means to secure or provide for these would, to him, be business, and to a corporation these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business: The term, carrying on business, has not the same meaning as transacting any of the debtor's business. There are in the carrying on of a business many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located, and such transactions may be of such frequent and even daily occurrence as to require an agency of considerable duration. Such transactions are not a carrying on of business in the sense of the law. "Carrying on business" looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. The debtor may find it necessary or expedient, in aid of his business, to employ agents or agencies in other places than those in which his business is carried on; but the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the debtor. It was not intended, by reason of such transactions, to subject the debtor to proceedings in bankruptcy where those agencies are maintained, whether these are conducted by agents

under one name or another, either officers or clerks, or by whatever name or official relation designated. (*In re Ala. & Chat. R. R. Co.* 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.)

A person who resides in one district, where he was formerly a member of a firm that has failed, and has an office in another district where he receives letters, and is engaged in winding up the business of the firm, does not carry on business, in the sense of the bankrupt act, in the latter district, and can only apply in the district where he resides. (*In re Little*, 2 B. R. 294; s. c. 3 Ben. 25.)

A person who has been employed as a clerk for more than a year in one district, but has resided in another district, can not apply in the district where he has been employed, but must apply in the district where he has resided. It can hardly be said that a book-keeper carries on business in a way that will give such publicity to his occupation or person as is contemplated by the act. (*In re Wm. H. Magie*, 1 B. R. 522; s. c. 2 Ben. 369.)

But where the petitioner is well known to be doing business as the agent of another party, he may apply in the district where he transacts his business. (*In re Bailey*, 1 B. R. 618; s. c. 2 Ben. 437; *in re Belcher*, 1 B. R. 666; s. c. 2 Ben. 468.)

The debtor may file his petition in the district in which he has resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he has resided or carried on business in any district. The object of the provision is to bring within the operation of the act every debtor who has resided or carried on business in any district for any length of time, provided the proceedings are instituted in the district in which his residence or carrying on of business has continued so long as to cover the longest space of time that he has resided or carried on business in any district during the six months next immediately preceding the time of filing the petition. Thus, during or within such six months, the debtor may have resided or carried on business in one district for two months, in another for one month and three-quarters, in another for one month and one-quarter, and in another for one month. In such case, the proper district in which to file the petition is the one in which the debtor has resided for two months. The fact that he has carried on business in another district for as long a period during the six months as he carried it on in the district in which he has filed his petition, does not deprive the court for the latter district of jurisdiction over the case, it not appearing that he carried on business in the former district for a longer period during the six months than he carried it on in the latter. (*In re Elisha Foster*, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127; *in re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.)

When one partner proceeds against his copartner, an averment that the petitioner for the six months next preceding the application has been a resident of the judicial district in which the petition is filed, and that he and his copartner, within said time, were partners in trade in said district, is sufficient to sustain the jurisdiction of the court, if the proceedings are brought in question collaterally, when it does not appear that the firm did business for a longer period in any other district. (*Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.)

The statute provides, in the alternative, that the debtor may be declared bankrupt either in the district in which he resides or carries on business. When once proceedings have been commenced in either district, it is a necessary consequence that the like proceedings can not be had in the other, and the jurisdiction is exclusive in that court where the jurisdiction first attaches. (*In re Horace Hall*, 5 Law Rep. 269.)

### Adjudication.

The adjudication of bankruptcy ought not to be postponed until the register has examined the petition and schedules, and certified them to be correct. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

The adjudication of bankruptcy is merely a certificate or order made by an authorized officer, to the effect that the debtor has become a bankrupt. It is nothing but a judicial finding of the fact that an act of bankruptcy was committed at some period prior to the time the adjudication is made. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

The register is to declare the party a bankrupt, but has no authority to ascertain the day of his becoming so. If he names the day, it is competent for a party in a collateral action to controvert the act of the register, so far as it respects the fixing of the day when the bankrupt becomes such, and to say that it was not till long afterwards. (*Rathbone v. Blackford*, 1 Caines, 588.)

An adjudication which recites the act of March 2, 1867, as authority for the proceeding, is neither irregular nor void. (*Ballin v. Ferst*, 55 Geo. 546.)

SEC. 5015.—The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known, the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Statute Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—August 19, 1841, ch. 9, § 1, 5 Stat. 440.

Petitions in bankruptcy must be full, and be true in point of fact, otherwise no discharge will be granted. (*In re Redfield*, 2 Ben. 72.)

The inability to pay debts, mentioned in this section, is the same thing as the insolvency mentioned in section 5021. It means the inability of the debtor, then and there, to pay accruing debts as they mature in the ordinary way, in the usual course of business or trade, in that which is made by the law of the United States a lawful tender in the payment of debts. (*Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.)

The name of a creditor who has a lien on the land of the petitioner should be placed on schedule A, No. 2. (*In re Decatur Jones*, 2 B. R. 59.)

Wherever the sum and the date of the debt are given, the statement is sufficient. (*In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321.)

Where the petitioner owes a debt to a newspaper he should give the names of the proprietors. (Anon. 2 B. R. 141.)

Where the petitioner owes a debt to a firm, it is safest to return the partnership debt as due to the firm, without naming the partners. (Anon. 1 B. R. 123.)

If the petitioner, as administrator, has spent the funds belonging to the estate, it is sufficient to state the debts as due to the estate, and not to the cred-

itors of that estate, although a dividend has been declared. (*In re John C. Tebbets*, 5 Law Rep. 259.)

The abode and the post office address should be both stated, so that personal service may be ordered at the former, or service by mail at the latter. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.)

In view of this section of the act, and of Form No. 1, and of Rule XXXIII, wherever a debtor states that the residence of a creditor is not known, he should show in the schedule, or in a separate affidavit, what efforts he has made to ascertain the present residence of the creditor. The debtor must make efforts to ascertain the present residence of his creditors; and he can not satisfy the law by reposing on the information at hand, and the belief which he may possess, without making any efforts to ascertain such present residences. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.)

It is necessary to state in the schedules whether or not any note has been given or judgment rendered, and whether any person is liable with the debtor as partner or joint contractor. (*In re Orne*, 1 B. R. 79; s. c. 1 Ben. 420.)

Debts barred by the statute of limitations should be placed on the schedules. (*In re John S. Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4.)

The placing of a debt barred by the statute of limitations upon the schedules will not revive the debt. (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 253; *in re Danl. P. Kingsley*, 1 B. R. 329; s. c. Lowell, 216; *in re Harden*, 1 B. R. 395; s. c. 1 L. T. B. 48; *in re John S. Wright*, 6 Biss. 317; *contra*, *Horner v. Speed*, 2 Pat. & H. 616.)

Absolute accuracy is not required, for it is to be done as far as practicable. The provisions of this section show that all the creditors, so far as known, are to be made parties by actual notice, and the publication is clearly intended to those not known or whose residence is not known. (*Hudson v. Bingham*, 8 B. R. 494; s. c. 6 L. T. B. 326; s. c. 12 A. L. Reg. 637.)

SEC. 5016.—The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and if so, what incumbrances thereon.

Statute Revised—March 22, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—August 19, 1841, ch. 9, § 1, 5 Stat. 440.

The schedules must set forth the separate items of the petitioner's estate. (*In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; *vide in re Robert Malcolm*, 4 Law Rep. 488.)

It is not necessary that the petitioner shall set forth a perfect and complete exhibit of every article; but the schedule must be so explicit that the assignee may be enabled to find the property, if necessary. It is not necessary that every article of clothing shall be set out. The wearing apparel should be so set forth that the assignee may be enabled to ascertain whether he can claim it or not. (*In re Robert Malcolm*, 4 Law Rep. 488; *in re Horace Plimpton*, 4 Law Rep. 488.)

Property conveyed by the petitioner in trust, for the benefit of his creditors, must be set forth, as far as possible, under one of the heads of schedule B. (*In re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204.)

Judgments in favor of the petitioner should be set forth in schedule B, No. 2 b. (*In re Sallee*, 2 B. R. 228.)

The statute, though framed in the most comprehensive terms, has reference to some right or interest inherent in the bankrupt. Whatever that may be, however contingent or valueless, he must name it, and point it out to his creditors. He is not permitted to exercise his own judgment as to its worth to them. (*In re David H. Robertson*, 1 N. Y. Leg. Obs. 20.)

The petitioner should state the proportion of his interest in the property of a firm of which he is a member, but need not enumerate the effects in detail. (*In re Nicholas G. Norcross*, 1 N. Y. Leg. Obs. 100; s. c. 5 Law Rep. 124.)

The petitioner is not restricted to the letters printed on the schedule. He may exhaust the alphabet, and use other marks, if he can thereby set forth his property more lucidly. (*In re Sallee*, 2 B. R. 228.)

The petitioner is only required to use such of the forms as are appropriate to and descriptive of the debts and property he is required to list. It would be absurd to require him to file in addition thereto a large mass of forms, all of which are simply blanks. He should state, however, the reason why these were omitted. (Anon. 1 B. R. 123.)

(The practice in this particular is generally regulated by the rules of court for each district. Blatchford's Rules, No. 4.—*Ed.*)

The term assets has been held to include the following things, to wit:

A claim for unliquidated damages. (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.)

Property conveyed to the petitioner in fraud of the creditors of the grantor. (*In re O'Bannon*, 2 B. R. 15.)

A vested interest expectant on the termination of a life estate. (*In re Bennett*, 2 B. R. 181; s. c. 8 A. L. Reg. 34; s. c. 25 Pitts. L. J. 316.)

An insurance on the petitioner's life, for the benefit of the petitioner's wife, whereon premiums have been paid by the petitioner after his insolvency. (*In re Erben*, 2 B. R. 181; s. c. 8 A. L. Reg. 34.)

Property in the possession of the petitioner, which belongs to a firm of which he has been a member. (*In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.)

The interest of the petitioner in the rights of action, and credits of a firm of which he was a member, although his interest in the firm has been levied upon and sold. (*Moore v. Rosenberger*, 7 Phila. 576.)

Property conveyed by the petitioner in fraud of his creditors. (*In re Hussmann*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.)

Property in the possession of the petitioner covered by a fraudulent assignment to which the creditors have never assented. (*Ashley v. Robinson*, 29 Ala. 112.)

Property held *de facto*, though by a defeasible title. (*In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.)

The money advanced by the petitioner as security for fees to the register, the clerk, and the marshal. (Anon. 1 B. R. 123.)

The husband's share in property left to him in trust, for the sole and separate use of his wife, during her life, and after her death to be equally divided between the husband and her children, share and share alike, even though there is a provision in the will that the property shall not be liable to the payment of the debts of any present or future husband. This latter provision must be construed to be limited by and to apply only during the life of the wife. (*In re Myrick*, 3 B. R. 154.)



The interest of the bankrupt under a will in an estate in expectancy. (*In re Connell*, Jr. 3 B. R. 443.)

The term assets has been held not to include the following things, to wit:

The right to a share in the net profits of a business conducted in the name of the petitioner, allowed as a compensation for services. (*In re Beardsley*, 1 B. R. 304; *in re Wm. H. Pierson*, 10 B. R. 107; *in re George Brown*, 5 Law Rep. 121.)

Property held by a trustee for the benefit of the petitioner's wife, wherein the petitioner's equitable interest had been sold under execution. (*In re Pomeroy*, 2 B. R. 14; *in re Hummitsh*, 2 B. R. 12; s. c. 15 Pitts. L. J. 494.)

Money invested in the name of the petitioner's wife, which has been earned by her. (*In re Hummitsh*, 2 B. R. 12; s. c. 15 Pitts. L. J. 494.)

A claim against a person for falsely recommending another as worthy of trust. (*Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.)

Property which, at the time of the filing of the petition, is vested in a receiver appointed by a State court. (*In re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245.)

A chose in action on which suit has been brought, but which has been assigned in good faith for a full and valuable consideration. (*Valentine v. Holloman*, 63 N. C. 475.)

An assignment made under the State insolvent laws, when they were in force, was the act of the law, and not of the party; and the confirmatory instruments which the debtor might be required by the assignee and ordered by the judge to execute were equally made by legal authority and direction. Property included in such an assignment, made before the commencement of proceedings in bankruptcy, no longer belongs to the debtor, and constitutes no part of the assets of the bankrupt. (*Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 246.)

SEC. 5017.—The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

Statute Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

A petition in involuntary bankruptcy can not be verified before a notary public. (*In re Heller Bros. & Co.* 32 Leg. Int. 136; s. c. 22 Pitts. L. J. 140.)

An indictment for perjury need not set out the petition substantially or otherwise. A mere reference to its character and object is sufficient. (*U. S. v. Deming*, 4 McLean, 3; *U. S. v. Nikols*, 4 McLean, 23.)

An indictment for perjury, which describes the petition as made to "a judge sitting as a bankrupt court," is sufficient, for no judge can sit in bankruptcy except the district judge. (*U. S. v. Deming*, 4 McLean, 3.)

SEC. 5018.—Every citizen of the United States petitioning to be declared bankrupt, shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before

either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

Statute Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521.

Although the prescribed form contemplates that the oath of allegiance shall be annexed to the petition, yet it cannot be doubted that, by the very terms of the statute, it may be lawfully filed at any time afterward, and with precisely the same effect as if annexed. (*U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 287; s. c. 3 L. T. B. 223; *in re A. J. Walker*, 1 B. R. 335.)

SEC. 5019.—Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers \* as the marshal shall select, not exceeding two; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies; † but whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.

Statute Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

The proceedings in bankruptcy are in no just sense *ex parte* in their character, for notice is required to be given to the creditors either personally or by publication. (*Lathrop v. Stuart*, 5 McLean, 167.)

After the public notice required by the statute has been given, creditors must be treated as having notice of the proceedings. (*Smith v. Brinckerhoff*, 6 N. Y. 305; s. c. 8 Barb. 519; *contra*, *Miller v. Black*, 1 Penn. 420.)

The warrant should contain a list of the bankrupt's creditors, with their respective places of residence, and the amount of their respective debts. (*In re Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

The omission to publish the notice in one of the newspapers designated by the warrant, is such a defect as will make all proceedings founded thereon, and subsequent thereto, irregular and voidable. (*In re Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

The marshal should insert in the notices served on the creditors the exact language of the warrant, but an immaterial variance will be disregarded. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381; *in re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321.)

\* So amended by act of 22 June, 1874, ch. 390, § 5, 18 Stat. 179.

† So amended by act of 22 June, 1874, ch. 390, § 5, 18 Stat. 179.

The notice to be served on the bankrupt's creditors should contain a list of all the creditors, with their respective places of residence, and the amount due to each. (*In re Decatur Jones*, 2 B. R. 59; *in re John S. Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; *in re Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

The marshal should insert in the notice to be published and served, the exact language of the warrant, but an immaterial variance will be disregarded. (*In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.)

The marshal has no discretion, but must serve all notices by mail, unless directed by the warrant to serve the notices personally on the parties therein specified by name. (Anon. 1 B. R. 216.)

The notice must be served on foreign creditors, as well as those who reside in the United States. (*In re Heyes*, 1 B. R. 21; s. c. 1 Ben. 333; s. c. 36 How. Pr. 249.)

SEC. 5020.—Every bankrupt shall be at liberty, from time\* to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529.

For the purpose of allowing amendments where they are uncontested, the register is the court, and has the power to allow them on a direct application to him. The co-ordinate power of allowing them exists in the judge. The original amendments permitted to be made should be filed with the clerk. (*In re Morford*, 1 B. R. 211; s. c. 1 Ben. 264; *in re B. Heller*, 5 B. R. 46; s. c. 41 How. Pr. 213.)

The register can, of his own motion, order amendments at any stage of the proceedings. Such an order ought to specify particularly the points in which the petition and schedules are defective. (*In re Orne*, 1 B. R. 79; s. c. 1 Ben. 420; *in re Horace Plimpton*, 4 Law Rep. 488.)

The register may order an amendment upon the petition of a creditor. (*In re Decatur Jones*, 2 B. R. 59.)

The register may refuse to allow amendments, except upon such conditions as will prevent injustice. (*In re Ratcliff*, 1 B. R. 400; *in re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4.)

The bankrupt may make an application for leave to amend his schedules at any stage of the proceedings before the register has returned the cause to the court, and the filing of specifications does not prejudice him in or deprive him of the right. (*In re B. Heller*, 5 B. R. 46; s. c. 41 How. Pr. 213; *in re Chas. Oakley*, 5 Law Rep. 327.)

When it appears, on the hearing of the specifications against the discharge of the bankrupt; that he has innocently omitted some property from his schedules, the case will be referred back to the register with leave to the bankrupt to amend his schedules. (*In re Connell*, 3 B. R. 443; *in re A. B. Preston*, 3 B. R. 103.)

The application for leave to amend is *ex parte*, and no notice is necessary. No creditor has a right to oppose the application. The allowance of an amendment does not prejudice the rights of a creditor. He is not a party to the proceeding, and is not estopped by the order. (*In re Watts*, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74; *in re B. Heller*, 5 B. R. 46; s. c. 41 How. Pr. 213.)

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\* So amended by act of Feb. 27, 1877, ch. 69, 19 Stat. 252.

The better practice in order to bring the question fully before the court, is to allow the assignee and creditors opposing the discharge to oppose the application for leave to amend, and to require due notice of such application to be given to them. (*In re B. Heller*, 5 B. R. 46; s. c. 41 How. Pr. 213.)

The bankrupt has the right to amend his schedules by striking out the names of persons who have been improperly and inadvertently inserted as creditors. (*In re B. Heller*, 5 B. R. 46; s. c. 41 How. Pr. 213.)

The bankrupt may amend his petition so as to bring in his copartner. (*In re Little*, 1 B. R. 341; s. c. 2 Ben. 186.)

If the petition merely alleges, that the bankrupt had a place of business within the district, he may be allowed to amend upon showing why the petition was not originally made in proper form, and accounting for the delay in applying for leave to amend. (*In re Edward T. Wood*, 13 B. R. 96; s. c. 6 Ben. 339.)

## CHAPTER THREE.

### INVOLUNTARY BANKRUPTCY.

SEC.	SEC.
5021.—Acts of bankruptcy.	5027.—Costs at trial.
5022.—Prior act of bankruptcy.	5028.—Warrant.
5023.—Who may file petition.	5029.—Distribution of property of debtor.
5024.—Proceedings after filing petition.	5030.—Schedule and inventory.
5025.—Service of order to show cause.	5031.—Proceedings when debtor is absent.
5026.—Proceedings on return day.	

SEC. 5021.\*—That any person residing, and owing (*a*) debts, as aforesaid, who, after the passage of this act, shall depart from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal (*b*) himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal (*c*) or remove any of his property to avoid its being attached, taken or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent (*d*) to delay, defraud or hinder his creditors; or who has been arrested (*e*) and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States, or of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States, or of such State, District, or Territory, applicable thereto, for a period of twenty days; or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, (*f*) or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference (*g*) to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or

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\* So amended by act of 22 June, 1874, ch. 390, § 12, 18 Stat. 180.

with the intent, by such disposition of his property, to defeat (*h*) or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, (*j*) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition (*k*) of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (*l*) provable under this act amounts to at least one-third of the debts so provable: *Provided*: That such petition is brought within six months after such act of bankruptcy shall have been committed: \* *Provided also*, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expira-

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\* So amended by act of July 26, 1876, ch. 234, § 1, 19 Stat. 102.

tion of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (*m*) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid.

Statutes Revised—March 2, 1867, ch. 176, § 39, 14 Stat. 536; July 27, 1868, ch. 258, § 2, 15 Stat. 228. Prior Statutes—April 4, 1800, ch. 19, §§ 1, 2, 2 Stat. 19, 21; Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

### Principles of Construction.

This section is highly remedial, and should be liberally construed. It is not to be construed strictly, as if it were an obscure or special penal enactment. The act establishes a system, and regulates in all their details the relative rights and duties of debtor and creditor. It does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he can not discharge, and allow him to commence the business of life anew. Such an act must be construed according to the fair import of its terms, with a view to effect its objects and to promote justice. (*In re Locke*, 2 B. R. 382; s. c. Lowell, 293; *in re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *in re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *in re Wm. Eeles*, 1 N. Y. Leg. Obs. 84; s. c. 5 Law Rep. 273.)

Its scope and purpose are to oblige insolvent traders to take the benefit of the bankrupt act, and thus to insure an equal distribution of their estate under

its carefully framed provisions. (*In re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; *in re Locke*, 2 B. R. 382; s. c. Lowell, 293; *White v. Raftery*, 3 B. R. 221; s. c. 1 C. L. N. 361; s. c. 16 Pitts. L. J. 110.)

That part of the statute which enumerates the acts of bankruptcy is in the nature of a penal statute, and to be construed strictly. It can not be enlarged by construction to include acts that are within the reason of the law, or the mischiefs intended to be provided against, but which are not within the words of the statute according to their reasonable construction. (*Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.)

Sections 5128 and 5021 are very nearly related to each other in their provisions, and must be construed together in *pari materia*. Section 5128, in express language, applies equally to voluntary and involuntary cases. Therefore all the qualifications and conditions prescribed by section 5128, not inconsistent with the provisions of section 5021, will apply to proceedings under the latter section, and all the qualifications, conditions, and prohibitions of section 5021, so far as they relate to the same class of matters provided for by section 5128, and are not inconsistent with its provisions, will apply to proceedings under section 5128. (*In re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.)

Section 5128 does not relate to or affect the question, what is an act of bankruptcy? By section 5021 alone that question must be answered. It is quite clear that facts which are entirely sufficient for adjudicating a debtor bankrupt on petition of his creditor, may be, and generally are, wholly insufficient to justify a decree declaring void a transfer of property, or preference given to a creditor. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 243.)

Section 5130 throws light upon the intention of Congress in the enactment of the 5021st section, and shows that any assignment or transfer of property by a failing debtor, not in the usual and ordinary course of business, is not only void, but evidence of fraud. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; *in re Dean & Garrett*, 2 B. R. 89; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138.)

The act makes a discrimination between cases of voluntary and involuntary bankruptcy. The debtor upon filing a petition with the proper averments is declared a bankrupt by the court. The allegation can not be traversed, nor is any issue or inquiry as to its truth permitted. While the debtor may, on this broad basis, call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which is essential to his right to appeal to the court. When any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury. The reason for the wide difference in the proceedings in the two cases is obvious. When a man is himself willing to refer his embarrassed condition to the proper court, with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues; but when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man—in short, to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be well defined in the law, but clearly established in the court. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 489; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.)



### What Sum a Debtor must Owe.

(a) The language, "owing debts as aforesaid," has reference to the following words of section 5014, viz: "owing debts provable in bankruptcy exceeding the amount of three hundred dollars." From this the following conclusions must be deduced:

1. The foundation of voluntary proceeding is indebtedness due and payable under the act against the debtor.

2. Whatever debts may be proved in a voluntary, may be proved in an involuntary case.

3. Whenever an indorser's liability has become fixed, such liability constitutes a debt, due and payable from the indorser, which may be made the foundation of involuntary as well as voluntary proceedings in bankruptcy.

Of course there must be shown in an involuntary case, in addition to such indebtedness, at least one of the acts of bankruptcy enumerated in this section. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233.)

A petition may be filed against a firm, although one of the partners has been previously declared a bankrupt on a petition filed against him alone. (*Hunt v. Poole*, 5 B. R. 161.)

Persons who have been adjudged bankrupts as partners in one firm, may be subsequently declared bankrupts as partners with another in another firm. (*In re S. A. Jewett*, 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.)

A certificate that the special partner has contributed a certain sum in cash, and a certain sum in goods does not comply with the statutes of New York relating to limited partnerships, and the parties may be proceeded against in bankruptcy as general partners. (*In re William G. Merrill*, 13 B. R. 91; s. c. 12 Blatch. 221.)

A firm can not be adjudged bankrupt on an involuntary petition, unless all the partners are parties to the proceeding. (*In re Chas. S. Pitt*, 14 B. R. 59.)

A consolidated railroad corporation, existing under charters from several States, but having one name, one set of stockholders and officers, the same assets, and the same creditors, if thrown into bankruptcy in one of these States, can not be afterwards adjudicated a bankrupt upon another petition by another creditor, brought in another State and district. The court first acquiring jurisdiction ought to retain it exclusively so far as an adjudication is concerned, and the assignment under the first adjudication will carry all corporate assets in the hands of the assignee. (*In re Boston R. R. Co.* 6 B. R. 209; s. c. 9 Blatch. 101.)

Infants, as subjects of either voluntary or involuntary bankruptcy, are not in respect to their general contracts within the provisions of the bankrupt law. (*In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.)

A party who is under guardianship as a lunatic may be proceeded against in involuntary bankruptcy in opposition to the wish of his guardian. (*In re Weitzel*, 14 B. R. 466; s. c. 3 Cent. L. J. 557.)

The fact that a receiver has been appointed by a State court to take charge of the assets of a corporation in a proceeding under a State law relating to the distribution of the assets of insolvent corporations, is no ground for refusing to adjudicate such corporation bankrupt. (*In re Green Pond R. R. Co.* 13 B. R. 118; *in re National Life Ins. Co.* 6 Biss. 35.)

The decree of a State court dissolving a corporation on account of a forfeiture of its charter does not prevent proceedings against it in bankruptcy. A corporation, however it may be dissolved, still exists for the purpose of paying its debts and of dividing its surplus, if any, among its shareholders, or of having

this done by a court of equity acting on its property. A petition in bankruptcy is an equitable sequestration. (*In re Independent Ins. Co.* 6 B. R. 169; s. c. 6 B. R. 260; s. c. 1 Holmes, 103; *Thornhill v. Bank*, 5 B. R. 377; s. c. 3 B. R. 435; s. c. 1 L. T. B. 287; s. c. 3 L. T. B. 38; s. c. 2 C. L. N. 157; *in re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243; *in re Washington Mar. Ins. Co.* 2 B. R. 648; s. c. 2 Ben. 292.)

The bankrupt law does not in general embrace trustees as executors, administrators, guardians, and others acting strictly in a fiduciary capacity. (*Graves v. Winter*, 9 B. R. 357; s. c. 7 Pac. L. R. 165.)

The executor of a banker who is merely authorized by the will to continue the business so long as may be necessary to a fair liquidation and settlement thereof, and has no power that does not tend to the object, can not be declared a bankrupt as such. (*Graves v. Winter*, 9 B. R. 357; s. c. 7 Pac. L. R. 165.)

A *feme covert* who is authorized by the laws of the State to carry on business as a sole trader, and incur liabilities, may be declared a bankrupt. (*In re Kinkeade*, 7 B. R. 439; s. c. 3 Biss. 405; *in re O'Brien*, 1 B. R. 176; *in re Julia Lyons*, 2 Saw. 524; s. c. 1 A. L. T. [N. S.] 167.)

A court of bankruptcy is clothed with all the powers of a court of equity, and if a *feme covert*, with the consent of her husband, can enter into copartnership with him or any other person, then she may be declared a bankrupt on the petition of creditors, or, at least, the firm, as a business entity, may be so adjudged for the purpose of distributing the assets among creditors. (*In re Kinkeade*, 7 B. R. 439; s. c. 3 Biss. 405.)

The directors and stockholders can not be adjudged bankrupts on account of an act of bankruptcy committed by the corporation, although they are jointly and severally liable for its debts, for joint debtors are not affected by an act of bankruptcy committed by one of them. (*James v. Atlantic Delawine Co.* 11 B. R. 390.)

(b) An order for the examination of a debtor upon proceedings supplemental to an execution is a legal process within the meaning of the act. (*Brock v. Hoppock*, 2 B. R. 7; s. c. 2 Ben. 478.)

If the concealment is a concerted measure between the debtor and some of his creditors, it is not an act of bankruptcy as against creditors not privy to the plot. (*Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.)

Concealment from or denial to creditors is not an act of bankruptcy if it does not prevent the service of process. (*Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.)

It is not an act of bankruptcy for a special partner to procure a general partner to leave the State. (*In re Lyman Terry*, 5 Biss. 110.)

(c) Procuring an attachment upon a fictitious debt, in order to prevent an attachment by a creditor, comes fairly within the language of this clause, because the words mean not only the physical removal or concealment, but the concealment of the actual title and position of property of whatever kind. (*In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.)

An allegation that the debtor concealed money with intent to prevent its being taken on legal process, which he knew was about to issue at the suit of one or more of his creditors, is sufficient. It is not necessary to state that there was any legal process in existence. (*Fox v. Eckstein*, 4 B. R. 373.)

The secrecy and concealment of goods, which constitutes an act of bankruptcy distinct from a fraudulent conveyance of them, must be an actual, not a constructive concealment of them by the bankrupt himself, or by his procurement, while they continue, in his intention, his own goods. (*Livermore v. Bagley*, 3 Mass. 487.)

**Fraudulent Conveyances.**

(d) It is not an element of this act of bankruptcy that the debtor shall be, at the time of committing it, bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, nor is any allegation to that effect necessary. (*In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89; *in re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; *in re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re Thomas Ryan*, 2 Saw. 411.)

The intent means an actual design in the mind, and must be proved as a question of fact. (*In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *in re Cowles*, 1 B. R. 280; s. c. 1 W. J. 367; *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; *in re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379.)

The intent need exist only on the part of the person making the transfer. If that exist, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person to whom the transfer is made. (*In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7.)

The question of intent to hinder, delay, or defraud creditors must be solved by looking at what the debtor says and does, and the effect thereof. (*Beffort v. Greeley*, 6 B. R. 433; s. c. 4 C. L. N. 209; *in re Thomas Ryan*, 2 Saw. 411.)

A mortgage given for a present consideration, which is used to relieve the mortgagor's stock from an attachment, and to pay the only overdue paper of the debtor known to the mortgagee, is not a transfer with the intent to delay creditors. (*In re Sandford*, 7 B. R. 351.)

A conveyance by a person whose property exceeds in value all that he owes, in consideration of an agreement that the grantee shall pay all the grantor's debts, and support him during the residue of his days, is not *per se* fraudulent and void as against creditors. (*In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.)

If an insolvent firm is dissolved and the assets transferred to one of the partners who immediately executes a mortgage to secure a separate debt, the mortgage may be charged as a conveyance to hinder and delay creditors. (*In re Waite et al.* Lowell, 407.)

A transfer of the firm property by one partner to his copartner is not a conveyance to hinder or delay the firm creditors. (*In re Munn*, 7 B. R. 468; s. c. 3 Biss. 442.)

A transfer of the warehouse receipts and bills of lading of goods purchased for cash on delivery, to a banker to keep the bank account good, and putting off the vendor on various grounds, is legally, if not intentionally, fraudulent, in that it hinders, delays, and defrauds the vendor, although the vendee is induced thus to act by the stress of his circumstances, and may hope ultimately to pay the vendor. (*In re Picton*, 11 B. R. 420; s. c. 2 Dillon, 548.)

The conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned. When the effect necessarily is to delay creditors, the intent ought to be presumed. When the defense is that the property was conveyed in pursuance of a secret trust, under which it was held, and parol evidence, by the statute of frauds, can not be admitted to prove such trust, so that, in case of attachment or bankruptcy before the conveyance was made, the conveyance would be conclusively held to be in the debtor, it is questionable whether he ought to be admitted to show this alleged trust even on the question of intent. When the petitioner is a witness, the fact that he has acted in a harsh and oppressive manner toward the debtor may be shown in evidence for the purpose of affecting his credibility. (*In re W. B. Alexander et al.* 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *Thornhill v. Link*, 8 B. R. 521.)

Allowing property to be taken on a false and fictitious judgment is a transfer with intent to hinder, delay, and defraud creditors. (*In re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28.)

When a party has given a fictitious note, and procured an attachment thereon for the purpose of preventing an attachment by a real creditor, it is no defense that the real object of thus withdrawing the fund was not to defeat creditors generally but only that one particular creditor, and that it was the purpose of the debtor to use the money to pay other creditors. The immediate result was to give the debtor the secret control of the fund under the guise of an adverse attachment. It is impossible for the court to go beyond that result and determine upon doubtful evidence, or any evidence, that the parties intended, when the fund was illegally withdrawn from the ordinary reach of the law, to apply it more beneficially than the law itself would apply it. This is a fundamental principle of the law of fraudulent conveyances. (*In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.)

A debtor has the right to mortgage his property or a portion of it for the purpose of raising money to pay his debts, but a mortgage given for the purpose and with the manifest design of so encumbering his available means that creditors will be hindered and delayed in the collection of their demands, is fraudulent. (*In re Cowles*, 1 B. R. 280; s. c. 1 W. J. 367; *Baldwin v. Rousseau*, 1 N. Y. Leg. Obs. 391.)

A sale of all the debtor's property for a small portion in cash and the balance in long notes does to that extent delay creditors. (*In re Dean & Garrett*, 2 B. R. 89.)

The insertion of a power in a mortgage to enter and sell whenever the mortgagee may deem himself unsafe, is a suspicious circumstance. (*In re Thomas Ryan*, 2 Saw. 411.)

If the value of the property largely exceeds the mortgage debt, this is a badge of fraud. (*Baldwin v. Rousseau*, 1 N. Y. Leg. Obs. 391.)

The retention of possession by the mortgagor is a badge of fraud. (*Baldwin v. Rousseau*, 1 N. Y. Leg. Obs. 391.)

Where the right to transfer a franchise is conferred by the Legislature, an assignment thereof may be made with intent to delay, hinder, or defraud creditors. (*In re Southern Minn. R. R. Co.* 10 B. R. 86.)

### Assignment for the Benefit of Creditors.

To make a general assignment for the benefit of creditors an act of bankruptcy within the meaning of this clause, it must be made with the intent to delay, defraud, or hinder creditors within the meaning of the statute of 13th Elizabeth, as exemplified in *Twyne's Case* and other subsequent decisions following it. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the bankrupt act unless it was meant to be so. (*Perry v. Langley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 8 A. L. Reg. 427; 7 A. L. Reg. 429; *Farrin v. Crawford et al.* 2 B. R. 602; *Wells et al.* [ex parte H. B. Claflin & Co.] 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163; *in re Potts & Garwood*, Crabbe, 469.)

An assignment is to be subjected to the sharpest scrutiny, and any badge of fraud that attaches itself in the light of extraneous circumstances will, unless fully and satisfactorily explained, be fatal to its validity, and the arm of the bankrupt law will sweep it away, and subject the person and estate of the debtor to its own provisions. When the assignor, through the agency of the assignee himself, retains a portion of the estate and converts it to his own use, to an amount much greater than he could hold under the exemption laws of the State,

the assignment is fraudulent. (*Farrin v. Crawford*, 2 B. R. 602; *in re Chamberlain et al.* 3 B. R. 710.)

An assignment by a solvent person for the benefit of creditors, with or without preferences, is void under the statute of frauds, because the necessary consequence of it is to delay and defraud creditors, by preventing them from subjecting the debtor's property, by the ordinary legal proceedings and process, to the satisfaction of their claims. An assignment which authorizes the assignee to sell on credit, or in any manner to prolong his possession of the property beyond the time reasonably necessary to convert it into cash and distribute it among the creditors, is fraudulent. (*In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.)

An assignment made with the intent to prevent creditors who are pressing suits to judgment from obtaining preference over other creditors, is not an act of bankruptcy. (*Perry v. Langley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 8 A. L. Reg. 427; 7 A. L. Reg. 429; *Wells et al. [ex parte H. B. Claffin & Co.]* 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.)

*Contra.* The fact that the debtor made the assignment without intent to defraud any creditor, is of no consequence, provided that he had the intent to delay or hinder his creditors. An assignment made for the purpose of preventing creditors who have sued him from appropriating the assigned property towards the payment of their claims, is made to hinder and delay such creditors. (*In re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379.)

An intent to hinder, delay, or defraud one creditor, is such an intent as the bankrupt act contemplates. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; *contra, in re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.)

An application to have the security of the assignee's bond increased is not such an assent to the assignment as will estop the creditor from urging it as an act of bankruptcy. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429.)

### Arrest of Debtor.

(e) A debtor who has not been actually imprisoned for more than twenty days, on an order of arrest issued against him in a civil action founded upon a contract, can not be adjudged a bankrupt on account of such arrest. The statute evidently intends to draw a distinction between being actually imprisoned for more than twenty days, and being held in custody for a period of twenty days. It confines the former to a civil action founded on contract, while it extends the latter to any demand in its nature provable against a bankrupt's estate. There are claims or demands which would fall within the first clause and not within the second clause. The first clause has, therefore, a field for operation over which the second clause does not extend. This being so, and there being a distinction evidently intended by the statute between actual imprisonment and mere arresting and holding in custody—a person actually imprisoned being held in custody, although a person held in custody is not necessarily actually imprisoned—full effect must be given to the second clause. This can not be done if it be held that a person arrested in a civil action, founded on contract, may be adjudged bankrupt, although he has not been actually imprisoned for more than twenty days. If it be so held on the ground that a claim founded on a contract is a demand in its nature provable against a bankrupt's estate under the act, and that it is sufficient, under the first clause, that the debtor be arrested and held in custody, under *mesne* process founded on such claims, for a period of twenty days, then no cases exist which would not fall within the first clause, and the second clause would become inoperative, and might as well have been left out of the statute. A statute must be so construed, if possible, without doing violence

to the language, as to give force, meaning, and effect to every part of it. There is no affirmative repugnancy between the two clauses, and sound principles of construction require that it shall be held to be the intention of Congress that cases falling within the second clause shall be governed wholly by the second clause, although, if the second clause had been omitted from the section, they would fall under the first clause. Even if the two clauses were repugnant to each other in a broader sense than they are, the second clause would control as being the later expression of the will of the law makers. (*In re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482)

The arrest and imprisonment are both necessary to constitute the act of bankruptcy. Either alone is not sufficient. Both do not exist until the term of imprisonment limited for that purpose has expired. (*Nelms v. Pugh*, 1 Murph. 149.)

If the capias upon which the arrest is made is not void, but voidable, the arrest is legal until it is set aside. If the debtor voluntarily submits to an arrest good upon its face for the period of twenty days, he commits an act of bankruptcy. If he is not insolvent, the law presumes that twenty days is long enough for him either to pay the debt, or procure bail to the action; or if he deem the arrest unlawful, to have its unlawfulness tested before the proper tribunal. If he neglects or delays within that time to obtain his discharge from duress in either of these ways, he commits the act of bankruptcy defined by the statute, and it is no defense that the order of arrest was subsequently set aside, and discharge granted to him upon giving common bail. (*In re B. Cohn*, 7 B. R. 31; s. c. 29 Leg. Int. 309; s. c. 5 C. L. N. 14.)

An imprisonment commencing on the forenoon of Sept. 8th, 1870, and terminating before noon on the 28th of that month, was held not to be sufficient. In legal contemplation, the debtor was in prison nineteen entire days and portions of other two days, and the first day being excluded, this made only twenty days. (*Hunt v. Fooke*, 5 B. R. 161)

### Insolvency.

(f) Mere insolvency is not, of itself, ground for involuntary bankruptcy: for a man, actually insolvent, may continue his business for years by renewals and extensions and indulgences on the part of his creditors, and ultimately not only pay all indebtedness with interest, but achieve success. (*Doan v. Compton & Doan*, 2 B. R. 607)

The act is not intended to cover all cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the class of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves in a great majority of cases parties who are really insolvent to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, and large business, totally insolvent, that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all and save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not of itself to be construed into an act of bankruptcy or a fraud on the act. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 489.)

The words "insolvent" and "insolvency" are not synonymous with the words "bankrupt" and "bankruptcy." Insolvency means an inability to pay

debts in the ordinary course of business; bankruptcy means a particular legal status, to be ascertained by a judicial decree. (*In re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Craft*, 2 B. R. 111; s. c. 6 Blatch. 177; *Morgan, Root & Co. v. Mastick*, 2 B. R. 521; *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185; *Jones v. Howland*, 49 Mass. 377; *Loneragan v. Fenlon*, 7 Pitts. L. J. 266; *contra, in re Henry Breneman, Crabbe, 456; Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364; *Everett v. Stone*, 3 Story, 446; *Winsor v. Kendall*, 3 Story, 507; *Ashby v. Steere*, 2 W. & M. 347; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Dennett v. Mitchell*, 6 Law Rep. 16; s. c. 1 N. Y. Leg. Obs. 356; *Hutchins v. Taylor*, 5 Law Rep. 289.)

The words "in contemplation of bankruptcy," mean in contemplation of committing what is made by the act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. (*In re Craft*, 1 B. R. 378; s. c. 2 Ben. 214.)

An allegation that the debtor was insolvent or in contemplation of bankruptcy, is insufficient, as it is impossible to say which is to be relied on. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

Insolvency means an inability to pay debts, as they mature and become due and payable, in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the laws of the United States, lawful money and a legal tender to be used in the payment of debts, without reference to the amount of the debtor's property, and without reference to the possibility or probability or even certainty that at a future time, on the settlement and winding up of all his affairs, his debts will be paid in full out of his property. Nothing else is a legal tender in payment of debts but that which is declared by the law of the United States a lawful money and a legal tender in the payment of debts. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind. Therefore, the amount of the trader's property is of no consequence, if such inability to pay matured debts in such lawful money exists. (*Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121; *in re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; *in re Rodgers & Conyell*, 2 B. R. 397.)

This is the only construction which is adapted to give effect to the bankrupt act for the beneficial purposes for which it was designed. Without this, the trader's property may be wasted, preferences among creditors be given, and other transfers of his property be effected, wholly inconsistent with the intent of the act. To hold that the probability that, if the estate should be judiciously managed, it would, after the lapse of some indefinite time, at prices corresponding with its then estimated value, produce enough to pay the creditors, if they also would wait, and not force sales by judgments and executions, is to constitute proof of solvency within the meaning of the law, would be neither sensible nor just. But insolvency is not to be inferred in every instance of temporary want of money to pay notes coming to maturity. This would be tantamount to holding that, whenever a trader suffers a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent. This would be an extreme view. (*Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

Inability to pay one debt in the ordinary course of business is sufficient. The ordinary "course of business" does not mean an ability to turn out goods, or bills receivable, or assets or securities to pay that one particular debt, at the same time leaving other debts which are certain to become due, unprovided for, and not leaving sufficient assets in the hands of the debtor to meet them when they become due. That is an extraordinary course of business. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *Driggs v. Moore, Foote & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440.)

A solvent man is one that is able to pay all his debts in full at once, or as they become due. Insolvency is merely the opposite of solvency. A man who is

unable to pay his debts out of his own means, or whose debts can not be collected out of such means by legal process is insolvent; and this although it may be morally certain that, with indulgence from his creditors, in point of time, he may be ultimately able to satisfy his engagements in full. The term insolvency imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts can not be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankrupt act. (*In re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; *in re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; *in re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 232; s. c. 3 Cent. L. J. 515.)

If the debtor is unable to pay his debts as they become due, the burden of proving that his property is sufficient to pay his debts rests upon him. (*In re Thomas Ryan*, 2 Saw. 411.)

The act has far less reference to the condition of mind of the insolvent debtor than to the condition of insolvency as a fact. When a debtor knows that he is insolvent, he must wait, before he gives a preference, until he knows that his condition is changed, or that his creditors consent to the preference. It is a general principle, to which there are no exceptions, that, where the parties know the insolvency, they must act at their peril if they appropriate the trust fund which the law devotes to the equal payment of all, before they also know that creditors have ceased to be such, or that they consent, after the most full and fair disclosures, to the discrimination which is made. Without this it is an act of bankruptcy. It is an irrelevant fact that they erroneously supposed that creditors had consented. Their careless, rash, or interested conclusions give them no power over the statutory vested rights of innocent and non-concurring creditors. (*Curran v. Munger*, 4 B. R. 295; s. c. 6 B. R. 33.)

A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer evidence tending to show his insolvency, and the debtor must then explain the evidence if possible, for he is best acquainted with the condition of his own affairs. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

A debtor admitting insolvency by his acts is conclusively presumed to contemplate insolvency. (*In re Waite & Crocker*, 1 B. R. 273; s. c. Lowell, 207.)

Where there is no proof that the acts were done in contemplation of bankruptcy, the petition should aver that the debtor was insolvent or in contemplation of insolvency, and this is the only averment that should be made. (*In re Craft*, 1 B. R. 378; s. c. 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; *in re Haughton*, 1 B. R. 460.)

The giving as security of a warrant of attorney to confess judgment, on which the creditor may enter judgment at any time, by no means, of itself, raises any presumption of insolvency. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

A voluntary contribution received by a debtor does not constitute a debt due by him. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

The fact that the bonds of a railroad corporation are at a mere nominal value does not make the corporation insolvent. (*Tucker v. Opelousas & Gt. Western R. R. Co.* 3 B. R. quarto, 31.)

Whether a debtor knows that he is insolvent, or purposely and willfully refuses to know by shutting his eyes to the facts before him, the result is the same. In one case, the fact of knowledge; in the other, an unavoidable legal inference. (*Farrin v. Crawford et al.* 2 B. R. 602.)



When a party is in fact insolvent, but denies insolvency under oath, it will be presumed that he was ignorant of the legal definition of the term insolvency, and that such ignorance led to such denial. (*In re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.)

A trader unable to pay his debts in the ordinary course of business is insolvent *prima facie*, and it is incumbent on him to show that he is not so in fact. The rule does not apply with the same strictness to farmers, and as to them the rule is reversed. The petitioning creditor must take the onus of showing actual insolvency. (*Miller v. Keys*, 3 B. R. 224.)

It will not do to say that the act of making a transfer of property, or of procuring or suffering property to be taken on legal process, with the intent named, is an act of bankruptcy, whether the debtor is or is not otherwise shown to be bankrupt or insolvent, or to be contemplating bankruptcy or insolvency, on the idea that the act becomes *ipso facto* one in contemplation of bankruptcy, because, it being an act of bankruptcy, and thus being bankruptcy, the doing of it must have been in contemplation of bankruptcy. This is reasoning in a circle, and such a view would not require that the debtor should even be insolvent, or contemplate insolvency, and would virtually strike those words out of the section; for if it were shown that the debtor had done the act named with the intent named, the fact that he had done it in contemplation of bankruptcy would follow as an inevitable legal conclusion, and insolvency, or the contemplation of it, would never become an operative prerequisite. The debtor must be shown, aside from the mere doing of the act named with the intent named, to have done it when bankrupt or insolvent, or in the contemplation of bankruptcy or insolvency. (*In re Craft*, 1 B. R. 378; s. c. 2 Ben. 214.)

If, at the time of committing the act named, the debtor, in his own mind, from a view of the state of things which surround him, contemplated that he would not be, and continue to be, from that time thenceforth, able to pay his debts, as such debts should mature in the ordinary course of his business, then he contemplated insolvency; and, if he contemplated insolvency, that puts the case in precisely the same predicament as though he was insolvent. A debtor has no more right to do the forbidden act when he contemplates that in view of the existing aspect of his affairs, he will not be able to pay his debts in the ordinary course of his business, than he would have if he were actually insolvent at the time. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

### Preferences.

(g) In an act of bankruptcy under this clause, there are the following ingredients, to wit:

1st. The debtor must either be insolvent, or contemplate insolvency.

2d. He must make a conveyance or transfer of money or property, or he must procure his property to be taken on legal process.

3d. He must do this with intent, on his own part, to give a preference to the creditor; or with the intent, on his own part, to defeat or delay the operation of the act. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

### Legal Process.

An allegation which does not set forth any specified day on which the property was taken on legal process, simply charging that the act of bankruptcy was committed on the blank day of blank, 1860, and in which the only other allegation of the time of its commission is, that it was committed within six months next preceding the date of the petition, which is not dated, but which was sworn to three days before it was filed, is defective. (*In re Chappel*, 4 B. R. 540.)

There is a clearly recognized distinction between procuring and suffering. The word "suffer" is different from the word "procure." "Suffer" implies a passive condition, so to speak, as to allow, to permit; not a demonstrative, active course, like the word "procure." (*In re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Craft*, 1 B. R. 378; s. c. 2 Ben. 214; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *in re Haughton*, 1 B. R. 460; *in re Heller*, 3 Biss. 153; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224; *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

Mere honest inaction, when a creditor seeks to make a just debt by law, is not itself an act of bankruptcy. The debtor's failure through inability to go into voluntary bankruptcy when he was sued, is not of itself an act of bankruptcy. (*Wright v. Filley*, 4 B. R. 611; s. c. 1 Dillon, 171; *Love v. Love*, 21 Pitts. L. J. 101; *contra*, *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Heller*, 3 Biss. 153; *in re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224; *Bonnett v. James*, 1 N. Y. Leg. Obs. 310.)

It is not enough that the debtor is passive, and does nothing to prevent a creditor from taking his goods on execution. The words of the act can be satisfied with nothing short of a positive agency, an active co-operation. To be passive merely and to do nothing, is not to procure an act to be done. It is not to aid, co-operate, or advise. (*Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.)

If the issuing of an execution on a judgment confessed under a power of attorney is not done at the request of the debtor, and was not agreed upon at the time of the execution of the power, it is not an act of procurement. (*Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.)

If a suit is commenced with the debtor's knowledge or assent, express or implied, and in consequence of information which he voluntarily communicated to the creditor for the express purpose of having measures taken to secure the debt, he procures his property to be taken. (*Fan Kleeck v. Thurber*, 1 Penn. L. J. 402.)

An agreement by the debtor that a default may be taken against him at a time when it could have been entered according to the usual course of the court without that agreement, is not a procurement of the taking of his property on legal process. (*Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.)

If a debtor voluntarily aids his creditor in taking his property on a writ of attachment, or in perfecting an attachment previously incomplete, he procures it to be taken. (*Fisher v. Currier*, 5 Law Rep. 217; s. c. 1 Penn. L. J. 217.)

If the debtor instructs the attorney who holds a judgment note to enter up judgment and issue execution, he procures the issuing of the execution although he does so at the request of the creditor. (*In re A. Benton & Bro.* 3 W. N. 547.)

It is not an act of bankruptcy for a debtor to suffer his property to be taken on legal process with intent to give a preference, or to defeat or delay the operation of the act. (*In re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. [N. S.] 416.)

A debtor who confesses judgment in favor of a creditor procures his property to be taken on legal process. (*In re Craft*, 1 B. R. 378; s. c. 2 Ben. 214; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.)

The mere admission of service of the summons does not amount to a procuring of his property to be taken on legal process, where it is only done at the instance of the creditor's attorney, and without any collusion or complicity between the parties. (*In re Dwight B. King*, 10 B. R. 103.)

An execution is the legal purpose of a judgment, its end and fruit. The motive and intention of a man can only be judged from the tendency of his acts. A man generally designs to do that to which his acts tend. Every ordinary person knows that a judgment is regularly followed by an execution—in other words, that the tendency of procuring a judgment is that the execution shall follow. It is not an absolute legal inference that a man who procures a judgment to be obtained against himself intends that an execution shall follow, but a question of fact. (*In re Thomas Woods*, 7 B. R. 126; s. c. 29 Leg. Int. 236; 20 Pitts. L. J. 21.)

The question is whether the debtor willfully facilitated, either directly or indirectly, the taking of his property on execution. (*In re Thomas Woods*, 7 B. R. 126; s. c. 28 Leg. Int. 236; s. c. 20 Pitts. L. J. 21.)

The confession of a judgment by an insolvent debtor, with the intent to enable a creditor to secure his debt by converting his lien by attachment into a lien by judgment, execution, and levy, is an act of bankruptcy. (*In re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.)

The nature of the debtor's business and the course of his dealings will be regarded in deciding whether the giving of a warrant to confess judgment is an act of bankruptcy. (*In re Leeds*, 1 B. R. 521; s. c. 7 A. L. Reg. 693; s. c. 1 L. T. B. 78; *in re Ralph Johnson*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313.)

Where the judgment is confessed under a warrant of attorney, it should be clearly established that the warrant was given by the proper authority. (*Hilton v. Telegraph Co.* 1 Cent. L. J. 75.)

Where the alleged act of bankruptcy consists in suffering property to be taken on legal process, the district court should give the debtor a reasonable time to contest the validity of the judgment in the State court. (*Hilton v. Telegraph Co.* 1 Cent. L. J. 75.)

Allowing property to be taken on legal process issued upon a judgment confessed, under a warrant of attorney given at a time when the debtor was not insolvent, is an act of bankruptcy when the other elements of such an act coexist. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *contra*, J. B. Wright, 2 B. R. 490.)

The petition should aver that the property was taken on the day of the levy, and not on the day of the giving of the warrant of attorney. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

When a State court has permitted a judgment to be entered up, and execution to be issued, the district court must presume that this was done in the legal and proper way. It must treat the record of the State court as being in due form. Irregularities can not be considered in a collateral proceeding. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

The term legal process, as used in the bankrupt act, is not to be confined to any particular form of writ, execution or attachment. An order of sale to be executed by a master of chancery is, in a just and proper sense, legal process; though in a technical sense, writs, executions, attachments, and the like, running in the name of the people, and addressed to the sheriff, or like officer, are usually meant by that term. The writ, mandate, or order of a court taking hold of the property, and withdrawing it from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due to them, are each and either of them within the intent and true meaning of the term legal process, as employed in this section. (*Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

The fact that the bankrupt act makes, in broad terms, the procuring of property to be taken on legal process, with certain attendant circumstances, an

act of bankruptcy, shows that the circumstance that the property is taken on legal process issued out of a State court furnishes no ground for withholding an adjudication of bankruptcy. On the contrary, in view of the well-known fact that the mass of civil legal process is issued out of the courts of the States all over the United States, and that the amount of property taken on civil legal process issued out of the Federal courts is comparatively very small, it is evident that Congress intended to say that the taking of property on legal process issued out of a State court is an act of bankruptcy, when accompanied by the other conditions specified in this section. (*Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.)

Procuring property to be taken under an order appointing a receiver, passed in an action instituted by the attorney-general of the State for the purpose of obtaining a dissolution of the corporation, is procuring it to be taken on legal process. (*In re Washington Marine Ins. Co.* 2 B. R. 648; s. c. 2 Ben. 292; *in re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243.)

The collection of a claim by a receiver is not a taking of the property on legal process in the sense of the statute, for the property was so taken by the appointment and not the subsequent collection. (*In re Amsterdam Fire Ins. Co.* 6 Ben. 365.)

### Intent to Prefer.

An allegation of a preference should give the name of the preferred creditor. (*In re Joseph S. Hadley*, 12 B. R. 366.)

An allegation of a preference need not charge that it was in fraud of the provisions of the bankrupt law. (*In re Joseph S. Hadley*, 12 B. R. 366.)

The property of an insolvent represents, in whole or in part, the credit given to him by his creditors, and therefore, in good morals, belongs to them and not to him. Strictly and truthfully speaking, an insolvent has no property, and therefore has no natural right to dispose of the property in his possession otherwise than with the consent of the real owners—his creditors. (*In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *Story v. Novlan*, 1 Mont. 350.)

The definition of a preference is a payment or transfer to one creditor which will give him an advantage over the others, or which may possibly do so. (*In re Hapgood et al.* 7 A. L. Rev. 664; *Miller v. Keys*, 3 B. R. 224.)

If a debtor effects a compromise with a portion of his creditors, of such a character that when they are paid, he is left undoubtedly and abundantly solvent, such payment is not an act of bankruptcy. (*In re Hapgood et al.* 7 A. L. Rev. 664.)

A mortgage by a railroad company of all its property, to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy. (*In re Union Pacific Railroad Co.* 10 B. R. 178; s. c. 8 A. L. Rev. 779; s. c. 6 C. L. N. 355; s. c. 31 Leg. Int. 261.)

A mortgage given in lieu of a mechanic's lien claim is not a preference, for the creditor gains no advantage. (*In re Christopher Weaver*, 9 B. R. 132.)

The intent is an element of the objectionable transaction according to the letter of the law, and though a person is presumed to intend the natural results of his acts, the intent is essential, and must be shown by his acts and the circumstances. (*Miller v. Keys*, 3 B. R. 224.)

This intent must be an intent on the part of the debtor; and, unless the debtor at the time knew that he was insolvent, or contemplated insolvency, he could have no intent to give a preference to one creditor over another. If a

person, while paying one creditor, honestly supposes that he is able to pay every creditor, there can be no intent to give a preference. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

Where the probable consequence of an act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference. (*In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *in re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; *Curran v. Munger*, 6 B. R. 33; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.)

When a debtor is insolvent, and knows it, any payments then made by him to any creditor in full, are with the intent to prefer. The giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors. The creditor is preferred because he has received his debt, and the other creditors have not. The debtor being insolvent has not the means to pay them, and by paying one in full has defrauded the others of their just proportion of his estate. Other motives may have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can; but this does not affect the question. The creditor whose debt is paid is nevertheless preferred. He has his money, but they must depend upon the often double uncertainty whether their debtor will in time become both able and willing to pay their debts in full. (*Farrin v. Crawford*, 2 B. R. 602; *in re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410.)

If a debtor is insolvent at the time of making a payment, he is presumed to know it until the contrary appears. (*In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *in re Samuel A. House*, 1 N. Y. Leg. Obs. 348.)

The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 232; s. c. 3 Cent. L. J. 515.)

A payment by an insolvent debtor is an act of bankruptcy, although it is made in the usual course of business. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

Where the defense is that the securities belonged to the creditor on account of an alleged fraud, the burden of proof is on the debtor to establish the fraud and the identity of the securities by a fair preponderance of evidence. (*Payne v. Solomon*, 14 B. R. 162.)

If a debtor purchases gold certificates by means of an overdraft on a bank, under an agreement that the proceeds of all overdrafts of his shall be the property of the bank, or with the preconceived idea of never paying back the money obtained by the overdraft, but of defrauding the bank, a transfer of the certificates to the bank is not an act of bankruptcy. (*Payne v. Solomon*, 14 B. R. 162.)

There is a distinction between an agreement that securities purchased with the proceeds of an overdraft shall all the time be considered the property of the bank, and an agreement to turn over the title as a future act. (*Payne v. Solomon*, 14 B. R. 162.)

If a bank merely certifies the check of a debtor in advance, relying on his promise to make his account good during the day, such an overdraft, in the absence of fraud, creates simply the relation of debtor and creditor, and the pay-

ment of such a debt after insolvency occurs, is an act of bankruptcy. (*Payne v. Solomon*, 14 B. R. 162.)

A mere agreement by a debtor that, in a certain event, he will deliver to the bank such securities as he may purchase with the proceeds of overdrafts, will not vest a title to the securities in the bank, so that a transfer of them will not be a preference. (*Payne v. Solomon*, 14 B. R. 162.)

A mortgage of the whole stock in trade to a pre-existing creditor is *prima facie* a preference. It is very strong evidence, because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader; and, therefore, would not be resorted to by any one who had readier means of paying the debt. (*In re Waite et al.* Lowell, 407.)

If a dissolution is a mere cover to conceal either actual or legal fraud, or with intent to give a preference to a separate creditor over those of the partnership, or to bring him on an equality with them in the distribution of the assets of the firm, there is such a fraud on the partnership creditors as will make it an act of bankruptcy. (*In re J. A. & H. W. Shouse*, Crabbe, 482.)

If an insolvent firm is dissolved, and all its assets transferred to one partner, who immediately executes a mortgage to secure a separate debt, the act is voidable by the joint creditors, and they may rely on the mortgage, or on the dissolution of the firm, or on both, for the dissolution itself works a preference to the separate creditors. (*In re Waite et al.* Lowell, 407; *in re J. A. & H. W. Shouse*, Crabbe, 482.)

An unexecuted agreement by a company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy. (*Winter v. R. R. Co.* 7 B. R. 289; s. c. 2 Dillon, 487.)

A conveyance attempted to be made by an instrument void for want of a stamp is not an act of bankruptcy. (*In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.)

The intent of a debtor to prefer, coupled with an attempt to do it, is an act of bankruptcy, although the instrument is so defective as to be void. (*In re S. Mendelsohn*, 12 B. R. 533; s. c. 3 Saw. 343.)

The giving of a mortgage during solvency to secure an existing *bona fide* debt is not an act of bankruptcy, although made with the intent to prefer the mortgage creditor. (*In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.)

The return of unearned premiums upon the cancellation of the policy does not constitute an act of bankruptcy where the parties believe they have the legal right to receive and pay these sums. (*Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142.)

Where a payment which is alleged to have been a preference, was made by an officer of the corporation, evidence must be given to show that it was the act of the corporation. (*Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142.)

Though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and, with such belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And, on the other hand, if the debtor, being insolvent and knowing his situation, and expecting to stop payment, shall then make a payment, or give a security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors. It rests upon the intent with which the act was done; and the intent is to be proved as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved. (*Morgan, Root & Co. v. Mastick*, 2 B. R. 521; *Doan v. Compton & Doan*, 2 B. R. 607.)

An insolvent debtor has the right to pay out money or make changes in his property before an actual adjudication of bankruptcy, if he does it in good faith, without injury to the right of his creditors, and especially when he saves property and increases his assets. A payment of rent may be made to prevent a forfeiture of the lease. (*Smith v. Teutonia Ins. Co.* 4 C. L. N. 130; *contra*, in *re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243.)

Agents may retain the money in their hands for the payment of their salaries. A check drawn by the secretary for his own monthly salary, and that of the clerks in the office, upon the bank where the company account is kept, he being the only person who can sign checks, is not an act of bankruptcy when it is drawn without the sanction or approval of the officers. (*Smith v. Teutonia Ins. Co.* 4 C. L. N. 130.)

A mortgage of partnership property made by one partner to his copartner is not an act of bankruptcy as against the firm creditors, for the property is not put out of the firm. (*In re Kenyon & Fenton*, 6 B. R. 238; s. c. 1 Utah Ter. 47.)

A preference to an employee is an act of bankruptcy. The law gives to an employee a priority to the amount of fifty dollars, but this must be secured, if at all, by and through the proceedings in bankruptcy, and not outside of them, or independent of or in spite of this act. (*In re Kenyon & Fenton*, 6 B. R. 238; s. c. 1 Utah Ter. 47.)

The return of a piano bought to fill a special order, and refused by the party for whom it was designed on its arrival, is not a preference. (*Doan v. Compton & Doan*, 2 B. R. 607.)

The fact that the debt is a fiduciary debt is of no consequence. The debtor has no more right to pay it than any other debt. There is no distinction between giving a preference when the creditor asks for it, and giving a preference when the creditor does not ask for it. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; in *re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.)

Neither a sale which contemplates a higher degree of solvency, nor a sale from inability to resist, constitutes an act of bankruptcy, when no preference is given nor creditors delayed in the prosecution of their claims. (*Rankin & Pullan v. Florida, Atlantic & G. C. Railway Company*, 1 B. R. 647; s. c. 1 L. T. B. 85.)

Evidence that an assignment of a bill of lading was made in trust for all the creditors is admissible, for the act is of an uncertain and doubtful character. (*In re Potts & Garwood, Crabbe*, 469.)

If there is a preference, it is an act of bankruptcy, no matter how small the amount or meritorious the creditor. (*In re J. A. & H. W. Shouse, Crabbe*, 482.)

A security given at the time of receiving a loan is not a preference. (*In re J. A. & H. W. Shouse, Crabbe*, 482.)

A preference is an act of bankruptcy, although it is given under pressure. (*Gassett v. Morse*, 21 Vt. 627; in *re Henry Brenneman, Crabbe*, 456; *Arnold v. Maynard*, 2 Story, 349.)

A preference is an act of bankruptcy, although it is given in pursuance of a promise made at the time of contracting the debt. (*Arnold v. Maynard*, 2 Story, 349.)

The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding. (*In re Oregon B. Printing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

### **Intent to Defeat the Operation of the Bankrupt Act.**

(h) The question of intent is a question of fact. The innocence or guilt of

the act depends upon the mind of him who did it, and is not a fraud within the meaning of the bankrupt act, unless it was meant to be so. (*Perry v. Langley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; s. c. 8 A. L. Reg. 427; *Wells et al. [ex parte H. B. Claflin & Co.]* 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.)

Every person of a sound mind is presumed to intend the necessary natural or legal consequences of his deliberate act. The legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and can not be rebutted by any evidence of a want of such intention. In such a case, the oath of the defendant is not sufficient to destroy such legal presumption, even in a suit which is brought to a hearing upon bill and answer without the filing of any replication. When the result which necessarily and inevitably follows an act is to defeat the operation of the bankrupt act, the law conclusively presumes that the party intended to accomplish that result, and his denial of such an intent is of no consequence. (*In re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; *Hardy v. Clark*, 3 B. R. 385; s. c. 3 L. T. B. 11; s. c. 1 L. T. B. 151; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.)

The motives of the debtor in committing the act are immaterial. It is no defense that other considerations were the moving cause. Motive should not be confounded with intent. When he intends to do the thing which necessarily hinders and defeats the act, he, in judgment of law, knows when he does it that it will have that effect. Knowing the effect, he must intend to produce it when he voluntarily chooses to do the act. Whatever his motive is, he acts voluntarily in choosing, and therefore in intending all the legal results which flow from his action in the matter. (*Hardy et al. v. Binninger et al.* 4 B. R. 262; s. c. 7 Blatch. 262.)

An assignment for the equal benefit of all creditors is in contravention of the spirit and policy of the bankrupt act, even when made in good faith. The intention of the act clearly is, that when a failing debtor is conscious of his inability to prosecute his business, and pay his debts, he should at once subject his property to such a disposition as the bankrupt act has provided for. The property then becomes a sacred trust for the benefit of creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a State, but according to the provisions of the national bankrupt act. Practically an assignment defeats or delays the operation of the act. It deprives creditors of a legal right under the statute, and is clearly in contravention of its spirit and its letter. It commits the disposition and the distribution of the property to an assignee selected by the debtor, and deprives his creditors of the right given them by the bankrupt act to choose an assignee for that purpose; it takes from the courts of bankruptcy the legal supervision and control—the legal and equitable jurisdiction—which they, under the act, are to exercise in respect to such property, and the hostile claims and adverse interests of the creditors, and the marshaling of the debtor's assets, as well as in respect to his conduct, property, and person; and it also defeats its operation in many other respects, by preventing the property assigned from being brought within the operation and protection of numerous minor provisions of the act, and within the protection of other provisions of great importance, the infraction of which is punished as a heinous crime. Such an assignment necessarily and absolutely defeats the operation of the bankrupt act. The provisions of the statute fully authorize, if they do not absolutely require, this construction. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; *in re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; *Anon.* 3 B. R. 78; *Spicer v. Ward*, 3 B. R. 512; *Curran v. Munger*, 6 B. R. 33; *in re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379; *in re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; *in re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; *in re Wells et al.*



[*ex parte* H. B. Claffin & Co.] 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. I. Reg. 163; *in re* Burt, 1 Dillon, 439; *in re* Henry Brenneman, Crabbe, 456; *Globe Ins. Co. v. Cleaveland Ins. Co.* 14 B. R. 311; s. c. 8 C. L. N. 258; *contra* *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; *in re* Kintzing, 3 B. R. 217; *Smith v. Teutonia Ins. Co.* 4 C. L. N. 130; *in re* Charles J. Marter, 12 F. R. 185.)

When an insolvent debtor has given preferences, by means of chattel mortgages, and then subsequently made an assignment, the preferences can not be set aside, unless the creditors can proceed in bankruptcy, and have the assignment declared void. (*In re* S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 I. T. B. 147.)

A mortgage which stipulates for the payment of all the debts of the mortgagor at the end of six months, and secures to the debtor the right, with the consent of a party selected by himself, to continue his business, including the purchase of more goods, until a breach of the condition of the mortgage, sets creditors at defiance for six months, and necessarily delays and defeats the operation of the bankrupt act. If the debtor can do this legally for six months, it is difficult to see how, in principle, he can be restrained from securing like immunity for six years by the same method. (*In re* Chamberlain *et al.* 3 B. R. 710; *in re* L. J. Doyle, 3 B. R. 640; s. c. 1 Holmes, 61.)

The requirements of the bankrupt act are plain. When a merchant or trader is insolvent—that is, unable to pay his debts as they mature in the ordinary course of business—it is his duty to go at once into a court of bankruptcy, under the protection of the law, and submit his property to that court for adjudication and distribution; and a mode is provided by the act for bringing in his copartner who will not come in voluntarily. An insolvent firm that allows its property to be taken by a receiver, under an order of a State court, thereby commits an act that necessarily delays and defeats the operation of the bankrupt act. In the first place, it absolutely defeats the operation of the bankrupt act by withdrawing the property from any administration under it. Whether some other administration, either through a receiver or a voluntary assignee is wiser and better or not—whether the end will be the same if those modes are carried into honest and faithful execution or not—the operation of the bankrupt act is equally defeated. For the statute does not say with intent to defeat or prevent the result which the bankrupt law is intended ultimately to accomplish, viz. the appropriation of the property to the payment of the debts; but it does say with intent to defeat or delay the operation of the act; and withdrawing the property from the reach of the law, and the means which it provides to secure the intended result, does effectually, in respect to that property, defeat the operation of the act. The design and purpose of the bankrupt act are that the property of insolvents shall be secured to the creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all its protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say that they can devise a better or safer, or more economical mode of reaching the same final result. If it were true, it would be only saying that they will resort to an expedient to defeat the bankrupt law and that their reason therefor is because they think their plan is wiser and better than that which Congress has devised. In the second place, such taking of the property by a receiver delays the operation of the act, for it can not reach the property at all, as to the partnership debts; and as to individual creditors, it should turn out that there is anything for them, they must wait the termination of the entire proceedings under the receivership before the assignee appointed for them can reach it. A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction through orders, appeals, rehearings, &c., is substituted for the summary

proceedings which the act provides. (*Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121; *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

It has always been the law and practice, under the insolvent statute of Massachusetts, to consider all partial settlements by insolvents as, in themselves, acts of bankruptcy; and it is well understood that, if a single creditor stands out, no arrangement can be made except through the bankrupt court. (*In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; *in re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204.)

The *onus probandi* rests upon the debtor when there have been secret preferences in a composition. It is never necessary to prove affirmatively that a man has not assented to that which is to his disadvantage. The presumption of law is that he has not. (*Curran v. Munger*, 6 B. R. 33.)

The sale of goods by an insolvent debtor from his store to customers in the ordinary course of trade, at a time when he is endeavoring to compromise with his creditors, does not raise a presumption of an intent to defeat the operation of the bankrupt act. His efforts to settle with his creditors without going through bankruptcy in court, are entirely legitimate, and not prohibited by any provision of the bankrupt act; and continuing to sell goods in the usual way of trade pending such negotiations, is entirely proper and justifiable, and what he ought to do so long as his intentions are not fraudulent. (*In re Munger & Champlin*, 4 B. R. 295.)

If a solvent partner takes all the assets on the dissolution of the firm, for the purpose of selling them with the consent of the creditors, a sale so made is not an act of bankruptcy. (*In re Christopher Weaver*, 9 B. R. 132.)

The rights of stockholders are always subordinate to the rights of creditors, and it is difficult to see how the issue at par of the stock of the company, not before issued, in payment of the *bona fide* debt of the company, can operate to the prejudice of creditors, or work a fraud upon them. If, however, the stock is owned by the company as paid up stock, it might be regarded as ordinary property, and if disposed of by the authorized act of the corporation to creditors, under circumstances to give them an illegal preference, no reason is perceived why it would not be an act for which the corporation could be proceeded against under the bankrupt law. (*Winter v. R. R. Co.* 7 B. R. 289; s. c. 2 Dillon, 487.)

Allowing property to be taken on an execution issued upon a fictitious and fraudulent judgment is an act of bankruptcy, since it delays and defeats the operation of the bankrupt act. (*In re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28.)

It is immaterial whether the debtor had in contemplation the provisions of the bankrupt act or not. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Haughey v. Albin*, 2 B. R. 399; 2 Bond, 244; s. c. 2 L. T. B. 47; *contra, in re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7.)

### Commercial Paper.

(j) The commercial definition of a trader is one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic and commerce. (*In re Cowles*, 1 B. R. 280; s. c. 1 W. J. 367; *Love v. Love*, 21 Pitts. L. J. 101.)

In order to be a trader, the person must buy as well as sell. (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282; *in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170.)

If he merely makes up the product of his own land, he is not a trader. (*In*

*re* Chandler, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *in re* Samuel King, 1 N. Y. Leg. Obs. 276.)

The keeper of a livery stable is not a trader. (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.)

A sale of surplus commodities not purchased with a view to sale is not such a dealing as will render the party a trader. (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.)

The occasional sale by the keeper of a livery stable of horses and carriages that have become unfit for use, is but a necessary incident to the main business of letting for hire, and does not render him a trader. (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.)

The keeper of a livery stable, who only sells horses occasionally, without holding himself out as a dealer in horses, is not a trader, for this is only auxiliary to his main business. (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.)

A manufacturer and vendor of sleighs, carriages, and other vehicles, is a trader. (*In re* Rufus Hoyt, 1 N. Y. Leg. Obs. 132; *Wakeman v. Hoyt*, 5 Law Rep. 309.)

A person who carries on the business of a distiller, and also buys cattle, which he fattens and sells, is a trader. (*In re* William Eeles, 1 N. Y. Leg. Obs. 84; s. c. 5 Law Rep. 273.)

If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same or in an improved state, he must be regarded as "using the trade of merchandise." (*In re* Rufus Hoyt, 1 N. Y. Leg. Obs. 132; *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391; *Wakeman v. Hoyt*, 5 Law Rep. 309.)

When a person sells the mere produce of his own labor, he is only a seller and not a trader. (*In re* Rufus Hoyt, 1 N. Y. Leg. Obs. 132; *Wakeman v. Hoyt*, 5 Law Rep. 309.)

A person who owns and leases oil land, and receives a part of the products as rent, is not a trader as respects his dealings in the products of his lands in a crude state. The word "trader" is to be interpreted according to its meaning in the English bankrupt law, and when the interpretation of the word in this respect was established, lands were not liable to be sold for the owner's debts, and the products of land were not considered the subjects of trade. The intervention of a factor, and the commercial disposal of the products by him, and the accommodations which he may have extended as a banker will not in such a case make the principal a trader. (*In re* Thomas Woods, 7 B. R. 126; s. c. 29 Leg. Int. 236; s. c. 20 Pitts. L. J. 21.)

The publishers of a newspaper, who also conduct a book and job printing office connected therewith, are manufacturers. (*In re* Kenyon & Fenton, 6 B. R. 238; s. c. 1 Utah Ter. 47.)

The printing and publishing of a daily newspaper is manufacturing in the strict sense of the law. A newspaper publication is as much the result of manufacture as that of books or cards or billheads. (*In re* Kenyon & Fenton, 6 B. R. 238; s. c. 1 Utah Ter. 47.)

A person who works up lumber is a manufacturer. The fact that he buys the land as well as the material does not appear to be material. It is not like the case of a farmer making cider or cheese. These products, when made by the farmer, exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used; and the making one is merely incidental to the cultivation of his land. But in the case of lumber, the land may be almost said to be incidental to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land. (*In re* Chandler, 4

, 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *Hall v. Cooley*, 3 N. Y. Obs. 282.)

he powers of a corporation must be determined by its charter. A corporation is an artificial person, the creature of law. It has no powers except what given by its incorporating act, either expressly or as incidental to its exist- and express powers. The mere power does not make the company a man- urer unless it actually engages in the business of manufacturing. The essage must also be carried on for the purpose of selling the products manu- red, and not for the exclusive use of the company, to make it a manufac- within the meaning of the bankrupt law. (*Ala. & Chat. R. R. Co. v.* , 5 B. R. 97.)

The involuntary feature of the bankrupt law is punitive in its character and, and as such should only be applied to those who do some act forbidden by law, or who failed to do some act required by it. It is not the contracting debt only that constitutes the act of bankruptcy, but it is something that is, or neglected to be done afterwards, and contemplates the power in each individual to refrain from doing the thing forbidden, or having the power to do thing required. This every partner is presumed to possess, but one who only lent his credit to the firm by holding himself out as a partner, and is liable to those who gave credit on that account, having no interest in business, and having no voice in the control over its affairs, has not such, and is not, therefore, subject to be declared a bankrupt for an act of bank- cy committed by the firm. (*Moore v. Walton*, 9 B. R. 402.)

A loan of money to be used in business under an agreement whereby the lender reserves the option to share in the profits if the business is successful, or, if not successful, then to receive back the amount advanced with interest, does not make the parties partners *inter se* without an election to share in the profits. (*rev. Walton*, 9 B. R. 402.)

Any person who has fraudulently stopped payment of his debts generally is adjudicated a bankrupt. (*In re Joseph S. Hadley*, 12 B. R. 366.)

What will constitute a stoppage of payment is usually easy to determine. The closing of the doors of a banking house, a general assignment for the benefit of creditors, or any other act which in common parlance is termed a failure is evidence of such stoppage. (*In re Joseph S. Hadley*, 12 B. R. 366.)

The provision in relation to commercial paper embraces two cases: the one is the original fraudulent stoppage of payment, in which proceedings may be instituted at once; and the other of a suspension of payment not fraudulent, and which is not an act of bankruptcy, but which, if continued for more than forty days, becomes an act of bankruptcy by its continuance. Congress seems to have taken up the whole subject of the stoppage of payment of debts as an act of bankruptcy, and enacted that banks, bankers, brokers, merchants, traders, manufacturers, and miners shall, if they fraudulently stop payment of their debts, be liable to be adjudged bankrupts at once, and if they stop or suspend payment of their commercial paper, and do not resume payment of it within a period of forty days, they shall then be liable to be adjudged bankrupts. (*Wells [ex parte H. B. Claflin & Co.]* 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. R. 163; *in re Weikert et al.* 3 B. R. 27; s. c. 1 Ben. 397; *in re Thompson & McClallan*, 3 B. R. 185; s. c. 2 Biss. 166; s. c. 1 L. T. B. 187; *in re Jones*, 1 B. R. 280; s. c. 1 W. J. 367; *in re Schoon*, 3 B. R. 215; *Baldwin v. Jones*, 6 B. R. 85; *in re Burt*, 1 Dillon, 439; *in re Hall*, 1 Dillon, 586; *in re Union Ins. Co.* 6 B. R. 338; s. c. 6 Ben. 85; s. c. 5 L. T. B. 400; *Mendenhall et al.*, 7 B. R. 320; *Winter v. R. R. Co.* 7 B. R. 289; s. c. 1 Dillon, 487; *Valliquette*, 4 B. R. 307; *in re B. Cohn*, 7 B. R. 31; s. c. 5 C. L. N. 14; 29 Leg. Int. 309.)

The words "stopped or suspended" are sometimes used to denote not only the act of stopping, but also the not resuming payment, and if they were the

only words used in the statute they would express both ideas. If the debt stopped payment before the passage of the statute, the subsequent non-resumption of payment of his commercial paper does not constitute an act of bankruptcy. The words "stopped" and "not resumed" have distinct significations. The one can not be a condition of non-resumption without a previous stopping of payment, but the words, as used, have a different relation as to time in the transaction. A fraudulent stopping of payment is an immediate act of bankruptcy, and no subsequent resumption will free the fraudulent debtor from an adjudication of bankruptcy, if proceedings are commenced within six months. In this clause of the statute the word "stopped" refers to the time of the immediate act, and the question of non-resumption does not arise, and the words "not resumed" are not used. In the subsequent clause, where a stopping of payment which is not fraudulent is provided for, the words "stopped" and "not resumed" are both used, one with reference to the time when the paper was dishonored, and the other with reference to the forty days of grace allowed by the bankrupt law. In this case stopping is an inchoate act of bankruptcy, which is completed by failure to make payment for forty days. (*Mendenhall v. Carter*, 7 B. R. 320.)

The non-payment of commercial paper at maturity, and the continued suspension and neglect of payment, are a continuous act of bankruptcy. The debtor, in such case, is in a state of suspension and non-resumption of payment. His duty to pay is just as definite on any day after the day on which his commercial paper is by its terms payable, as it is on that day, and on any such day he is in the very position, as between him and the creditors, neglecting his duty, suspending, keeping in suspense, and not resuming payment. Whether his continued suspension and non-resumption of payment is termed a continuous act of bankruptcy, or be regarded as daily successive acts of bankruptcy, is not material. So long as it continues, the creditor may avail themselves of it as an act of bankruptcy, committed as truly within the preceding six months as on the day on which the debtor first violated his commercial obligation. (*In re Jacob Raynor*, 7 B. R. 527; s. c. 11 Biss. 43; *Baldwin v. Wilder*, 6 B. R. 85; *contra*, *Mendenhall v. Carter*, 7 B. R. 320.)

An express authority is not in general indispensable to confer upon a corporation the right to borrow money or to become a party to negotiable paper. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends, and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt in any form not prohibited by statute. (*In re Hercules Ins. Co.* 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.)

The term commercial paper is used in the bankrupt act to denote bills of exchange, promissory notes, and negotiable bank checks—paper governed by those rules which have their origin in and are established upon the custom of merchants in their commercial transactions known as the law merchant. Such paper is usually denominated commercial paper, and it should be presumed that Congress used the term in its common acceptance rather than in a more restricted sense. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re Hollis et al.* 3 B. R. 310; *in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *in re R. Steven* 5 B. R. 112; s. c. 1 Saw. 397; *in re Carter*, 6 B. R. 299; s. c. 3 Biss. 195; *in re Kenyon & Fenton*, 6 B. R. 238; *in re Hercules Ins. Co.* 6 B. R. 338; s. c. Ben. 35; s. c. 5 L. T. B. 400; *in re James W. Sykes*, 5 Biss. 113; *vide in re Lowenstein et al.* 2 B. R. 306; *in re McDermott Patent Bolt Manuf. Co.* 3 B. R. 128; s. c. 3 Ben. 369; *in re Clemens*, 8 B. R. 279; s. c. 9 B. R. 57; s. c. Dillon, 534.)

Negotiable paper stands, by usage and by statute, upon the custom of merchants, and is controlled and regulated by such custom; and these regulations are always treated as part of the law merchant. In saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he fail

to pay his commercial paper, Congress simply referred to a well known and very exclusive test of insolvency. If a trader allows his paper to go to protest, he is said to have failed or suspended. The expressions are used as equivalent. It is like the closing of the counting room and denying one's self to creditors according to the old English law, and it will be observed that, while Congress has not thought fit to say that every insolvent person may be made bankrupt against his will, yet any one who has shown by certain conclusive acts or neglects, like avoiding process, being imprisoned, and suffering his paper to remain dishonored, that he can not hope to pay his debts, may be proceeded against. (*In re Chandler*, 4 B. R. 218; s. c. Lowell, 478; s. c. 2 L. T. B. 170.)

A note given merely as a voucher or memorandum in exchange for a note of like amount, simultaneously given by the petitioner to the debtor, though in form negotiable, can not in any proper sense be called the commercial paper of the maker as between him and the petitioner. (*In re Charles S. Westcott et al.* 7 B. R. 285; s. c. 6 Ben. 135.)

Although confederate currency was the only medium of exchange at the time of the execution of a note, yet it is commercial paper if it is payable in money. (*Mendenhall v. Carter*, 7 B. R. 320.)

When the *lex loci contractus* places notes on the same footing as inland bills of exchange, a note is commercial paper. In the absence of evidence to the contrary, the presumption is that it was executed at the place where it is dated. (*In re Shea et al.* 3 B. R. 187; s. c. 2 Biss. 156; s. c. 1 L. T. B. 107; *in re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re Carter*, 6 B. R. 299; 3 Biss. 195; *Mendenhall v. Carter*, 7 B. R. 320.)

The fact that a manufacturing firm has been dissolved by the death of one of the partners, and the survivor is engaged in settling its affairs, and closing up its business at the time of giving the draft does not divest the latter of his character of manufacturer, especially when the debt which forms the consideration of the draft is a debt contracted by the firm in the course of its manufacturing business. (*In re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397.)

The bonds and coupons of a railroad corporation are not commercial paper. (*Tucker v. Opelousas & Great Western R. R. Co.* 3 B. R. quarto, 31.)

Interest coupons severed from the bonds are commercial paper when issued by a railroad corporation. (*In re Greenville & Col. R. R. Co.* 5 C. L. N. 124; s. c. 6 A. L. J. 422.)

A note given by one partner upon the dissolution of the firm on final settlement at the close of mercantile business, is not commercial paper. (*In re Christopher Weaver*, 9 B. R. 132.)

An accommodation note which is indorsed by the payee, but taken up by the maker within forty days after the suspension of its payment, is not an act of bankruptcy on the part of the payee. (*In re Massachusetts Brick Co.* 6 B. R. 403; s. c. 4 L. T. B. 220.)

A retiring partner who authorizes his former partners to use his name in their business, is responsible as a partner in respect to a note given by them, and must answer to all who rely upon the firm name, whether old customers or not. (*In re Krueger et al.* 5 B. R. 439.)

A judgment note is not commercial paper. (*Love v. Love*, 21 Pitts. L. J. 101.)

To be the debtor's commercial paper, the debt which the paper represents must have been incurred by the debtor in his character of bank, banker, broker, merchant or trader, manufacturer or miner. This being so, it matters not whether the note, bill, or check was given for a loan of money, for goods purchased, or otherwise; nor whether the debtor is liable thereon as maker, acceptor, or indorser—whether as principal debtor or otherwise. It must be commercial paper, and the debtor must be a party thereto with a fixed liability; and it must

be a debt incurred in his character of banker, merchant or trader. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re James W. Sykes*, 5 Biss. 113.)

The accommodation indorsement of the note of another does not make it within the meaning of this clause the commercial paper of the accommodation indorser. (*In re Clemens*, 8 B. R. 279; s. c. 9 B. R. 57; s. c. 2 Dillon, 534; *in re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *Innes v. Carpenter*, 4 B. R. 412; *contra, in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170.)

A person who had ceased to be a trader at the time when he gave the note does not commit an act of bankruptcy by suspending payment thereof, although the debt for which the note was given was contracted while he was a trader. The language of the section clearly indicates that the making of the note must have been done while the party was a trader. (*In re Francis M. Jack*, 13 B. R. 296; s. c. 1 Woods, 549.)

A note given by one partner, on a settlement of a partnership business as manufacturers, to pay for the interest of the copartner in the business, and to settle the balance appearing against him, is not the commercial paper of a manufacturer issued in the course of his business as such. (*In re George Lang*, 14 B. R. 159.)

It is not necessary that the non-payment for the given period shall be general. The statute has not declared that suspension of payment on any particular number of notes, or bills of exchange shall constitute an act of bankruptcy, but the language is his commercial paper. (*In re Guy Wilson*, 8 B. R. 396; s. c. 5 Biss. 387; *McLean v. Brown, Weber & Co.* 4 B. R. 585; s. c. 2 L. T. B. 169.)

An allegation of the suspension of one piece of commercial paper makes out a *prima facie* case, and is sufficient. If there is any legal reason for the non-payment, it is for the debtor to show it before the court. The petitioner need not therefore set forth by negative allegations all the particular circumstances which by possibility might show the non-payment to be within the meaning of the law. It is sufficient that a *prima facie* case is made upon the petition. (*In re Guy Wilson*, 8 B. R. 396; s. c. 5 Biss. 387; *in re Moses A. McNaughton*, 8 B. R. 44.)

If a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension within the meaning of the bankrupt act. (*In re Thompson & McClallen*, 3 B. R. 185; s. c. 2 Biss. 166; s. c. 1 L. T. B. 137; *in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *Bank v. Iron Co.* 5 B. R. 491; s. c. 1 L. T. B. 272; s. c. 19 Pitts. L. J. 5; s. c. 3 C. L. N. 402; s. c. 8 Phila. 171; *in re Charles S. Westcott*, 7 B. R. 285; s. c. 6 Ben. 135; *in re Mannheim*, 7 B. R. 342; s. c. 6 Ben. 270; s. c. 6 L. T. B. 94; *in re James W. Sykes*, 5 Biss. 113.)

The court of bankruptcy will not sit to try the validity of the reasons for the non-payment of the note or bill. It is not a court for the mere collection of debts, and each case must be considered by itself in connection with the circumstances surrounding it. The non-payment of one piece of paper is not of itself suspension, for there may be a good reason for it. But when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the act, although but a single check is shown to have laid over unpaid for forty days. (*McLean v. Brown, Weber & Co.* 4 B. R. 585; s. c. 2 L. T. B. 169; *in re Hercules Ins. Co.* 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.)

The clause ought not to be used to enable a creditor to collect an ordinary debt on commercial paper, where the circumstances show that, although the paper is not paid though due, there has been no stoppage or suspension of payment of the commercial paper of the debtor within the meaning of the clause. In such case, the ordinary remedy furnished through a suit to collect the paper

is all that the creditor is entitled to. The court, however, must guard against being imposed upon by a denial of liability which is altogether a sham, and not made in good faith. The denial of liability may, nevertheless, be founded on reasons which are not valid, and which would fail in a direct action on the paper, and yet be made in good faith, in such wise that the non-payment can not be regarded as a stoppage or suspension within the act. (*In re Hercules Ins. Co.* 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.)

It is not sufficient to defeat the operation of the bankrupt law to simply deny liability upon the commercial paper. The party must satisfy the court that he has good reasons for disputing his liability, and that his liability is involved in doubt, at least, before a bankrupt court will refuse to proceed. (*In re Munn*, 7 B. R. 468; s. c. 3 Biss. 442; *in re James W. Sykes*, 5 Biss. 113.)

It is not enough for a debtor to show as a reason why a decree in bankruptcy should not go against him that he is insolvent, and because of spite, or caprice, or some other similar cause he does not choose to pay his commercial paper. The reason which alone can prevent the non-payment of commercial paper and its continuance for forty days from constituting an act of bankruptcy must be a legal reason, such as to enable the court to say that it is not within the scope and meaning of the bankrupt law. (*In re Guy Wilson*, 8 B. R. 396; s. c. 5 Biss. 387.)

It is enough that the alleged debtor could and did honestly entertain the belief that he was not legally bound to pay the paper till it should be so adjudged. Such a case is not one for an adjudication of bankruptcy, but for a suit on the paper in a proper tribunal. (*In re Charles S. Westcott*, 7 B. R. 285; s. c. 6 Ben. 135; *in re Hercules Ins. Co.* 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400; *in re Mannheim*, 7 B. R. 342; s. c. 6 Ben. 270; s. c. 6 L. T. B. 94.)

The refusal to pay commercial paper on the ground that it is tainted with usury, and that the full sum named therein is not for this reason due, is not an act of bankruptcy. (*In re Staplin*, 9 B. R. 142.)

A suspension which has taken place on account of an injunction against the debtor, restraining him from making any transfer or disposition of his property, is not an act of bankruptcy. (*In re Edward D. Pratt*, 9 B. R. 47; s. c. 6 Ben. 165.)

The fact that a State court has obtained jurisdiction of the property and assets of the debtor, under an assignment for the benefit of creditors, does not prevent the bankrupt court from entertaining a proceeding against the debtor. (*In re P. Laner*, 9 B. R. 494.)

The suspension continues, although the debtor makes an assignment for the benefit of the creditors before the expiration of the forty days, and when the time expires, is a complete act of bankruptcy. (*In re P. Laner*, 9 B. R. 494.)

Evidence that the debtor is a man of means, and has met his other paper as it became due, may tend to rebut the presumption of insolvency, and to show that the failure to pay the note was from other causes not making him amenable to the bankrupt act. (*In re James W. Sykes*, 5 Biss. 113.)

The suspension of payment of commercial paper for forty days is an act of bankruptcy of which any creditor may avail himself. The act of suspension raises a presumption of insolvency, and makes the party guilty thereof a proper subject for proceedings in bankruptcy. This act of bankruptcy is not condoned or defeated by the mere payment of the suspended paper, so as to prevent any other creditor from availing himself thereof. It is not enough that the debtor shall pay his suspended paper alone. He must pay or settle all his debts, and satisfy all his creditors, if he would wipe out the offense against his commercial



standing committed by the suspension. (*In re Ess & Clarendon*, 7 B. R. 133; s. c. 3 Biss. 301.)

The dissolution of a partnership, and the assumption of the partnership debts by one partner, does not make any difference with the duty and liability of the retired partner to meet the partnership paper. He should pay the debt, and look to his late partner for reimbursement. (*In re Weikert et al.* 3 B. R. 27; s. c. 1 Ben. 397.)

It is no defense that the debtor was not a banker, merchant, or trader at the time of suspension. If the maker of the paper was a banker, merchant, or trader at the time of its execution, he becomes liable to meet it in the time specified by the law, no matter what his occupation may then be. (*Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138; *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391; *Everett v. Derby*, 5 Law Rep. 225.)

When a man enters the commercial community as a merchant, trader, banker, or otherwise, he assumes all the responsibilities which attach to his calling. One of these is the obligation to take care of all his commercial paper, whether made before or after he commenced business. Consequently he may be declared a bankrupt for suspending the payment of commercial paper issued by him prior to the time of entering such business. (*In re Carter*, 6 B. R. 299; s. c. 3 Biss. 195.)

The principle upon which the liability as secret partner rests is essentially different from that of a known or open partner, whose name appears in the business. A secret partner is liable, not because credit is supposed to have been given to the firm by reason of his connection with it, but because he is one of the contracting parties, and benefited by the profits of the contract; so that, in order to charge a secret partner for debts contracted in the name of the firm of which he is a dormant partner, it is necessary to show that such debts were contracted in the name and business of the firm, or that the secret partner had an interest in the contract or profits. (*In re Munn*, 7 B. R. 468; s. c. 3 Biss. 442.)

Suspension and non-resumption, during the pendency of negotiation for extensions and renewals with all the creditors, do not constitute an act of bankruptcy. (*Doan v. Compton & Doan*, 2 B. R. 607.)

An allegation of stoppage and suspension on a certain day, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the commercial paper, which consisted of a due bill, payable on demand, had been demanded at different times, and that the debtor had failed to make payment, is equivalent to an allegation of demand on that day. (*In re Chappel*, 4 B. R. 540.)

The petition should state, as nearly as possible, the date of the promissory note or bill of exchange, to whom made, and for what amount, and when payable, and whether the debtor was liable thereon as maker or indorser, and by whom the same was held when payment was neglected or refused. (*In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; *Orem & Son v. Harley*, 3 B. R. 263.)

If the forty days have not expired at the time of the filing of the petition, the suspension can not be relied on to support it, although the forty days elapse before the hearing. (*In re Tivoli Brewing Co.* 11 B. R. 470.)

When fraud is averred, the petition should set forth the acts that make the suspension and non-resumption fraudulent. (*Gillies v. Cone*, 2 B. R. 21; s. c. 2 Ben. 502.)

If the allegation sufficiently describes the paper to identify it and prevent the party from being misled, it need not give the date thereof. (*In re Joseph S. Hadley*, 12 B. R. 366.)

An allegation that the paper was the commercial paper of the debtor, and made by him as a merchant, &c., need not be averred except in general language. (*In re Joseph S. Hadley*, 12 B. R. 366.)

It is not necessary that the facts constituting the fraud in the suspension of the paper shall be set forth in the petition. (*In re Joseph S. Hadley*, 12 B. R. 366.)

A fraudulent stopping of payment is not an act heretofore known or defined, and it is not easy of definition. As to fraud, a mere oversight, or a *vis major*, or a fraud practiced upon the debtor himself, or an honest defense to the particular paper refused—if these reasons, or such as these, occasion the refusal to pay—would take the case out of the statute. And this would be so though the word fraudulently were omitted from the statute, because such an accident or refusal could not fairly be called a stopping of payment. Fraudulently means knowingly, and without just excuse applicable to the paper itself. (*In re Hollis et al.* 3 B. R. 310; *Bank v. Iron Co.* 5 B. R. 491; s. c. 1 L. T. B. 272; s. c. 3 C. L. N. 402; s. c. 19 Pitts. L. J. 5; s. c. 8 Phila. 171.)

Something must be shown from which the court can draw the conclusion that the stoppage or suspension of payment of the paper was fraudulent. The mere non-payment does not warrant such conclusion. It is for the creditor to show that the stoppage, or suspension was fraudulent. That is not shown by proving nothing but stoppage, or suspension, and such proof alone does not even make out a *prima facie* case of fraud. There may be many reasons for stoppage falling short of fraud. (*In re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482.)

When a merchant engages in business, and purchases his stock, or any part thereof, on credit, there is an implied promise that the proceeds of its sale shall be applied to the payment of such debts. The merchant commits a fraud upon his creditors if he appropriates the proceeds to any other purpose until the obligation is discharged; indeed, his whole capital stock is virtually pledged for the payment of such commercial liabilities as he may incur in such business; he is further pledged to give to his business his best skill and attention; and a failure to comply with these requisitions is a fraud on the rights of those who have given him credit in his business, and whose demands remain unsatisfied. (*Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 188.)

A solvent debtor, who has the means wherewith to pay commercial paper, and does not pay it, is guilty of fraud. (*In re Lowenstein et al.* 2 B. R. 306; *Hardy v. Binniger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

Suspension and non-resumption, with the assent of the holder of the suspended paper, is not fraudulent. (*In re Lowenstein et al.* 2 B. R. 306.)

In the following cases it was held, prior to the amendment, that suspension and non-resumption were *prima facie* evidence of fraud. (*In re Jersey City Window Glass Co.* 1 B. R. 426; s. c. 1 L. T. B. 61; s. c. 7 A. L. Reg. 419; *in re Ballard & Parsons*, 2 B. R. 250; *in re Lowenstein et al.* 2 B. R. 306; *Doan v. Compton & Doan*, 2 B. R. 607; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 188; *in re Shea et al.* 3 B. R. 187; s. c. 2 Biss. 156; s. c. 2 L. T. B. 107; *in re Hollis et al.* 3 B. R. 310.)

In the following cases it was held that mere suspension and non-resumption were not sufficient, but that fraud must be proved. (*In re Leeds*, B. R. 521; s. c. 1 L. T. B. 78; s. c. 7 A. L. Reg. 693; *Gillies v. Cone*, 2 B. R. 21; s. c. 2 Ben. 502; *in re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482.)

A creditor whose claim is not evidenced by commercial paper, but rests in open account, may file a petition against his debtor, and charge that he has suspended and failed to resume payment of his commercial paper for the prescribed period. (*In re Hall*, 1 Dillon, 586; *in re Ess & Clarendon*, 7 B. R. 133; s. c. 3 Biss. 301.)

### The Involuntary Petition.

(k) Proceedings in bankruptcy can not be initiated in the circuit court. For that purpose the jurisdiction of the district court is plainly exclusive. (*In Binninger et al.* 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.)

This section does not designate the district judge to whom the petition of a creditor shall be addressed. It seems not only reasonable, but most in accordance with the other provisions of the act, to hold that proceedings against a debtor, to procure an adjudication of involuntary bankruptcy, are, like those instituted by himself to obtain adjudication of voluntary bankruptcy, to be had in the court of the district in which he has resided or carried on business for the preceding six months, or for the longest period thereof. The assent of the debtor to the proceeding will not make it valid, for consent can not give jurisdiction. The petition must be addressed to the court authorized by law to take cognizance of the case, and to none other. (*In re Fogerty & Gerrity*, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174; *in re Ala. & Chat. R. R. Co.* B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.)

The petition can not be filed in the district where the debtor neither resides nor carries on business. (*In re J. M. Palmer*, 1 B. R. 213; *in re Fogerty & Gerrity*, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174.)

The restrictions in section 5014 as to the judge to whom the petition is to be addressed apply to proceedings under this section. The debtor can not be adjudged a bankrupt in a district in which he has not resided for the longest period of the six months next immediately preceding the filing of the petition. (*In re Leighton*, 5 B. R. 95.)

Proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business, and not with reference to his domicile. If a party has actually resided in one State during the greater part of the six months next immediately preceding the filing of the petition, the petition must be filed in the district court for that State, although his family may have resided in another State during the whole period. (*In re Watson*, 4 B. R. 613.)

The district court of any district in which the debtor may actually reside and do business at the time of the filing of the petition against him has jurisdiction to hear the cause and make an adjudication of bankruptcy. (*In re Johnson* 1 Cent. L. J. 223.)

If the name of the judge is given, it must be correct. A petition misnamed for the judge can not be filed. (Anon. 3 B. R. 128.)

The petition should name facts with certainty and detail, so as to inform the debtor of what he must meet and resist. The various statements of facts in bankruptcy, given in Form No. 54, are mere outlines or skeleton statements, and must be filled in with the particular circumstances of each case, and such is the direction given in the *nota bene* near the end. (*In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.)

The allegations of the petition must be positive and unqualified. There must be nothing in the act, or in the rules and forms, or the nature of the proceeding which requires that the allegations, either as to the debt, or as to the act of bankruptcy, should be made on the personal knowledge of the petitioner. The petition must be made by the creditor, and in most instances can be made upon information and belief alone. In addition to the petition, there must be a deposition to the debt, and to the act of bankruptcy. In these it may be proper that the witness should speak from his own knowledge, or at least disclose the grounds of his belief or the sources of his information. Much will depend upon the circumstances of the particular case. (*In re Muller & Bretano*, 3 B. R. 32; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *Orem & Son v. Harley*, 3 B. R. 263.)

petition to have a partnership declared bankrupt must set forth acts of bankruptcy on the part of the partnership. An averment of an act of bankruptcy on the part of one of the members is not sufficient. (*In re Waite & Ser*, 1 B. R. 373; s. c. Lowell, 207; *in re Redmond & Martin*, 9 B. R.

petition against partners must allege that the act of bankruptcy was committed during the continuance of the partnership. (*In re Hill & Vanburgh*, 5 Law Rep. 326.)

fraudulent dissolution and transfer of the firm property to one partner is not of all the partners. (*In re J. A. & H. W. Shouse, Crabbe*, 482.)

When a transfer of property is charged as an act of bankruptcy against a partner the petition should distinctly allege that the property transferred belonged to the firm. (*In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. T. B. 100.)

Transfer of firm property by one member of the firm, without the privity or consent of his copartners, is an act of bankruptcy on the part of the firm accompanied by the other conditions prescribed by the act. (*In re Blackcor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *Fisher v. Currier*, 7 Rep. 217; s. c. 1 Penn. L. J. 217.)

In order to render a party liable on the ground that he has been held out as partner, he must have had no notice of his being so held out or there must be circumstances from which notice can be presumed. (*In re S. A. Jewett*, 15 B. R. 6; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.)

When a party permits another to hold him out as partner and thereby procures credit on the strength of his supposed relation, neither community of interest nor participation in the profits is necessary to render him liable as partner. (*In re S. A. Jewett*, 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N.

is never good pleading to make averments in the alternative. When two distinct matters, each of which contains a good cause of action or defense, are joined conjunctively, it is enough that either of them be satisfactorily proved. (*Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *Irving v. Hughes*, 2 B. R. s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.)

Where one of the alternatives will support the pleadings and the other not, the instruction will be against the pleading, and it will be held bad on demurrer. (*In re Redmond & Martin*, 9 B. R. 408.)

Where it is immaterial which one of the alternatives is true, a pleading in the alternative will not be held bad on demurrer. (*In re Redmond & Martin*, 9 B. R. 408.)

It is not necessary in the first instance for a petitioning creditor to show that there are other creditors. Ordinarily, bankruptcy proceedings may be instituted and maintained where there are no other creditors. If, however, that fact becomes material in any case, the burden is on the debtor to show it. (*In re Sheehan*, 8 B. R. 345.)

A careful pleader in stating the nature of the demand will allege that the demand was contracted by the alleged debtor; but where the demand has already been averred to be against the alleged debtor, an omission to so charge a description of the claim will not render the petition bad on demurrer. (*Raymond & Martin*, 9 B. R. 408; *vide in re J. A. & H. W. Shouse*, 482.)

The demand need not be stated in detail, but it should be so far stated that the court may see that it is a provable debt. (*In re Joseph S. Hadley*, 12 B. R.

An allegation which does not show that the debt is due to the petitioner creditor is not sufficient. (*In re Western S. & T. Co.* 13 Pac. L. R. 66.)

The allegation must show that the creditor was still a creditor at the time the filing of the petition. (*In re Western S. & T. Co.* 13 Pac. L. R. 66.)

The petition must affirmatively show that the requisite number of creditors in number and amount have united therein. This allegation need not necessarily be so positive that the party can be prosecuted for perjury on it, but may be stated on information and belief. (*In re J. Young Scammon*, 10 B. R. 66; s. c. 6 Biss. 130; *in re Joliet Iron & Steel Co.* 10 B. R. 60; s. c. 1 A. L. [N. S.] 372; s. c. 10 A. L. J. 29; s. c. 6 C. L. N. 328; s. c. 21 Pitts. L. J. 20; *in re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. [N. S.] 41; *Warren Savings Bank v. Palmer*, 10 B. R. 239; s. c. 6 C. L. N. 366; s. c. Leg. Int. 261; s. c. 8 Pac. L. R. 44; 21 Pitts. L. J. 193; *in re James R. Keel*, 10 B. R. 419; s. c. 20 I. R. R. 82; s. c. 1 A. L. T. [N. S.] 422.)

An allegation upon belief without charging either information or knowledge that the petitioners constitute the requisite proportion of creditors is sufficient. (*In re Henry A. Mann*, 14 B. R. 572; s. c. 13 Blatch. 401; s. c. 51 How. F. 174.)

The requirement of the statute is not met by an allegation that the petitioners constitute the requisite proportion of the creditors when two of them have claims for less than two hundred and fifty dollars. (*In re James A. McKibbe* 12 B. R. 97.)

An allegation that the petitioners constitute at least one-fourth in number the creditors of the debtor, and that the aggregate of their debts provable under the act amounts to at least one-third of the debts so provable, is sufficient, although some of the claims are under two hundred and fifty dollars. (*In re Robert L. Hall*, 15 B. R. 31.)

It is not necessary to amend the petition when there has been an adjudication before the amended act took effect. The judgment of adjudication based upon a petition conforming to the provisions of the law in force when made is valid and as binding upon the debtor as if the amended act had not been passed. The adjudication removes the case beyond the domain of legislative control. (*In re Jacob Raffauf*, 10 B. R. 69; s. c. 6 Biss. 150; *in re Frederick E. Ange* 10 B. R. 73; s. c. 31 Leg. Int. 254; s. c. 21 Pitts. L. J. 206; 6 C. L. N. 342; s. c. 1 Cent. L. J. 363; *in re H. & M. Rosenthal*, 10 B. R. 191; s. c. 31 Leg. Int. 254; 6 C. L. N. 342; *in re Obear*, 10 B. R. 151; s. c. 3 Dillon, 37; *in re C. B. Comstock & Co.* 10 B. R. 451; s. c. 3 Saw. 128; *Barnert v. Hightower*, 10 B. R. 157; *in re Wm. J. Pickering*, 10 B. R. 208; s. c. 1 Cent. L. J. 371.)

An adjudication made on the 22d day of June, 1874, may be set aside if the proper proportion of creditors did not join in the petition. (*In re Carrier Baum*, 13 B. R. 208.)

If an adjudication has been made upon a petition not signed by a sufficient number of creditors, the court, upon the filing of a petition signed by the requisite proportion of creditors praying for a confirmation of the proceeding may make a new adjudication. (*In re Wm. N. Taylor & Co.* 1 W. N. 16.)

### The Verification.

If there are five or less signers, all must verify the petition by oath; but if there are more than five signers it is sufficient if the first five of them so verify it. This necessarily implies that there may be more signers than those who verify the petition by oath, and also that those who are petitioners must sign the petition. (*In re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. [N. S.] 416.)

Where several petitioners join in the petition in the same right, a verification

is sufficient. But the case of petitioners joining in separate and distinct is different, and it is necessary that there should be a verification by or half of each petitioner. (*In re Solomon Simmons*, 10 B. R. 253; s. c. 1 L. J. 440.)

a petition may be signed in the name of the firm and verified by a member firm. (*In re Morris*, 11 B. R. 443.)

When an agent is clothed with full authority, and is able to present the authentication of the petition required by the forms, the petition should be retained, although the petitioning creditor does not in person sign or swear to the petition. The act does not in terms say that the petition shall be signed by the petitioner at all. It should be construed as similar language is in the whole of the legislation, and in the terminology of courts; and there the maxim, "*qui per alium, facit per se*," is of almost universal application. The blanks in the forms may be filled by the name of the attorney or agent of the petitioner, or the name of the petitioner, "by A. B., his attorney and agent." (*In re Rayner*, 7 B. R. 527; s. c. 11 Blatch. 43; *contra*, *Hunt v. Pooke*, 5 B. R. 257; *in re D. C. Butterfield*, 6 B. R. 257.)

An officer of a corporation has authority, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by law, or resolution of the board of directors. Such authority being special, must in all cases be made to appear by the oath of the person signing and verifying the petition, or other competent evidence. (*In re Moses A. McNaughton*, 8 B. R. 44; *in re Ralph*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313.)

Whether a corporation is a resident of the district or not, it may verify the petition by its agent. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N.

The agent to verify the petition need not be an officer of the corporation. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

When the petition is signed and certified by an agent there must be proof of his authority, either by his oath or otherwise. (*In re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583; *in re Joseph S. Hadley*, 12 B. R. 366; *in re Ed-ward Sargent*, 13 B. R. 144; *in re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

If the petition is signed by an agent of the petitioning creditor, it need not be verified by the authority under which the agent acts. (*In re California Pacific R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.)

Where there is no proof of the authority of the agent, the court may receive supplementary affidavits tending to prove the authority of the agent at the time he signed and verified the petition. (*In re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.)

Creditors who are absent from the district may sign the petition by proxy. (*In re California Pacific R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.)

If the petition is verified by an agent, where there are more than five petitioning creditors, the fact of non-residence should be stated and sworn to in the petition. (*In re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440; *in re Joseph S. Hadley*, 12 B. R. 366.)

Where there are less than five petitioning creditors, the fact of non-residence should be stated in the affidavit when it is made by an agent. (*In re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440.)

If the name of the agent who acts for one of the first five signers is not contained in the body of the verification, the petition is not sufficiently verified, although the name is appended to the verification. (*In re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.)

When an agent verifies the petition, he should do so on behalf of his principals. (*In re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440.)

If the petition purports to be signed by the agent of a creditor who never in fact consented thereto, it must be dismissed, where it merely alleges that all the petitioners constitute the requisite number, for no amendment in such case can be allowed. (*In re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.)

If the verification is made by an agent, it should state that the allegations are true to the best of the knowledge and belief of the principal, and not to the best of his own knowledge and belief. (*In re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 Pac. L. R. 205.)

The jurat subscribed by the register need not contain a venue when it can be sufficiently collected from the deposition itself that the oath was administered where the officer resides. (*In re Hill & Van Valkenburgh*, 5 Law Rep. 326.)

The affidavit as well as the petition should be subscribed by the petitioner. The omission to subscribe the affidavit is an incurable defect. The petition is not a petition in *propria forma*, such as can be amended. (*Moore & Bro. v. Harley*, 4 B. R. 242; s. c. 2 L. T. B. 666.)

The verification is no part of the petition. It is necessary that it should accompany the petition only in order to predicate upon it certain prescribed action in furtherance of the jurisdiction acquired by the filing of the petition. A defective verification may, therefore, be amended. (*In re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440; *in re California Pacific R. Co.* 11 B. R. 193; s. c. 3 Saw. 240; *in re Edward Sargent*, 13 B. R. 144.)

An objection to a defective verification may be waived by the debtor. (*In re Morris*, 11 B. R. 443.)

### The Depositions.

It is not necessary for each creditor joining in the petition to file a proof of his claim. That is required only of the first five signers. (*In re Philadelphia Axle Works*, 1 W. N. 126.)

The proof of debt should be according to Form 55, and not Form 22. (*In re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 Pac. L. R. 205.)

The proof of debt must show that the creditor is still a creditor. (*In re Western S. & T. Co.* 13 Pac. L. R. 66.)

A deposition in proof of the debt, should state whether the claim is secured or not. (*Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.)

The deposition of acts of bankruptcy must be such as constitutes legal testimony. Its statements must be of facts, and not the mere conclusions of the witness, and as a general rule they must be of the witness' own knowledge and not mere hearsay. They must be stated with such clearness as to leave no doubt as to their meaning. (*In re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.)

A deposition setting forth a transfer of property should give the time when it was made. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

A single member of a firm who are the petitioning creditors, is competent to depose to the act of bankruptcy. (Anon. 1 Cent. L. J. 182.)

A deposition to an act of bankruptcy should be made upon the personal knowledge of the deponent. (*In re Joseph S. Hadley*, 12 B. R. 366.)

If any fact in a deposition to an act of bankruptcy is stated on information and belief, it should be stated with such particularity and details that the court may see from whom the information was derived, the circumstances under

it was acquired, and the weight that should be attached to it. (*In re S. Hadley*, 12 B. R. 366.)

deposition to an act of bankruptcy, consisting of fraudulent conveyance, allege or show the fraudulent intent of the debtor in making the conveyance. (*Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.)

when a petition is amended by charging a new act of bankruptcy, a new petition should be filed. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

a deposition to an act of bankruptcy is defective through mistake or inaccuracy, it may be amended. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

when the depositions are defective, the order to show cause may be stricken. (*In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.)

if no deposition to the act of bankruptcy is filed, the petition will be dismissed. (*In re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 B. R. 205.)

a petition will not be dismissed because the depositions in support thereof are defective, but the petitioning creditor on motion will be allowed to file supplemental depositions. (*Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165; *In re Joseph S. Hadley*, 12 B. R. 366; *contra*, *May v. Harper et al.* 4 B. R. 253; s. c. 2 L. T. B. 181.)

when depositions are defective, the order to show cause will be set aside, and a new order will be issued on supplemental depositions. (*Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.)

if the officer who took the deposition omits to sign the jurat, he may be allowed to sign it after the deposition is filed. (*In re James A. McKibben*, 12 B. R. 97.)

a deposition to an act of bankruptcy can not be taken before a notary public. (*In re James A. McKibben*, 12 B. R. 97.)

### The Amount.

the object of notice to the creditors named in the list is to enable the petitioning creditors and others of the named creditors to show that the list is in the list. The proper course to be pursued is to enter an order referring the matter to the clerk or register to ascertain and report whether the requisite number of creditors have joined in the petition. (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427; *in re Edward Sargent*, 13 B. R. 144.)

an affirmative of the allegation and denial on the reference is with the petitioning creditors. (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.)

a written or printed notice should be given by the clerk by mail, postage prepaid, to all of the creditors named in the list, at the addresses named in the list, time and place of reference and its object. Such notice should contain a copy of the list with its names, places of residence and amounts. (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.)

a debtor should attend on the reference and submit to an examination, if called by the petitioning creditors, as to the matters embraced in the list or referred by the issue. (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.)

a petitioning creditors are to be "one or more" in number; but whether one will suffice, or if more are necessary how many there must be, is to be determined by certain tests prescribed by the section. (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.)

a creditor may elect to obtain one-fourth in number of the chief creditors,



or one-fourth of all the creditors, provided that one-third in amount of all the debts are represented in the petition. (*In re* J. R. Currier, 13 B. R. 68; *in re* Robert L. Hall, 15 B. R. 31; *in re* Wm. M. Lloyd, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

It is not necessary that the chief creditors shall have been asked to sign and have refused. (*In re* J. R. Currier, 13 B. R. 68.)

Creditors whose claims are under \$250 are not to be counted in estimating the numbers, if one-fourth of the creditors above that sum join in the petition. If such number do not join, then creditors below \$250 may be counted to obtain the necessary number. (*In re* Woodford & Chamberlain, 13 B. R. 575; s. c. 1 Cent. L. J. 37; *in re* Reiman & Friedlander, 11 B. R. 21; s. c. 7 Ben. 455; s. c. 13 B. R. 128; s. c. 12 Blatch. 562; *in re* John B. Bergeron, 12 B. R. 385; s. c. 10 Pac. L. R. 259; s. c. Cent. L. J. 507; *in re* Philadelphia Axle Works, 1 W. N. 126.)

In computing the amount, the aggregate of the petitioning creditor's debts must be equal to one-third of all the debts, irrespective of amount, provable against the estate. (*In re* Joseph S. Hadley, 12 B. R. 366; *in re* John B. Bergeron, 12 B. R. 385; s. c. 10 Pac. L. R. 259; s. c. 2 Cent. L. J. 507; *in re* J. R. Currier, 13 B. R. 68; *in re* Woodford & Chamberlain, 13 B. R. 575; s. c. 1 Cent. L. J. 37; *in re* Hugo Broich, 15 B. R. 11; *in re* Wm. M. Lloyd, 15 B. R. 257; s. c. 24 Pitts. L. J. 113; *contra*, *in re* Hymes, 10 B. R. 433; s. c. 7 Ben. 427.)

A party has the right to purchase a claim in good faith, with a view to enable himself to join in a petition in order to make up the necessary number. (*In re* Woodford & Chamberlain, 13 B. R. 575; s. c. 1 Cent. L. J. 37; *in re* J. A. & H. W. Shouse, Crabbe, 482.)

Where a sale of a claim is void for fraud or want of consideration, and is set aside for that reason, the claim in the court is to be deemed to belong to the assignor. (*In re* Woodford & Chamberlain, 13 B. R. 575; s. c. 1 Cent. L. J. 37.)

An indorsee who accepts payment from the indorser while the proceedings are pending, can not join in the petition, although the claim was proved but not filed before the payment. (*In re* Hugo Broich, 15 B. R. 11.)

The claim of a firm of which the debtor is a partner can not be counted. (*In re* William M. Lloyd, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

If the debtor is a member of two different firms, the claim of one firm against the other can not be counted. (*In re* William M. Lloyd, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

In order to put a person into bankruptcy individually who is a member of a firm, one-fourth in number of all his creditors, both individual and partnership, must unite in the petition, and the aggregate of the debts of the petitioning creditors must amount to one-third of all the debts both individual and partnership. (*In re* William M. Lloyd, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

A creditor who has issued an attachment within four months before the commencement of the proceedings in bankruptcy can not be reckoned in computing the proportion of creditors who must unite in the petition. (*In re* C. G. Scrafford, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19; *contra*, *in re* Hugo Broich, 15 B. R. 11.)

A debt barred by the statute of limitations in Wisconsin is not provable, and can not be reckoned in computing the number who must join in an involuntary petition filed in that State. (*In re* Theodore Noesen, 12 B. R. 422; s. c. 6 Biss. 443.)

A petition by creditors who are entitled to petition alone is not affected by the joining of another creditor whose debt is insufficient. (*In re* Tower, 1 N. Y. Leg. Obs. 8; s. c. 5 Law Rep. 214; s. c. 1 Penn. L. J. 209.)

Creditors who have received and still hold fraudulent preferences are not counted in determining whether the requisite number of creditors, as to value, have joined in the petition. (*In re M. C. Israel*, 12 B. R. 204; s. c. 3 Dillon, 511; *Clinton v. Mayo*, 12 B. R. 39; *in re J. R. Currier*, 13 B. R. 68.)

A secured creditor may be a petitioning creditor, but the amount at which his debt is to be reckoned is to be ascertained by deducting the value of the security. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240; *in re Stansell*, 6 B. R. 183; *in re Daniel Sheehan*, 8 B. R. 345; *in re W. B. Alexander*, 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *Ecfort v. Greely*, 6 B. R. 433; s. c. 4 C. L. N. 209; *in re Hugo Broich*, 15 B. R. 11; *contra, in re Johann*, 3 B. R. 144; s. c. 4 B. R. 434; s. c. 2 Biss. 139; s. c. 2 L. T. B. 92; *in re Jacob Frost*, 11 B. R. 69; s. c. 6 Biss. 213; *in re Green Pond R. R. Co.* 13 B. R. 118.)

If a secured creditor joins in an involuntary petition without referring to his security, he thereby waives it, and his claim should be counted. (*In re Hugo Broich*, 15 B. R. 11.)

If the petitioning creditors do not constitute one-fourth in number, and there is no allegation to that effect, the petition will be dismissed without allowing any time for other creditors to unite therein. (*In re Thomas F. Burch*, 10 B. R. 150.)

The petitioning creditors must be held to good faith, and can not recklessly file a petition for the purpose of making the respondent file a statement of his creditors. Such a fishing petition can not be entertained. If it appears to the court by affidavit or otherwise, that at the time of filing the petition the creditors joining in it knew that they did not constitute the requisite number, the petition should be dismissed. The matter may be brought before the court by a motion. (*In re J. Young Scammon*, 11 B. R. 280; s. c. 6 Biss. 145, 195.)

If the petitioning creditors deny that the list of creditors filed by the debtor is true, either as to the nature or amount of the debts, the case may be referred to a register to take proof and report as to the correctness of the list. (*In re Jacob Frost*, 11 B. R. 69; s. c. 6 Biss. 213.)

The same number and amount of creditors must join in a proceeding to force a corporation into bankruptcy as is required in the case of an individual. (*In re Leavenworth Savings Bank*, 14 B. R. 82, 92; *in re Detroit Car Works*, 14 B. R. 243; *in re Oregon B. Printing & P. Co.* 14 B. R. 394; s. c. 13 B. R. 199; s. c. 14 B. R. 405; s. c. 3 Saw. 529, 614.)

If there is no reference for the purpose of ascertaining whether sufficient creditors have joined in the petition, other creditors may unite in the proceedings. (*In re Frank Frisbie*, 15 B. R. 522.)

While the investigation of the list of creditors is pending, the court may provisionally limit the period within which other creditors may join in the petition, and such time will not be enlarged, except for sufficient cause. (*In re Benjamin Bullock*, 1 W. N. 22.)

The register's report should contain a list of the claims counted and of those rejected. (*In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

If an order is entered dismissing a case—unless an amended petition is filed, a creditor who transferred his debt after the filing of the original petition can not unite in the amended petition. (*In re Western S. & T. Co.* 13 Pac. L. R. 66.)

### The Petitioner's Debt.

(b) It is not necessary that the debt should have existed at the time the act of bankruptcy was committed. The creditor who can file a petition for involuntary bankruptcy is one whose debt is provable under the act. Section 5067

declares that all debts due and payable at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, may be proved against the estate of a bankrupt. A debt existing at the time the petition is filed, if a valid one, is sufficient to support the proceedings. (*Phelps v. Clasen*, 3 B. R. 87; s. c. 1 Wool. 204; *contra*, *in re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

A debt contracted prior to the passage of the act is sufficient. (*In re John W. Hull*, 1 N. Y. Leg. Obs. 1.)

The provisions of the bankrupt act, literally construed, are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner. His debt exists at and before the adjudication of bankruptcy, and is, therefore, a provable debt. Being a provable debt, it is sufficient to maintain the petition. (*Linn v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 229; s. c. 3 L. T. B. 218; *in re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47; *in re W. B. Alexander*, 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *in re Samuel King*, 1 N. Y. Leg. Obs. 276; *in re Tower*, 1 N. Y. Leg. Obs. 8; s. c. 5 Law Rep. 214; s. c. 1 Penn. L. J. 209.)

When the petition alleges the debt to be due and payable, and the proof shows that the debt was not due at the time of the filing of the petition, the variance will not be fatal, because the averment that the debt was due was not necessary. (*Linn v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 229; s. c. 3 L. T. B. 218.)

When the petitioning creditor has received the notes of third parties, to be applied to the payment of his debt, if they should on inquiry be found collectible, the delivery of the notes amounts to a conditional payment. If the notes are paid or collected according to their tenor, the debt of the petitioner would be paid and extinguished. If they are not so paid or collected, and the petitioner has not been guilty of negligence in the premises, the delivery would amount to nothing. The petitioner having agreed to take the notes as payment if they were collectible, thereby bound himself to sue upon them if suit should be necessary for their collection. An agreement to take notes as payment if they are proved collectible, implies something more than to take them if they are paid. It is equivalent to an agreement to collect them so far as the same can be done by the use of ordinary diligence. It is not the proper construction of the agreement, that the petitioner agreed to take the notes, if, on inquiry, he should find them collectible, and it ought not to be so interpreted. If the notes were in fact collectible, they were, from the date of their delivery, so far payment of the debt. If this conditional payment has in fact turned out to be no payment, by reason of the notes proving worthless or uncollectible, notwithstanding the due diligence of the petitioner, he should produce them at the trial, and surrender them to the debtor. If the balance that remains, after deducting the amount of the collectible notes, is less than \$250, it will not be sufficient in amount to enable the petitioner to maintain his petition. (*In re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47.)

When the nature of the petitioner's demand is fully set forth in the petition, the question, whether the debt is provable or not, is one of law and not of fact merely, and the court must decide it. (*Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.)

A joint liability upon a bond given by the petitioner and the debtor, and secured by a mortgage, is not sufficient to support a petition. The joint obligor can not prove his claim in a case where the principal creditor could prove, and the creditor could not prove, because he has security upon the property of his debtor. Nor can the petitioner sustain his petition upon the ground that he has a contingent debt or a contingent liability. It can hardly be supposed that it was intended that a petition against a debtor should be maintained upon the allegation that upon a certain contingency, which might never happen, the party proceeded against would become a debtor. The provision that authorizes an application to the court to have the present value of the debt or liability ascer-

tained, only authorizes proof of the amount so ascertained, and it is, to say the least, very doubtful whether, in case of such a joint bond, there is any provable debt within the meaning of the statute until the amount is so ascertained. (*Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.)

If two firms share in a certain venture, and deposit the proceeds in bank under the name of one of them, with the word "Co." added, the agreement will not constitute a partnership between the members of the two firms, nor will a check drawn upon the bank establish that there is such a copartnership. (*In re J. H. Warner et al.* 7 B. R. 47; s. c. 4 Pac. L. R. 123.)

A participation in the profits is presumptive proof that the participant is a partner, and sufficient proof in the absence of all other opposing circumstances. If the alleged dormant partner receives interest on the money placed at the disposal of the firm, and a compensation beyond the usual rate as book-keeper, the circumstance indicates that the arrangement is either a device to cover up a partnership in the profits or a usurious loan. As it is not unlawful to be a dormant or secret partner, and it is to loan money at usurious interest, the law will presume that the contingent and extra compensation for keeping the books is a device to enable the party to share in the profits as partner. (*In re Francis & Buchanan*, 7 B. R. 359; s. c. 2 Saw. 286.)

The petitioner may proceed against one partner, even though the debt proved is a partnership debt. Upon principle as well as authority, a partnership creditor has such an interest in the property of any one of the partners that he may proceed against one alone upon proof of his debt. (*In re Melick*, 4 B. R. 97.)

A creditor who has taken the property of a debtor upon legal process can throw him into bankruptcy for that act. (*In re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56.)

The institution of proceedings at law or in equity does not conclude the creditor from afterwards abandoning such proceedings and coming into the bankruptcy court at any time before such proceedings have resulted in a satisfaction of the debt. The issue and levy of an execution does not take away the right of the creditor to institute proceedings in bankruptcy. (*In re Daniel Sheehan*, 8 B. R. 345.)

A judgment will sustain a petition for an adjudication of bankruptcy, although a writ of error is pending, and a bond has been filed to stay execution. (*In re Daniel Sheehan*, 8 B. R. 345.)

If the petitioning creditor has received the debtor's note well endorsed in part payment of his account, and has passed it to another, the amount due is the balance that remains after the credit for the note is given. (*Culver v. Calender*, 5 Law Rep. 125)

Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular debt of the petitioning creditor. They are for the benefit of all the creditors. The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown for two purposes only: 1st. To show that the alleged debtor occupies that relation; 2d. To show that the petitioner has the requisite qualifications to commence the proceedings. Its office is then exhausted, and it has not, and is never given, any other or further force or effect. The petitioning creditor stands in no better or more favorable position after adjudication than any other creditor. He must prove his debt in the course of the bankruptcy proceedings the same as any other creditor. His debt may be opposed, adjudicated upon, and allowed, abated or expunged the same as any other debt. (*In re Daniel Sheehan*, 8 B. R. 345.)

A tender in court of the amount due to the petitioner can not defeat the petition. If the debtor is insolvent, it would not be proper for the petitioner to accept payment in full at the expense of the other creditors. But the fact that

there are no other creditors to be prejudiced by, and complain of, the payment can not be presumed to be within the knowledge of the petitioner. Before I accepts the tender, he must inquire concerning it, and he may be mistaken. Besides, no understanding of the petitioner, or proceedings between him and the debtor upon such question, could prevent third persons, who might be creditor from asserting their rights as such. (*In re Williams & Co.* 3 B. R. 286; s. Lowell, 406; s. c. 2 L. T. B. 100; *in re Ouimette*, 3 B. R. 566; s. c. 1 Sav 47.)

A debtor who is solvent may pay any or all of his debts although proceedings in bankruptcy are pending against him. (*In re Oregon B. Printing Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515)

Where a trust in the strict and technical sense exists, cognizable only in court of equity, it will not be affected by the statute of limitations. But a agent who receives money to deposit in a savings bank, but converts it to his own use, and immediately notifies his principal of the conversion, is not a trustee in that sense of the term. From the day the principal was advised of the conversion the claim became a legal debt, enforceable at law and not in equity. From that date it was a simple legal demand upon which the statute of limitations ran. (*In re Cornwall*, 4 B. R. 400; s. c. 6 B. R. 305; s. c. 9 Blatch. 114 s. c. 2 L. T. B. 220.)

A creditor who has received an unlawful preference in respect to the debt set forth in the petition, can not maintain the petition without a surrender of the preference. (*In re Peter Rado*, 6 Ben. 230.)

If the petitioning creditor has received a preference upon his debt, he can maintain his petition by making a voluntary surrender of such preference for the benefit of the creditors of the estate. (*In re Hunt & Hornell*, 5 B. R. 433 *in re Marcer*, 6 B. R. 351; s. c. 29 Leg. Int. 76.)

A petition in involuntary bankruptcy can not be sustained by one whose claim is barred by the statute of limitations of the State in which the petition is brought. (*Cornwall v. Cornwall*, 6 B. R. 305; s. c. 6 A. L. Rev. 365.)

If it appears at any stage of the trial that the case is not within the bankrupt law, the proceedings must be dismissed. If the petitioning creditor, after the filing of the petition, receives payment sufficient to reduce the amount of his debt below \$250, he can not prosecute the case any further. The cost incurred by him in the proceedings can not be added to his debt to make up the requisite amount. The debtor must owe his creditor \$250, and be guilty of an act of bankruptcy, before the creditor has any right to make costs for the purpose of having him adjudicated a bankrupt. (*In re Skelley*, 5 B. R. 214; s. c. 1 Biss. 260.)

If the principal of the petitioning creditor's debt is less than \$250, but exceeds that sum if the interest up to the date of the petition is added, the adjudication will be deemed valid when assailed in a collateral proceeding. (*Sloan v. Lewis*, 12 B. R. 173; s. c. 68 N. C. 557; s. c. 22 Wall. 150.)

If a creditor was induced to release his claim through the misrepresentation of another creditor, the release is void, and the debt is sufficient. (*Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398.)

It is no defense in bankruptcy that the petitioner is the only creditor, or that he has an adequate remedy at law or in equity in the State or Federal courts. The bankrupt act protects all creditors, and is additional to other remedies where it applies. It is immaterial that the expenses in bankruptcy bear a very large proportion to that part of the petitioner's debt which remains unsecured. It is not a matter of discretion, but of strict right, that he shall be permitted to proceed in bankruptcy if he chooses to do so. (*In re W. B. Alexander et al* 4 B. R. 178; s. c. Lowell 470; s. c. 2 L. T. B. 238; *Elfort v. Greely*, 6 B. R. 433; s. c. 4 C. L. N. 209.)

A creditor who holds security upon the property of a third person has a provable debt for the full amount against the estate of his debtor. If the debtor is a surety and pays the debt, he may be entitled to the benefit of the collateral security. \*But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt if possible. If he is obliged to realize his security and prove only for the balance, he will be losing the advantage for which he has stipulated of the full credit of the promise of the surety. (*In re W. B. Alexander et al.* 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *Fox v. Eckstein*, 4 B. R. 373.)

Although the law does not expressly require that the list of creditors presented by the debtor in denial that the requisite number and amount of creditors have joined in the petition, should be sworn to by him, the general intent of the act indicates that it should be done. The list of his creditors is peculiarly within his own knowledge, and the petitioning creditor is entitled to the benefit of a sworn list, so that he may have some assurance that fictitious claims are not inserted. (*In re Louis E. Steinman*, 10 B. R. 214; s. c. 6 Biss. 166; *in re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427; *Barnert v. Hightower*, 10 B. R. 157.)

### Amendment.

It belongs to courts of justice, as the general rule, to permit amendments of proceedings before them when they have obtained jurisdiction of the person and of the subject-matter, and it would be strange if the district court, in the administration of the bankrupt law, should be held incompetent to allow such amendments. The exercise of the power may often be indispensable to the complete attainment of justice. The rules in bankruptcy made by the supreme court contemplate the exercise of this power, and are at least evidence that the supreme court deemed that such amendments might lawfully be allowed. (*Hurdy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

The petition may be amended. Special reasons must be given to obtain an amendment to a sworn petition, or the pleadings, which are required to be verified by the oath of the party; and where the object is to introduce new facts or change essentially the grounds of the prosecution or the defense, the courts are disinclined to allow such amendments, except for very special reasons, and where they are clearly required in the furtherance of justice. (*Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79; *in re Craft*, 1 B. R. 378; 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; *in re Waite & Crocker*, 1 B. R. 373; s. c. Lowell, 207; *in re Haughton*, 1 B. R. 460; *in re Hill & Van Valkenburgh*, 5 Law Rep. 326.)

The application for leave to amend should be accompanied by a copy of the proposed amendments, and notice thereof should be served on the opposite party. (*Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79.)

It should be shown that the petitioners and their attorneys were not advised of the facts sought to be added by the amendment at the time the original petition was prepared, or that they were omitted from inadvertence, mistake, or other reason which might excuse such omission, and that application for leave to amend was made within reasonable time after the necessity for amendment was discovered. (*Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79.)

Where an act of bankruptcy is clearly established, and especially where something more than a mere technical violation of the law may be suspected, it is the duty of the court to allow such amendments and further allegations to be made as may sustain the proceedings. (*In re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.)

A merely formal amendment, which can not take the debtor by surprise,

may be allowed, when it appears to be due to justice, even at the hearing, and after all the testimony in the case has been taken. (*In re Craft*, 1 B. R. 378; 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; *in re Waite & Crocker*, 1 B. R. 373; s. c. Lowell, 207; *in re Haughton*, 1 B. R. 460; *in re A. B. Gallinger* 4 B. R. 729; s. c. 1 Saw. 224.)

Amendments which would introduce into the petition entirely new acts of bankruptcy, founded upon facts not referred to in the petition, and alleged to have been committed more than six months prior to the application for leave to amend, will not be allowed. (*Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79; *in re Craft*, 2 B. R. 111; s. c. 6 Blatch. 177.)

An amendment to add a new party will not be allowed after all the testimony is taken and the case is before the court upon final hearing. (*In re Chas. S. Pitt*, 14 B. R. 59.)

While it is in the discretion of the court, at any stage of the proceedings, in furtherance of justice, to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action, not to permit, under the form of amendments, new causes of action to be introduced, thus perverting the power to amend into a power to substitute one cause of action for another. The petitioning creditor, like a plaintiff, brings a definite cause of action, and makes allegations accordingly, and the *allegata* and *probata* must correspond at the trial. The defendant appears to meet the allegations made, and no others. If there has been an informal or imperfect statement, the court can permit the needed corrections to be made on such terms as justice demands, but it would be an unjust and unjustifiable action on its part to convert, under the name of an amendment, one cause of action into another, entirely distinct, and calling for different proofs and for different proceedings. (*In re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177.)

If the allegation in regard to the joining of the requisite proportion of the creditors in the petition is defective, it may be amended. (*In re James A. McKibben*, 12 B. R. 97; *in re Joseph S. Hadley*, 12 B. R. 366; *in re Morris*, 11 B. R. 443.)

The petition ought to make a complete case for adjudication, and defects in it can not be supplied by affidavits. (*In re James A. McKibben*, 12 B. R. 97.)

An amendment relates back to the commencement of the proceedings in bankruptcy, and gives effect to the action of the court upon an imperfect petition. (*In re Williams & McPheeters*, 11 B. R. 145; s. c. 6 Biss. 233.)

When an amendment introduces new matter, it should be met by an answer. (*Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

An objection may be taken to a defect in an amended petition, although it might have been made to the original petition, but was not. (*In re Western S. & T. Co.* 13 Pac. L. R. 66.)

In an action for fraud, in receiving money after the filing of an involuntary petition, an allegation that it was received in good faith under an expectation of effecting a compromise with all the creditors, is a good defense. (*Van Alstyne v. Crane*, 4 N. Y. Supr. 113.)

### Limitation.

The six months' limitation provided for in this clause applies solely to the time within which the petition for adjudication of bankruptcy must be filed, and not to the time within which a preference may be attacked. (*In re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; *Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.)

In the absence of any evidence to the contrary, it will be presumed that the

date of an instrument was the time of its execution and delivery. The six months will only begin to run from the time of the actual execution and delivery of the deed. (*In re Rooney*, 6 B. R. 168.)

If a deed is not recorded within the period allowed by the State laws for the registration of deeds, the time will run from its recording and not from the time of its delivery. (*Thornhill v. Link*, 8 B. R. 521.)

### What Preferences are Void.

(m) The prohibition contained in this clause applies equally to section 5128 and section 5021. It probably would not have been inserted if sections 5128 and 5021 had covered no other class of cases than preferences. They do, however, provide for recovery in other cases than those of preference merely, such as payments, sales, &c., with a view to prevent the debtor's property from coming to his assignee, &c.; and money, goods, &c., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, &c., with intent to delay, fraud, or hinder creditors. This express prohibition was inserted in order to prescribe one general rule, applicable alike to all cases of recovery of money or other property paid, conveyed, &c., to creditors contrary to the bankrupt act. (*In re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; *in re Thos. C. Evans*, 3 B. R. 261; *Bingham v. Richmond*, 6 B. R. 127; *Bingham v. Frost*, 6 B. R. 130.)

This section is a very long one, and recites all the acts which subject a person to involuntary bankruptcy, and that is its main purpose. Among the acts which constitute a man a bankrupt, are those of giving preference to creditors in contemplation of bankruptcy. And it is in the conclusion of this section declared in general terms that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property which was the subject of the act of bankruptcy. But the general declaration of the right of the assignee to recover is not inconsistent with the limitation of the right in another section in cases accruing within six and four months of the commencement of proceedings in bankruptcy. Sections 5021 and 5128 having, for the first time, set up a rule by which certain payments and transfers of property shall be declared void—a rule at variance with the common law and with the statutes of the several States—very properly limit and define the circumstances within which this new rule shall operate. These are, among others: that the recipients of the bankrupt's property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent; when the bankrupt law is applied to the case of a creditor, within four months, and, with the general purchaser, within six months. (*Bean v. Brookmire*, 4 B. R. 196; s. c. 1 Dillon, 24; *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch. 284; *Colins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.)

This amendment does not apply to suits brought to recover preferences before Dec. 1st, 1873. (*Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Biss. 167; *Van Dyke v. Tinker*, 11 B. R. 308; *in re Simeon Leland*, 7 Ben. 436.)

The penalty upon a creditor provided for by this clause is enforceable against him only in case he compels the assignee to resort to legal proceedings to recover back the property transferred in violation of the act, and in case such proceedings are successful. The provisions of section 5084 must be construed, in connection with this clause, in such a manner that, if possible, both may stand. A creditor who claims to retain the property, makes himself conclusively a party to the fraud against the act, by resisting the claim of the assignee to recover the property in case the assignee is successful; but where the creditor avails himself of the *locus pœnitentiæ* given to him by section 5084, and voluntarily surrenders the property to the assignee, he ceases to be a party to the fraud, and may prove his debt in bankruptcy and receive dividends on it. (*In re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; *in re H. B. Montgomery*, 3 B. R. 137;



s. c. 3 Ben. 565; *in re* Scott & McCarty, 4 B. R. 414; *in re* Princeton, 1 B. R. 618; s. c. 2 Biss. 116; s. c. 1 L. T. B. 125; *in re* J. J. & C. W. Walton, 4 B. R. 467; s. c. 1 Deady, 598; s. c. 1 L. T. B. 162; *in re* Colman, 2 B. R. 563.)

A creditor who, after suit has been brought against him by the assignee, and before trial, voluntarily releases his preference and surrenders it to the assignee can not prove his debt. (*Phelps v. Stern*, 4 B. R. 34.)

If a mortgage is given to a creditor without his knowledge, or if a creditor upon receipt of such knowledge repudiates it, the prohibition is not to be enforced against him. (*In re* Princeton, 1 B. R. 618; s. c. 2 Biss. 115; s. c. 1 L. T. B. 125.)

But when the creditor does nothing in disaffirmance of the preference after he has been informed of it, he makes himself liable to the penalty. (*In re* Colman, 2 B. R. 563.)

Sections 5084 and 5021 are reconcilable by confining the latter to actual frauds as contradistinguished from constructive frauds. (*Babbitt v. Walbrun*, 4 B. R. 121; s. c. 1 Dillon, 19.)

This clause only refers to the debt sought to be preferred, and not to other debts in respect to which no preference was attempted to be given. A preferred creditor who has other claims that were not preferred should be allowed to prove them. (*In re* Arnold, 2 B. R. 160.)

In cases of actual fraud, a preferred creditor can not prove for a moiety of his debt until he has surrendered his preference. (*In re* Cramer, 13 B. R. 225; s. c. 8 C. L. N. 106; *in re* J. Schoenenberger, 15 B. R. 305.)

The provision which prevents a creditor in case of actual fraud from proving more than a moiety of his debt, only applies when there has been a recovery (*In re* John Riorden, 14 B. R. 332; s. c. 51 How. Pr. 271.)

A mere fraud on the bankrupt law by accepting a preference in violation of its provisions is not an actual fraud. (*In re* John Riorden, 14 B. R. 332; s. c. 51 How. Pr. 271.)

SEC. 5022.—Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

SEC. 5023.—[This section is repealed by act of 22 June, 1874, ch. 390, § 12, 18 Stat. 180.]

SEC. 5024.—Upon the filing of the petition authorized by the preceding section, if it appears that sufficient (a) grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also by injunction, (b) restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property, not excepted by this Title, from the operation thereof and from any interference therewith; and if it shall appear that

there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant (c) to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

Statute Revised—March 2, 1867, ch. 176, § 40, 14 Stat. 536.

### Sufficient Grounds.

(a) The commencement of the proceedings is the filing of the petition, and no valid order can be made until the proceedings are commenced. (*Ala & Chat. R. R. Co. v. Jones*, 7 B. R. 145.)

A *prima facie* case must be established by the proofs offered to sustain the allegation of the petition. It would otherwise be abhorrent to the sense of justice and right that the very stringent proceedings connected with the creditor's petition should be admissible, viz.: seizure of the debtor's property, injunction, and arrest. If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause can be granted, and the petition falls. If such proof is made, *allegata* and *probata* corresponding, and the order to show cause is entered, then, under proper proofs, the court may even grant warrants of arrest and seizure, and issue injunctions. All of the subsequent proceedings are based on the initial proofs that "sufficient grounds" exist; that is, that *prima facie* the defendant has committed the act of bankruptcy. (*In re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177; *in re Price & Miller*, 8 B. R. 514.)

An order to show cause issued upon a petition unsupported by any proof of the act of bankruptcy or of the creditor's claim is void and of no effect. (*In re Davis Rogers*, 10 B. R. 444; s. c. 1 Cent. L. J. 470.)

The debtor, from and after the commencement of proceedings in bankruptcy against him, is by the act denominated or called a bankrupt, and is subject to the orders of the court in all matters relating to his bankruptcy. (*In re Bromley & Co.* 3 B. R. 686.)

### Injunction.

(b) The averments in the petition for an injunction should be positive, and not on information and belief merely. When the affidavits filed upon a motion to dissolve an injunction do not sustain the allegations of the petition, but disclose the existence of another ground for an injunction, the petition may be amended so as to cover that ground. Nothing would be gained by dissolving the injunction, and then reissuing upon the same state of facts. (*In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.)

An injunction can not be granted on a summary petition against a party who claims adversely to the proceedings under a conveyance from the bankrupt, although the conveyance may be void under the bankrupt law. (*In re Charles J. Marter*, 12 B. R. 185.)

The bill need not be verified by the oath of the creditor himself, but will be sufficient if verified by the oath of his agent or attorney. (*In re Fendly*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.)

An injunction may be issued without notice. The court, however, may require notice to be given to the adverse party, and even that the applicant shall give security for damages, whenever it thinks that the ends of justice or the security of parties require it. (*In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.)

"Other person" has reference to parties interfering with the property of an individual not yet adjudicated an involuntary bankrupt, and which is to be preserved inviolate until his bankruptcy has been legally ascertained. (*In re Campbell*, 1 B. R. 165; s. c. 1 Abb. O. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.)

When a petition for an injunction is presented at the same time with the petition for an adjudication of bankruptcy, the court may look to the facts set forth in the former petition to ascertain whether the requisite proportion of the creditors have joined in it. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

When the injunction is sought by a bill in equity, the respondent can not, craving oyer of the petition in bankruptcy, demur to the bill on the ground that the petition does not set up any act of bankruptcy, for the demurrer only goes to the sufficiency of the bill, and can not raise any question as to the sufficiency of the petition. (*Blackburn v. Stannard*, 5 Law Rep. 250.)

A bill for an injunction against third parties who have accepted of a transfer from the debtor, should allege some danger either threatened or imminent to the property. (*Blackburn v. Stannard*, 5 Law Rep. 250.)

A bill for an injunction should contain a description of the property. A mere allegation that it is personal estate is not sufficient. (*Blackburn v. Stannard*, 5 Law Rep. 250.)

An injunction may be in the form of an order addressed to the debtor and all other persons who may attempt to transfer or interfere with his property. The fact that such other persons are not named in the order makes no substantial difference, for it plainly apprises them of what they are restrained from doing. Any distinction between a writ of injunction and an order in the nature of one is disregarded in practice. (*In re Lady Bryan Mining Co.* 6 B. R. 252.)

The injunction is temporary only, and is intended to restrain the disposition of the goods and property of the debtor until an adjudication can be had, and an assignee appointed to take charge of the assets for the benefit of the creditors. (*Creditors v. Cozzens*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *in re R. & L. Calender*, 5 Law Rep. 129; *in re Metzler et al.* 1 B. R. 38; s. c. 1 Ben. 356; *in re Kintzing*, 3 B. R. 217.)

The injunction granted under this section continues until vacated by order of the court, although the debtor is adjudicated a bankrupt. (*In re Fendly*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.)

When an injunction is asked for, at the commencement of the proceedings, against any person other than the debtor, a separate petition should be filed, so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy. (*Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *Creditors v. Cozzens*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.)

It is immaterial whether the order to show cause is in proper form or not. The jurisdiction of the court to issue an injunction against persons other than the debtor, or to issue a provisional warrant to take possession of the debtor's goods, is not dependent upon the service on the debtor of a proper order to show

cause. (*In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

*Quære.* Will the injunction allowed by this section extend to a case of voluntary bankruptcy, or protect what may be a mere right of action in the assignee to recover the proceeds of property which has been sold under a judgment rendered in a State court? (*In re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 243.)

If the petitioner shows a covinous contrivance between the bankrupt and other parties to embezzle the estate for the benefit of the bankrupt or his preferred creditors, the district court will award an injunction restraining them from disposing of the property. (*In re John Harper Smith*, 1 N. Y. Leg. Obs. 249.)

The district court, before awarding an injunction against parties other than the bankrupt, may require security to an amount adequate to cover all probable losses. (*In re John Harper Smith*, 1 N. Y. Leg. Obs. 249.)

The district court will not allow an injunction against a trustee claiming under an assignment, merely on the apprehension of a creditor that the property may be dissipated or put out of the trustee. The court will interfere with this high process only in case of actual and imminent danger to the property of the bankrupt, and not as a mere preventive against its possible waste or misapplication. (*In re John Nightingale*, 1 N. Y. Leg. Obs. 8.)

When the grounds set forth in the motion for a dissolution of an injunction go to the merits of the case, and the debtor has denied the acts of bankruptcy, and prayed a jury trial, the court will not grant the dissolution, and thus on affidavits dispose of what are really all the issues involved in the proceedings. (*In re Metzler et al.* 1 B. R. 38; s. c. 1 Ben. 356.)

When a creditor seeks to dissolve an injunction issued against him to prevent a preference, his petition must negative the circumstances which would, under section 5128, make the transfer void. (*In re Binns*, 4 Ben. 152.)

Upon the hearing of a motion to dissolve an injunction, affidavits for the party making it, and counter-affidavits for those resisting it, may be read. (*In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.)

A claimant of property seized under the provisional warrant can not urge as grounds for dissolving the injunction, that the order to show cause is irregular, or that the petition does not show at what time the act of bankruptcy was committed, or that there is no positive charge of an act of bankruptcy, or that the proof of debt does not show that the debt existed at the time the act of bankruptcy was committed. Nor will the court, on a motion for dissolution, decide the question of title to the property. (*In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

When the *prima facie* case made out by the petition is not rebutted, the injunction can not be dissolved. (*In re Dean & Garrett*, 2 B. R. 89.)

There is no party to a creditor's petition except the petitioning creditor and the bankrupt. The service of an injunction upon a person does not make him a party to the proceedings. He may have a wrongful injunction dissolved, but he has no right to contest or vacate an adjudication. That is a matter in which he can have no interest. A party who seeks to annul an adjudication, must show some priority of interest in the property of the debtor. (*Carr v. Whitaker*, 5 B. R. 123.)

A party, not the debtor, can not be punished for contempt in violating an injunction issued in accordance with the prayer contained in the petition in involuntary bankruptcy against the debtor, unless separate or distinct proceedings are instituted against him for that purpose. (*Creditors v. Cozzens & Hall*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.)

A party is liable for breach of an injunction after notice of its having been

obtained, although the order has not been served upon him. All that is required is that the defendant should have knowledge of the order for the injunction, and the court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence. The belief that the order has been made and concealment to avoid service are sufficient. The right to indemnity for the damages occasioned by a breach of the injunction can not be in any way affected by the fact that the defendant acted under the advice of counsel. The fine should be equal in amount to the actual loss and expenses occasioned by his misconduct. (*In re Feeny*, 4 B. R. 233; s. c. 2 T. B. 182.)

The restraining power of the court is limited in point of time to the period of time expressed by the words "in the mean time," and those relate manifestly to the period of time between the entering of the order to show cause and the time specified therein for the hearing. The most extended construction that can be given to these words is that they are intended to cover the whole period to such time as a hearing and adjudication shall be had upon the petition for adjudication in bankruptcy. There is no warrant whatever for extending the meaning beyond that. Acts which are done after the restraining power of the injunction has ceased to operate do not make the parties liable for a contempt. (*In re Moses*, 6 B. R. 181; *in re Mary Irving et al.* 14 B. R. 289.)

If the contempt committed by the bankrupt in collecting money from his debtors is not of a willful character, it may be purged by turning everything over to the assignee, and will not then be visited by punishment, either personal or pecuniary. (*In re J. P. Hayden*, 7 B. R. 192.)

### Provisional Warrant.

(c) The application for a provisional warrant should be made by a separate petition, supported by affidavits of persons having knowledge of the facts. A provisional warrant should not issue, except where all material facts are stated upon personal knowledge. (*In re James A. McKibben*, 12 B. R. 97; *in re Joseph S. Hadley*, 12 B. R. 366.)

The facts in support of a provisional warrant should be set forth in separate depositions. (*In re Joseph S. Hadley*, 12 B. R. 366.)

A recital, in the order allowing the warrant, giving the date of the bankrupt act incorrectly—1868 for 1867—is an immaterial mistake, and in no way affects the legality of the order. The recital of the title of the bankrupt act in a proceeding is mere matter of form. The court takes judicial notice of the act of Congress, and they need not be set forth or specially referred to in any proceedings before it. (*In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

The order need not require the arrest of the debtor; the warrant may issue against the person and goods, or either of them. When the warrant is for the seizure of both the person and goods, it may be executed against both or either as the petitioning creditor may direct. (*In re Muller & Bretano*, 3 B. R. 32 s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.)

It is the duty of the marshal to take possession of "all the property and effects" of the debtor, in whose hands he may find them. This is a question of fact for the officer to determine for himself. If, by mistake or otherwise, he takes the goods of another, he is liable to the party injured on his official bond. The court must presume that the marshal obeys the writ and seizes nothing but the debtor's property. (*In re Muller & Bretano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *in re Marks*, 2 B. R. 575; s. c. C. L. N. 245; s. c. 16 Pitts. L. J. 12.)

If the marshal, in the execution of the warrant, takes property belonging not to the bankrupt, but to another person, he is as much a wrong-doer as

acting in a private capacity, and the act differs not in its nature from any other trespass. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.)

If the marshal under a provisional warrant seizes property which has been transferred in violation of the bankrupt law, he is not liable to the transferee. (*Stevenson v. McLaren*, 14 B. R. 403; s. c. 3 Cent. L. J. 478.)

An attorney who directs the marshal to take goods under a warrant is not liable for trespass unless the direction in some degree wrought injury to the owner, or was in some degree the cause of such injury. (*Rice v. Melendy*, 41 Iowa, 395.)

If the preferred creditor was a witness in the proceedings to put the debtor into bankruptcy, he may be enjoined from prosecuting a suit subsequently instituted in a State court against the marshal for trespass in taking the property under the warrant. (*In re S. S. Miller*, 6 Biss. 30.)

The marshal, under the warrant, may hold possession of the property claimed by other persons when once in his possession, and may take possession of property not in the possession of the bankrupt, whether indemnified or not. If indemnified, it is made his duty to retain possession in the one case, and to take possession in the other, and he would be liable if he did not. If not indemnified, he is merely released from liability if he does not do it. His authority is derived from the warrant, and is as complete in the one case as in the other. With indemnity he is bound to exercise his authority; without it he may exercise it or not, at his option. He may take property from the possession of any person claiming to be a purchaser of the same. (*In re Briggs*, 3 B. R. 638; s. c. 2 C. L. N. 218.)

Property which does not belong to the debtor can not be taken under a provisional warrant, although the transfer may be void under the bankrupt law. (*In re Geo. B. Holland*, 12 B. R. 403; *in re Harthill*, 4 B. R. 392; s. c. 4 Ben. 448; s. c. 2 L. T. B. 181.)

The court can not order the seizure of any property under a provisional warrant, except such as belongs to and is in the possession of the debtor. (*In re Geo. B. Holland*, Jr. 12 B. R. 403.)

The district court will not order a summary sale of property forcibly taken by the marshal, under the warrant, from the possession of a receiver appointed in a proceeding supplementary to an execution. (*In re William W. Hulst*, 7 Ben. 17.)

If the property of another is taken under the warrant, he may come into court promptly by petition, and ask to have the warrant set aside. The marshal's possession of the property having been taken under a warrant which was improperly issued against it, the property must be released from the marshal's possession, and must revert to the possession of the owner, and, if it has been sold, the proceeds must take the same course. The assignee must be left to take such affirmative proceedings against him in respect to the property as may be proper. Such proceedings must be taken by a pleading, making proper averments, and calling for an answer on which an issue raised can be tried, leading to a determination which the aggrieved party can have reviewed. The proceeds of property seized by the marshal improperly under the warrant, are not in court rightfully nor as belonging to the estate of the bankrupt, and can not be awarded according to the merits of the case between the creditors and the claimant. The *bona fides* of the purchase can not be tried upon such petition for restoration. (*In re Harthill*, 4 B. R. 392; s. c. 4 Ben. 448; s. c. 2 L. T. B. 181; *Doyle v. Sharp*, 41 N. Y. Sup. 312.)

The jurisdiction of the district court is not broad enough to authorize the marshal simply upon a provisional warrant to take from the possession of the sheriff property held by virtue of a levy of the final process of execution issued by a State court, and levied before the commencement of proceedings in bankruptcy. (*Mollison v. Eaton*, 16 Minn. 426.)

The exercise of the power to issue a provisional warrant to take possession of the debtor's property is one of great delicacy, and should not be called into action unless the court is satisfied that it is necessary for the protection of the property, and that it will inure to the benefit of the creditors. It is discretionary, but it is a legal discretion. The court must be satisfied that the disposition of the property is fraudulent, with the design to remove the same to the prejudice of the general creditors, and to defeat the provisions of the bankrupt law. The removal of the goods of the debtor in the performance of an existing contract is not fraudulent. It is but the exercise of his legitimate right in carrying on his business, when for all the goods shipped he receives an equivalent in bills of exchange or money. Under such circumstances a provisional warrant will not be issued. (*Bank v. Iron Co.* 5 B. R. 491; s. c. 3 C. L. N. 402; s. c. 1 L. T. B. 272; s. c. 8 Phila. 171; s. c. 19 Pitts. L. J. 5.)

The arrest of the debtor is in no manner for security or satisfaction of the petitioning creditor's debt. It is simply to secure the attendance of the debtor from time to time, as the court shall order, until the decision of the court on the petition or the further order of the court, and it is to that purpose and no other that bail is required of him. (*In re Daniel Sheehan*, 8 B. R. 345.)

The arrest of the debtor does not conflict with, and is not an evasion of the restriction against suing out execution for the satisfaction of the petitioning creditor's judgment, where a writ of error is pending thereon, and a bond has been duly filled. (*In re Daniel Sheehan*, 8 B. R. 345.)

If there are no other creditors, the execution of the provisional warrant may be stayed, if execution upon the judgment debt of the petitioning creditor has been stayed by suing out a writ of error and filing a bond. (*In re Daniel Sheehan*, 8 B. R. 345.)

The second alternative clearly relates to a time within and not beyond that of the first, and appears to have been inserted in the statute with the object of allowing the debtor to be discharged, at the discretion of the court, before the adjudication of bankruptcy, not of keeping him in custody or attendance after that adjudication and during the pendency of the proceedings in bankruptcy. When the debtor has attended the court at the time of the order adjudging him a bankrupt, he has fulfilled the whole obligation imposed upon him by the statute. The obligation can not be extended or enlarged by the court, by substituting "and" for "or" in its order and warrant. (*Usher v. Pease*, 12 B. R. 305; s. c. 116 Mass. 440.)

An arrest can not be made under the warrant after the adjudication of bankruptcy. (*Usher v. Pease*, 12 B. R. 305; s. c. 116 Mass. 440.)

SEC. 5025.—A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned, and an order made that the notice be forthwith so served or published. \*And if, on return day of the order to show cause as aforesaid,

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\* So amended by act of 22 June, 1874, ch. 390, § 13, 18 Stat. 182.

the court shall be satisfied that the requirement of section *five thousand and twenty-one* [thirty-nine] of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section *five thousand and twenty-one* [thirty-nine] of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs.

Statute Revised—March 2, 1867, ch. 176, § 40, 14 Stat. 536. Prior Statute—April 4, 1800, ch. 19, § 3, 2 Stat. 22.

### Service of Process and Further Proceedings.

Where a corporation has been dissolved by means of an order passed by a State court, in an action instituted by the State attorney general, the case is one where the debtor proceeded against can not be found, on account of the dissolution, and the service of the order to show cause should be made by publication. (*In re Washington Marine Ins. Co.* 2 B. R. 648; s. c. 2 Ben. 292.)

Service is to be deemed to be made personally on a corporation when it is effected in the only mode in which service can be made on such artificial persons, viz.: by delivering the order to its head or principal officers. The "usual place of abode" in regard to corporations means their principal place of business. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

A service of the order to show cause upon a corporation is sufficient, if it would be valid and effectual if made in a suit at common law in the circuit court. (*In re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

When the order directs that a copy of the petition and order shall be served upon the president of a corporation, if the president can not be found, a new order may be issued, upon the filing of an affidavit setting forth such absence, directing the service to be made on the cashier, and such service will be valid. (*Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.)

The words "if such debtor can not be found" mean if he can not be found within the jurisdiction of the court. The marshal is not compelled to serve him in another jurisdiction, even when he knows precisely where he may be found. The words "not found" have a well-settled technical meaning, and mean not found in the jurisdiction of the court. If the debtor can not be found within the jurisdiction of the court, that does not authorize service out of the jurisdiction. In such case other modes of service must be resorted to. A corporation can have no legal existence out of the bounds of the sovereignty by which it was created. It must dwell in the place of its creation. Service upon an officer of the corporation out of the district and State, or service at the supposed residence of the corporation, also out of the district and State, is defective and invalid. The fact that the corporation is also chartered by several States does not make it one corporate body on which service can be made at its residence in any one of those States. If the place of the debtor's residence can not be ascertained, as if there is no office of the corporation within the district, and no person representing the corporation, on whom service can properly be made, can be found in the district, then service by publication may and should be resorted to. (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97; *Stuart v. Au-mueller*, 8 B. R. 541.)

The act is entirely silent as to the place of service. The mode only is designated. The act authorizes service by publication only when the party to be



served can not be found or his place of residence ascertained. When the debtor is found, personal service may be made upon him out of the district. (*Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.)

The act nowhere provides by whom a personal service shall be made. The fact that the act makes special provision for the service of certain processes on the marshal, and remains entirely silent as to the person by whom the order to show cause shall be served, is a strong argument against the position that such order can be served by the marshal only. *Expressio unius est exclusio alteri*. The order to show cause is not directed to the marshal, but to the debtor, and may be served by the marshal or any other person. (*Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.)

The prohibition of "further proceedings" is intended of proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons, or even the debtor. (*In re Muller & Bretano*, 3 B. R. 32; s. c. 1 Dedy, 513; s. c. 2 L. T. B. 33.)

After the filing of the petition, depositions to be used in the cause may be taken at any time, before any register, upon service of notice thereof on the opposite party, even though the order to show cause has not been served upon the debtor. (*In re Dean & Garrett*, 2 B. R. 89.)

### Requisite Number.

It is a matter of inquiry for the court to ascertain and adjudge whether the requisite number of creditors have joined in the proceedings. The reason for this is very obvious. This provision is designed to guard against collusive proceedings, and makes it the duty of the court to investigate and find whether the requisite number of creditors have joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition, although admitted by the debtor, does not seem to be enough, but the court must be satisfied that the requisite number of creditors have united in the petition, and must also be satisfied that the admission of such fact, if admitted by the debtor, is made in good faith. (*In re J. Young Scammon*, 10 B. R. 66; s. c. 6 B. R. 130; *in re Joliet Iron & Steel Co.* 10 B. R. 60; s. c. 1 A. L. T. [N. S.] 372; s. c. 10 A. L. J. 29; s. c. 6 C. L. N. 328; s. c. 22 Pitts. L. J. 207; *in re Isaac Sci* 10 B. R. 165; s. c. 7 Ben. 371; s. c. 10 A. L. T. [N. S.] 416; *in re James Keeler*, 10 B. R. 419; s. c. 1 A. L. T. [N. S.] 422; s. c. 20 I. R. 82.)

When the court has adjudged that the requisite proportion of creditors have joined in an involuntary petition, the judgment is final, not only as respects the debtor, but as respects all his creditors, and will not be re-examined by the district court except upon an allegation of fraud or bad faith. (*In re Wm. Duncan*, 14 B. R. 18; *in re John H. McKinley*, 7 Ben. 562; *in re J. Funkenstein*, 14 B. R. 213; s. c. 3 Saw. 605.)

Where the summons is by publication, the adjudication will not be set aside on the application of the debtor, in the absence of fraud or collusion. (*In re John H. McKinley*, 7 Ben. 562.)

Where the debtor neither admits nor denies the allegation, but merely makes default, the adjudication will not be set aside on the application of creditors, unless bad faith or collusion is alleged. (*In re J. Funkenstein*, 14 B. R. 213; s. c. 3 Saw. 605.)

After an adjudication of bankruptcy no inquiry can be made into the truth of an affidavit filed to show that the requisite proportion of creditors have united in the petition, unless fraud or bad faith is alleged. (*In re Wm. B. Duncan*, B. R. 18.)

The co-operation of the debtor in securing creditors by lawful means to unite in an involuntary petition, is no ground for setting aside an adjudication. (*In re Wm. B. Duncan*, 14 B. R. 18.)

SEC. 5026.—On such return day, or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy.\* Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor and not less than one-half of his creditors, in number and amount; or in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Statute Revised—March 2, 1867, ch. 176, §§ 41, 42, 14 Stat. 537. Prior Statutes—April 4, 1800, ch. 19, § 3, 2 Stat. 22; Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

### Appearance and Pleadings.

A debtor who has not been served with the order to show cause may appear by attorney. It is not necessary that he should appear in person. (*In re Weyhausen et al.* 1 Ben. 397.)

A party who appears without an order to show cause, and confesses or puts in a denial of the alleged acts of bankruptcy, and demands a trial, submits himself to the jurisdiction of the court. (*In re Moses A. McNaughton*, 8 B. R. 44.)

If a corporation, subject to the provisions of the bankrupt act, is in existence when the petition against it is filed, and when the proper papers are served

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\* So amended by act of 22 June, 1874, ch. 390, § 14, 18 Stat. 182.

on its proper officer, a decree dissolving the corporation made after such service and before the return day can not oust the jurisdiction of the bankrupt court to proceed on the return day to an adjudication of bankruptcy. The papers having been served on an officer of the corporation while the corporation was in being, the order of adjudication is substantially a proceeding *in rem*, and not one *in personam*. The proceeding in bankruptcy does not abate by the dissolution of a corporation so as to be incapable of being proceeded with thereafter. (*Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.)

Where the parties appear on the return day or adjourned day, and join issue, and no further proceeding or adjournment is had, the matter is to be considered as pending from day to day. In such case each subsequent day is an adjourned day to all intents and purposes. (*In re William Buchanan*, 10 B. R. 97.)

If the petitioning creditor and the debtor appear on the return day, the want of a formal adjournment does not terminate the proceedings, for such an adjournment is not necessary to keep them alive. (*In re William Buchanan*, 10 B. R. 97.)

After the return day, an answer can only be filed by special leave of the court. (*In re Gebhardt*, 3 B. R. 268; *vide in re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. [N. S.] 416.)

When the allegations of the petition are not sufficiently distinct, the debtor may decline to answer on that ground, and ask that they be made more definite and certain, or be stricken out. (*In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.)

When the allegations of the petition are insufficient, the objection may be taken by a demurrer, but a demurrer is not a proper mode to raise a question as to the sufficiency of the allegations on the ground that they are not precise and definite. (*Orem & Son v. Harley*, 3 B. R. 263.)

A plea in abatement of the pendency of other proceedings in bankruptcy instituted by the petitioning creditor must show jurisdiction in the court whose proceedings are so set up. (*In re John T. Balch*, 3 McLean, 221.)

A general demurrer which is good only as to one of the several acts of bankruptcy alleged in the petition can not be sustained. (*In re Kenyon & Fenton*, 6 B. R. 238; s. c. 1 Utah Ter. 47.)

The debtor may at the same time demur to the sufficiency of the allegations of the petition, and file an answer denying the acts of bankruptcy. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 149; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233)

Objections to the maintenance of the proceedings may be made by a motion to set aside the petition. (*In re Melick*, 4 B. R. 97.)

When a motion to dismiss has been filed, attention must first be given to that, unless it is waived. (*Hunt v. Pooke*, 5 B. R. 161.)

On the overruling of a demurrer, the court may adjudge the debtor a bankrupt on the allegations of the petition, and he will have no legal right to complain. It is in the discretion of the court to say whether he shall make a new choice of defense or not. (*In re A. Benham*, 8 B. R. 94.)

If the debtor demurs to the petition on the return day, and the hearing is postponed to a subsequent day, he thereby waives his right to demand a jury trial upon the overruling of the demurrer. (*In re A. Benham*, 8 B. R. 94.)

If the petition sets forth an act of bankruptcy on the part of one of the debtors, but not of all, it may, when a demurrer is sustained, be retained as to him and dismissed as to the others. (*In re Redmond & Martin*, 9 B. R. 408.)

The questions at issue on the petition and the denial of bankruptcy are questions solely between the petitioning creditor and the debtor, with which no out-

side party, sustaining merely the relation of a person who claims to be a creditor, can be permitted to interfere. A mere creditor can have no concern in the matter before adjudication. (*In re Boston R. R. Co.* 5 B. R. 232; *in re Bush*, 6 B. R. 179; s. c. 6 W. J. 276; *Dutton v. Freeman*, 5 Law Rep. 447.)

Any creditor has a standing in court to be heard touching the proceedings in any case prior to the adjudication, if he shows by proof satisfactory to the court, that he is in fact a creditor, and that his interests will be affected by the adjudication. A formal and technical proof is not necessary. A petition by an alleged creditor against his debtor to compel a submission of his estate to the bankrupt court is not a mere suit *inter partes*. It rather partakes of the nature of a proceeding *in rem*, in which every actual creditor has a direct interest. The proceeding is summary, and in a high degree informal, and it should be free from technical embarrassment. No one is entitled to be heard thereon who has no interest to protect. To justify an intervention the object or purpose disclosed must be one which in a legal sense is meritorious and not purely officious; therefore the facts alleged as ground of intervention must be such as entitle the applicant to consideration. The court must be able to see that the intervention may serve some useful purpose, either in protecting the rights of the applicant, or those of the creditors at large. (*In re Boston R. R. Co.* 6 B. R. 209, 222; s. c. 9 Blatch. 101, 409; *in re Bonnet*, 1 N. Y. Leg. Obs. 310; *in re Heusted*, 5 Law Rep. 510; *Clinton v. Mayo*, 12 B. R. 39.)

No creditor can appear and contest the proceedings until he proves his debt. (*Dutton v. Freeman*, 5 Law Rep. 447.)

The creditor who is charged by the petition with receiving a preference may appear and oppose the adjudication. (*In re Heusted*, 5 Law Rep. 510; *Clinton v. Mayo*, 12 B. R. 39.)

A petitioning creditor who has filed a prior petition in another court may intervene. (*In re Boston R. R. Co.* 6 B. R. 209; s. c. 9 Blatch. 101.)

A creditor who has received a mortgage which is liable to be assailed as a preference may intervene. (*In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.)

An attaching creditor may intervene and oppose the adjudication. (*In re S. Mendelsohn*, 12 B. R. 533; s. c. 3 Saw. 343; *in re Hatje*, 12 B. R. 548; s. c. 6 Biss. 436; *in re Francis M. Jack*, 13 B. R. 296; s. c. 1 Woods, 549; *in re C. G. Scrafford*, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19.)

An attaching creditor may intervene to contest an adjudication upon the merits as well as to claim that the court has no jurisdiction of the case. (*In re Elias G. Williams*, 14 B. R. 132.)

An attaching creditor who intervenes to oppose an adjudication may take advantage of any defense available to the debtor. (*In re Elias G. Williams*, 14 B. R. 132.)

An attaching creditor may contest the adjudication on the ground that the proper proportion of creditors have not joined in the petition. (*In re C. G. Scrafford*, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19.)

An objection to defects in the petition may be made even at the hearing. The objection is in the nature of a motion in arrest of judgment. (*In re Waite & Crocker*, 1 B. R. 373; s. c. Lowell, 207.)

The process, pleadings, and proceedings in a case of involuntary bankruptcy must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law. (*Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.)

A reasonable construction requires the debtor's allegations to be reduced to writing, and in such form as to raise an issue in analogy to issues in other cases triable by a jury. The word "allegations" is used in the sense of pleadings,

as meaning a formal statement of the acts of bankruptcy in the petition, an like formal defense of the debtor thereto, either a general denial which will in issue all the facts stated in the petition, or a statement of any matter: avoidance according to the rules governing pleadings in common law cases. *re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re Alexander Findlay*, 9 R. 83; s. c. 5 Biss. 480; *contra*, *in re Heydette*, 8 B. R. 333.)

Form No. 61 is the form of the order to be entered by the court. It is an act or allegation of the debtor, but is an order of the court based upon allegation of the debtor previously presented or communicated to the court some forum, either orally or in writing. (*In re Alexander Findlay*, 9 B. R. s. c. 5 Biss. 480; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *com* *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204; *in re Dunham & Orr*, 2 R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89; *in re Heydette*, 8 B. R. 333; *re Hawkeye Smelting Co.* 8 B. R. 385.)

The answer should be made under oath. The general rule in all courts is require a pleading or petition to be answered in as solemn a manner as it is quired to be made. (*In re Alexander Findlay*, 9 B. R. 83; s. c. 5 Biss. 4 *contra*, *in re Gebhardt*, 3 B. R. 268; *in re Heydette*, 8 B. R. 333.)

The objection that the petition is not duly signed and verified is waived putting in a denial of the act of bankruptcy, and a demand for a trial. By s an act the debtor waives not only the necessity of an order to show cause, the necessity of proof of the authority of the person signing the petition, a in fact, of any verification whatever. Proof of the authority of a person si ing a creditor's petition in a representative capacity, and a verification of petition, like the accompanying proof of the petitioning creditor's debt : deposition as to the alleged act of bankruptcy, are requisite only to author the making of an order to show cause. When that is done their office is acc plished, and they never can be and never are of any other or further use in case. (*In re Moses A. McNaughton*, 8 B. R. 44.)

The debtor may deny that the petitioner is a creditor, and by proofs m tain such denial. The act provides that if the debtor proves that the facts forth in the petition are not true, the proceedings shall be dismissed. The f set forth in the petition are all those which are necessary to make it the duty the court to adjudge the debtor a bankrupt; that is to say, there must be bel the court a creditor with a provable debt to the required amount, and th must be established an act of bankruptcy within six months before the filing the petition. It must also be alleged and shown that the debtor owes prov debts to the amount of three hundred dollars. Unless all these concur, petitioner has no right to prosecute the petition, and however he may be abl prove, or does prove, the commission of acts of bankruptcy, he is not by clothed with the right or power to begin or sustain a prosecution or ask a dec (*In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; *in re Ouimette*, 3 B. R. 5 s. c. 1 Saw. 47.)

The debt and the act of bankruptcy taken together constitute the caus action. The defense set up may go to either or both of these matters, and t may be several defenses to each, but they must be separately stated—that is that each one will stand or fall by itself without the aid of the other. (*I. Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47.)

It is nowhere expressly or impliedly said that one who can furnish p which, unexplained and uncontradicted, would show *prima facie* that he creditor, may file a petition, or that a party may be adjudged a bankrupt u such petition. The objection that the petitioner is not a creditor goes not ( to his disability, but to the jurisdiction of the cause. It would be monst injustice if parties were not only liable to be proceeded against, but must ne sarily be adjudged bankrupts, submit to a warrant and be dispossessed of their property at the instance of any one and every one who either dishone

or by mistake was able to present, by petition and affidavits, *prima facie* evidence of a debt, when in truth none existed. It might often happen that the only act of bankruptcy alleged depended for its character upon the very question whether any debt was owing to the petitioner; and if a mere *prima facie* case shown by the petition precluded further inquiry on that question, a party might be declared a bankrupt, his property be subjected to administration under the law, and, in the end, it would appear that the petitioner, having no debt, no act of bankruptcy had been committed, and the whole proceeding, injurious as it must be, was wholly groundless. (*In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114.)

When the petition sets forth the several acts of bankruptcy alleged conjunctively, the denial in the answer should be in the disjunctive, and in such form as to fully deny either of the intentions imputed to the debtor. (*In re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.)

A proceeding in bankruptcy is not an action to collect a debt, but to procure an adjudication of bankruptcy, and therefore a plea of tender of the amount due the petitioner can, under no circumstances, be a defense to it. The allegation of the petition is, that the party is not only indebted to the petitioner, but that he has committed an act of bankruptcy. To this it is no sufficient answer to allege a tender of the amount due. The court will not presume that the petitioner is the only creditor. If, in fact, there are no other creditors, the plea should contain an allegation to that effect. A plea containing such an allegation would not be a good defense. (*In re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47.)

If the debtor proves that there are no other creditors to the requisite amount to proceed against him under the bankrupt act, and tenders the amount due on the petitioning creditor's claim, together with the costs of the proceedings, the proceedings will be dismissed. (*In re Daniel Sheehan*, 8 B. R. 353.)

If the tender of payment does not include the costs, the debtor must pay full costs, as upon an adjudication, after hearing, if the proceedings are dismissed. (*In re Daniel Sheehan*, 8 B. R. 353.)

If the petitioning creditor, after the filing of the petition, obtains an order in the suit instituted in a State court for the arrest of the bankrupt and another, but instructs the sheriff not to arrest the bankrupt, a voluntary surrender and giving of bail in that action will not be a sufficient ground for dismissing the petition, although the debt which constitutes the cause of action in both cases is the same. A person proceeded against as a bankrupt does not by voluntarily placing himself under arrest, or in jail, or in any other place of confinement, remove himself from the effect of the bankrupt law. (*In re George Merkle*, 5 Ben. 8.)

The debtor may set up a claim for unliquidated damages arising out of a contract, as a set-off or counter-claim against the petitioning creditor's debt. (*In re Osage V. & S. K. R. R. Co.* 9 B. R. 281; s. c. 1 Cent. L. J. 33.)

Where a debtor has committed an act of bankruptcy, he can not discharge himself from his legal liability for such act by subsequent rescission or undoing thereof. (*In re Thomas Ryan*, 2 Saw. 411.)

A *feme covert* may avail herself of her coverture to defeat the debt which is the basis of proceedings in bankruptcy. (*In re Schlichter et al.* 2 B. R. 336; *in re Howland*, 2 B. R. 357; *in re Rachel Goodman*, 8 B. R. 380; s. c. 5 Biss. 401.)

When a note is given by a *feme covert*, it must appear on the face that it was given with the intent to bind her separate estate, or there must be allegations that it was given for the benefit of her separate estate, or in the course of

trading transactions which she is authorized to engage in by law. (*In re Howland*, 2 B. R. 357; *in re Schlichter*, 2 B. R. 336.)

A married woman, living separate and apart from her husband, may, under the laws of California, contract a valid debt, which can be enforced against her. (*In re Julia Lyons*, 2 Saw. 524; s. c. 1 A. L. T. [N. S.] 167.)

A person who is so unsound of mind as to be wholly incapable of managing his affairs can not, in that condition, commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian. (*In re Marvin*, 1 Dillon, 178; s. c. 3 C. L. N. 394; *in re Mitzel*, 3 Cent. L. J. 555.)

The denial of a fraudulent intent to give a fraudulent preference involves a confession of an intent to give a preference, though not a fraudulent one. Such a preference is an act of bankruptcy. (*In re R. Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344.)

A corporation by appearing and answering a petition thereby admits that it may be proceeded against in bankruptcy, and can not afterwards object that the petition does not allege that it is a moneyed, business or commercial corporation. (*In re Oregon B. Printing & Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

Irrelevant or immaterial matter in a pleading may be stricken out, although it is a denial of an immaterial allegation in a prior pleading. (*In re Oregon B. P. & P. Co.* 13 B. R. 199; s. c. 14 B. R. 405; s. c. 3 Saw. 614.)

When the case is brought to a hearing on petition and answer, and the answer denies material averments contained in the petition, the averments must be regarded as disproved, unless they are conclusively presumed by law. (*Wells et al. [ex parte H. B. Clafin & Co.]* 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.)

It is a well-settled rule of pleading, that a traverse or denial must not be taken on a mere matter or conclusion of law, for the effect would be to submit the question of law to the jury rather than to the court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable, and the issue raised thereby triable by a jury, under the direction of the court as to the law. The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done, and as this intent is not a mere conclusion of law, but of law and fact compounded, it may be traversed or denied. (*In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410.)

Although the intent to prefer is a necessary ingredient in the alleged act of bankruptcy, yet, if a preference is a necessary consequence of the facts admitted in the answer, the law conclusively presumes the intent to prefer, and the intent can not be denied and tried as an issue of fact. When, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and can not be rebutted by any evidence of intention. (*In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *in re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; *in re Thomas Ryan*, 2 Saw. 411.)

An allegation in the answer as to the value of property which the debtor owns and holds, is simply surplusage and immaterial, and ought to be stricken out, but it is no ground for a demurrer. A plea of a tender of the petitioner's debt may be stricken out as immaterial. Objections to the sufficiency of an answer may be taken by demurrer. When a demurrer to an answer is overruled, the petitioner may be permitted to reply on payment of costs. (*In re Quimette*, 3 B. R. 566; s. c. 1 Saw. 47.)

If the denial of the allegation in the petition is not in proper form, the proper course is to move to strike the paper from the file, and to vacate the subsequent record and order made thereon. (*In re Heydette*, 8 B. R. 333.)

When the answer consists merely of the denial contained in Form No. 61, application is needed. (*In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; 1 L. T. B. 89.)

the petitioning creditor is declared a bankrupt, his assignee may be substituted as a petitioner in his place, and prosecute the petition. (*In re B. F. Jones*, 7 B. R. 506.)

the remedies of an assignee under the law are regulated by the same provisions that control the rights of other parties. He can not in any way secure an insolvent debtor a preference over other creditors for the estate which he is administering. He must adopt the only remedy which the law allows him for the performance of his duty to collect the assets of the bankrupt, and that is the filing of a petition in bankruptcy against the bankrupt's insolvent debtor. (*In re B. F. Jones*, 7 B. R. 506.)

the motion for an adjudication upon or notwithstanding the respondent's answer may be denied, and the case allowed to proceed to trial upon the merits. (*In re Safe D. & S. Inst.* 7 B. R. 392.)

a jury can not be demanded on any day but the return day. By consent of the parties, an adjourned day may be held to be the same in all respects as the return day. (*In re G. & H. Pupke*, 1 Ben. 342; *in re Gebhardt*, 3 B. R. 268; *Sherry*, 8 B. R. 142; *Clinton v. Mayo*, 12 B. R. 39.)

the petition was not signed originally by the requisite number of creditors, and was only made complete by the filing of an intervening petition after the return day, the debtor may demand a jury trial on the day when such intervening petition is filed. (*In re J. M. Kintner*, 22 Pitts. L. J. 150.)

if the debtor demand a jury trial, the court may issue a special venire to summon a jury to try the issue. (*In re Alexander Findlay*, 9 B. R. 83; s. c. 5 Ben. 480; *in re Hawkeye Smelting Co.* 8 B. R. 385.)

the district court may impanel a jury to try the issue of bankruptcy *vel non* during a vacation as well as in term time. (*Lehman v. Strassberger*, 2 Woods,

## Evidence.

the burden of proof rests upon the creditor. (*Brock v. Hoppock*, 2 B. R. c. 2 Ben. 478; *in re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, s. c. 2 L. T. B. 69; *in re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177; *in re Miller*, 8 B. R. 514; *in re Jelsh & Dunnebacke*, 9 B. R. 412; *in re Under, Wilcox & Ogden*, 1 N. Y. Leg. Obs. 325; *in re Oregon B. Printing & Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

a paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive. (*In re Oregon B. Printing & Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

a defense which has been stricken out of the case may be given in evidence in admission. (*In re Oregon B. Printing & Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

the letters of the debtor are admissible in evidence against an attaching creditor who intervenes to oppose an adjudication. (*In re Hatje*, 12 B. R. 548; 6 Biss. 436.)

the admissions of the debtor made in the course of an examination upon the merits of the proceedings, when duly authenticated under section 905, are admissible in evidence against him. (*In re Rooney*, 6 B. R. 163.)

the district court has plenary power to compel the examination of all papers and books of the debtor, or in his possession, if pertinent to the issue and re-



quired for the protection of the rights and interest of the petitioning creditor (*In re Mendenhall*, 9 B. R. 285.)

The provisions of section 724 are peculiarly stringent, and when a court asked to enforce it, a plain case must be presented for its interposition. There is no limitation in regard to the kind of action at law which must be on trial order to entitle either party to the benefit of the statute. A proceeding in bankruptcy is within its purview. (*In re Mendenhall*, 9 B. R. 285.)

When the debtor omits to call a witness who is conversant with all the facts and might explain doubtful points, the presumption is against him. (*Curran Munger*, 6 B. R. 33; *in re Thomas Woods*, 7 B. R. 126; s. c. 29 Leg. Int. 23 s. c. 20 Pitts. L. J. 21.)

If the counsel for the petitioner omits to prove a particular fact, under the impression that it has been proven, the court may allow him to supply the omission even after the commencement of the argument of the case. (*In re Mur* 7 B. R. 468; s. c. 3 Biss. 442.)

When the evidence all points one way, and there is no question of fact to be submitted, the court may direct the jury to render their verdict for the party entitled to it. (*Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.)

Under the issue made by the denial of bankruptcy, the debtor can introduce proof to contradict all the material allegations of the petition. Evidence in regard to the indebtedness is admissible under the issue. (*In re Skelley*, 5 B. R. 214; s. c. 3 Biss. 260.)

The creditor must establish his debt before proceeding to show acts of bankruptcy. (*Brock v. Hoppock*, 2 B. R. 7; s. c. 2 Ben. 478; *Moore v. National Exchange Bank of Columbus*, 1 B. R. 470; s. c. 2 Bond, 170; s. c. 1 L. T. B. 7. *Foster v. Remick*, 1 N. Y. Leg. Obs. 232; s. c. 5 Law Rep. 406.)

*Quære.* When the debtor intends to deny that he owes the petitioner creditor debts to the requisite amount, ought he not to raise that question before going to the jury on the alleged acts of bankruptcy? (*Phelps v. Classen*, 3 L. R. 87; s. c. 1 Wool. 204; *Foster v. Remick*, 1 N. Y. Leg. Obs. 232; s. c. Law Rep. 406.)

While the court may in a case where the facts are undisputed take a question from the jury and dispose of it as a matter of law, and will generally do so in a case entirely free from doubt, yet whether the court will do so or not is in all cases a matter of discretion, and it is not error to send it to the jury however clear the case may be. (*In re Jelsh & Dunnebacke*, 9 B. R. 412.)

When the petition is against two partners, one of whom is in default, and the other of whom contests and succeeds, the petition must be dismissed. Both parties must be found guilty under the act before judgment can be entered against the partnership. (*Doan v. Compton & Doan*, 2 B. R. 607.)

If the petitioner proceeds against joint debtors, he can not prevail even as to one by proving the commission of an act of bankruptcy by him. (*James v. Atlantic Delaine Co.* 11 B. R. 390.)

The motive of the petitioner in prosecuting the petition, or the co-operation of one of the debtors, or his motive therefor, can have no possible effect in determining the quality of the acts alleged to be acts of bankruptcy, or the legal consequence of such acts. Evidence tending to show collusion between them should be rejected. (*Hurdy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.)

The petitioning creditor is confined to the act of bankruptcy alleged in the petition. (*In re James W. Sykes*, 5 Biss. 113.)

The debtor can not be adjudicated bankrupt for committing an act of bankruptcy which is not specially set forth in the petition. (*In re Potts & Garwood*

e, 469; *in re* J. A & H. W. Shouse, Crabbe, 482; *in re* James W. Sykes, 118.)

### Estoppel.

pendency of a suit in a court of law on a distinct and independent decision is not a bar to the filing of a proceeding in bankruptcy. The petitioning creditor may proceed to an adjudication while the suit is pending, but the suit is annulled and surrendered by an adjudication. It is true that the petitioning creditor can not carry on the two proceedings at the same time, at law and in bankruptcy for another, but there is no reason why he should be required to abandon his suit commenced before the filing of the petition, until it is determined whether the petition can be sustained. (*Ex parte Derby*, 5 Law Rep. 225.)

The institution of an action at law and the recovery of a judgment therein is no ground for dismissing the proceedings. (*Van Dusen v. Thurber*, 1 Penn. L. J. 402.)

A plaintiff who institutes proceedings in bankruptcy after the commencement of an action, can not have the suit postponed until the proceedings in bankruptcy are terminated. (*Stewart v. Sonneborn*, 51 Ala. 126.)

A creditor who has given his assent to a transaction is estopped from urging its invalidity in an act of bankruptcy. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 85; A. L. Reg. 429; *in re* Schuyler, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.)

It is not a bar to a creditor setting up an assignment as an act of bankruptcy, because he has delayed filing his petition for seventeen days after the execution, and sought information concerning the estate, and offered to sell the property assigned, and proposed to assent to it, if the debtor and the assignee would surrender the property assigned, and commit its disposal and management to some one more satisfactory to him. (*Spicer v. Ward*, 3 B. R. 512.)

If the petitioner has advised the making of an assignment, or after its execution has expressly given his assent to it, he will be precluded from insisting on its invalidity in an act of bankruptcy. But a motion to have the penalty of the assignee's increased is clearly no approval of, or assent to, the assignment. (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 84; s. c. 7 A. L. Reg. 429.)

The petitioning creditor is a stockholder in a corporation against which he has a claim, and is present at a meeting when a resolution is passed to give validity to an act of bankruptcy. It is his duty to protest, and see if the stockholders deliberately intend to commit an act of bankruptcy. His failure to protest will bind him, which may prevent him from voting upon the question. (*In re Massachusetts Brick Co.* 5 B. R. 8; s. c. 4 L. T. B. 220.)

A creditor who has signed a composition agreement for an extension of time, containing a stipulation that it shall not be binding unless it is signed by all the creditors, can not file a petition until a sufficient time elapses to ascertain whether all the creditors will become parties thereto. (*In re Potts & Garwood*, 1 B. R. 469.)

If a creditor, after a proposition of compromise has been submitted to him, assigns the property of his debtor, this is such an unequivocal act that his disclaimer is reasonably presumed, and a creditor who has signed the composition may then file a petition. (*In re Potts & Garwood*, Crabbe, 469.)

Creditors who have taken possession of the entire property of a debtor under a general assignment, or bill of sale intended to prefer them, can not set up the payment of a note as an act of bankruptcy. (*In re Elias G. Williams*, 14 B. R. 132.)

Creditors who have obtained a preference by a bill of sale from the debtor are estopped to set up the execution of the same as an act of bankruptcy. (*re* Elias G. Williams, 14 B. R. 132.)

During the pendency of proceedings in involuntary bankruptcy the debtor can not be adjudged a bankrupt on a voluntary petition filed after the filing of the petition of the creditors against him. (*In re* R. R. Stewart, 3 B. R. 1 *contra*, *in re* Philemon Canfield, 1 N. Y. Leg. Obs. 234; s. c. 5 Law Rep. 41)

If all the creditors prove their claims under the subsequent voluntary petition, they thereby waive the right to insist upon going back and proceed under the prior involuntary petition. (*In re* Nounnan & Co. 6 B. R. 579; s. c. 4 L. T. B. 228; s. c. 1 Utah Ter. 44.)

If the special verdict found by the jury is defective, there is a mistrial, and the case remains pending in court after the verdict is stricken out. (*In re* R. G. King, 8 Dillon, 364.)

### New Trial.

A proceeding in bankruptcy is not a *quasi* criminal proceeding. It does not involve any charge of crime, and is, like every other question of fact, to be decided by the weight of evidence and tried like any civil case. Incidental to the trial of jury causes, all courts of record, unless specially restricted from its exercise, possess the power of revising verdicts of juries and setting them aside in all civil cases in their discretion. (*In re* R. A. De Forest, 9 B. R. 278; *in Dunn et al.* 9 B. R. 487; s. c. 12 Blatch. 42.)

The matter decided by the verdict of a jury upon a mere denial of the truth of the petition, is as to the act of bankruptcy alleged, and that is all the verdict determines either by its terms or legal effect, and it can be pleaded in bar or to a new proceeding in bankruptcy for the same act. The fact of partnership in a proceeding against alleged partners, while it is essential to the maintaining of the joint petition, yet, like the fact of the petitioning creditor's debt, is really incidental to the main issue, and the verdict adverse to the petitioning creditor is not a bar to a subsequent action at law, nor does it conclude either fact. (*In re* Jelsh & Dunnebacke, 9 B. R. 412.)

A new trial will not be granted on account of an error in the charge, when it could have been corrected at the time without changing the result. (*Ham v. Pettibone*, 10 B. R. 172; s. c. 6 Biss. 167.)

If new evidence is discovered after the trial, the bankrupt may make an application to the district court setting forth sufficient facts to justify the court reopening the question connected with the decree and asking for a rehearing. The district court has the power in a proper case to entertain and grant such application. (*In re* Great West. Tel. Co. 5 Biss. 359.)

If the court has no jurisdiction over the case, an attaching creditor may move to set the proceedings aside. (*In re* Fogerty & Gerrity, 4 B. R. 451; s. c. 1 St. 233; s. c. 2 L. T. B. 174; *in re* John B. Bergeron, 12 B. R. 385; s. c. 10 P. L. R. 259; s. c. 2 Cent. L. J. 507.)

Notice of a motion to annul an adjudication must be served upon the bankrupt, for he has an interest in the continuance of the proceedings which may result in his discharge. (*In re* Bush, 6 B. R. 179; s. c. 6 W. J. 273.)

The mere subscription of a decree is not *per se* an adjudication. The effect of an order, though signed, remaining in the sole possession and knowledge of the judge, whether for the purpose of further consideration or for any other reason, is subject to his control, and not final so as to conclude him; and until it is in some manner notified to the clerk of the court or to one of the parties in such a way that this decision can be properly said to be promulgated or announced concludes no one. This is not to be taken to import that all orders must

announced formally in open court, or that orders which may be made out of court must be formally proclaimed, but there must be something tantamount to promulgation or delivery, something of which the parties to be affected can have or can obtain knowledge, before their rights can be said to have received adjudication, something which completes and authenticates the judicial act. (*In re Boston R. R. Co.* 6 B. R. 222; s. c. 9 Blatch. 409.)

A memorandum signed by the initials of the judge directing that an order of adjudication be entered is not an adjudication, nor can such an order be entered *nunc pro tunc*. The test is whether a formal order of adjudication has been entered. Until the entry of such formal order a discontinuance is always allowed to be entered if desired by the petitioning creditor. A direction that such order be entered is no more than the decision of the judge. It is not a judgment, or an entry on the files of the court that the court adjudges thus and so. The form of an adjudication is prescribed by Form No. 58. Nothing else is an adjudication. (*In re Joseph M. Hill*, 10 B. R. 133; s. c. 7 Ben. 378; s. c. 1 A. L. T. [N. S.] 421.)

A motion to strike out a default and an adjudication thereon is too late when it is made after a delay of several days, during which time the debtor has delivered the list of his creditors to the marshal, and could in no case be entertained without the most ample and satisfactory excuse for the delay. (*In re J. Neilson*, 7 B. R. 505.)

The defense that the debt of the petitioning creditor is based upon the sale of intoxicating liquors is not one to be favored by the courts, and hence the facts must be stated fully and particularly, in order that the court may see that the case comes within the law. (*In re J. Neilson*, 7 B. R. 505.)

The granting of a rehearing opens a decree and suspends its operation. (*In re Boston R. R. Co.* 6 B. R. 222; s. c. 9 Blatch. 409.)

No mere outside creditor has a right to ask that an adjudication shall be annulled. (*In re Bush*, 6 B. R. 179; s. c. 6 W. J. 276; *Karr v. Whitaker*, 5 B. R. 123.)

An agreement to dismiss the proceedings in bankruptcy is to some extent under the jurisdiction and control of the bankrupt court, and may be set aside even after the proceedings have been dismissed, upon satisfactory proof that it was obtained by fraud or given inadvertently or improperly, under a mistake of fact. (*In re Francis J. Buler*, 7 B. R. 552.)

A release given to the assignee after the proceedings in bankruptcy have been dismissed can not be set aside by the bankrupt court. The case has passed out of the jurisdiction of the bankruptcy court, and will not be reinstated for the purpose of deciding a new controversy which has arisen since the dismissal. (*In re Francis J. Buler*, 7 B. R. 552.)

An order adjudicating a debtor a bankrupt, made after the return day, but upon the petition of a creditor, and after notice to and appearance by the debtor, though it may be irregular, is not void, and can not be collaterally assailed. (*Hobson v. Markson*, 1 Dillon, 421.)

An adjudication in involuntary bankruptcy made against an infant can not be ratified by him after he becomes of age, so as to give the court jurisdiction as of the time of the adjudication. (*In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.)

An adjudication against an infant, who does not appear by a guardian *ad litem*, can not be upheld. It is an adjudication against a person who has no legal existence so as to be proceeded against in a court as if he were of full age. (*In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.)

If the debtor was *non compos mentis* at the time of the adjudication, the adjudication will be set aside. (*In re Alonzo Murphy*, 10 B. R. 48.)

Where an attorney assumes to appear and give any waiver of time, or anything else, and to admit the charge brought against the debtor, the debtor may appear within a reasonable time and move the court to have the proceedings set aside. But he must move promptly, to show that he is standing upon his rights, and if he does not, the court will refuse the motion. (*Leiter v. Payson*, 8 B. R. 317; s. c. 9 B. R. 205; s. c. 6 C. L. N. 157.)

The mere pendency of a prior petition against the bankrupt in another district which is there contested, is no ground for setting aside an adjudication. (*In re William Harris et al.* 6 Ben. 375.)

If the debtor appeared and was adjudicated a bankrupt on his admission of the commission of the alleged act of bankruptcy, the adjudication will not subsequently be set aside at the instance of other creditors, although the debtor did not commit such act of bankruptcy. (*In re James S. Thomas*, 11 B. R. 330; s. c. 7 C. L. N. 187.)

### Costs.

When there is a trial by jury, the docket fee of \$20 to the attorney of the successful party is taxable as part of the costs. There is a distinction between trial and judgment without a trial. The pleadings may be filed, the issues made up, but until the jury is sworn there is no trial. (*Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 149.)

When there is no denial and no contest, no docket fee can be allowed to the attorney for the petitioning creditor. (*In re Mead & Co.* 8 Phila. 174.)

When the petition is dismissed by order of the court, the debtor is entitled to recover from the petitioner the same costs that are allowed by law to a party recovering in equity. The attorney's fee is twenty dollars. No fee can be taxed for the attorney for the petitioning creditor. (*Dundore v. Coates*, 6 B. R. 304.)

When it appears that the debtor was guilty at the time the petition was filed, but has since reduced the petitioning creditor's debt below \$250, by payments, a judgment may be entered that he shall pay all taxable costs except docket fees made up to the time of filing his denial, and that on such payment the proceedings shall be dismissed. (*In re Skelly*, 5 B. R. 214; s. c. 3 Biss. 260.)

When the petition is dismissed, the petitioning creditor's debt can not be set off against the costs taxed in favor of the respondent. (*In re Lowenstein*, 3 B. R. 269; s. c. 3 Ben. 422.)

If the proceedings are dismissed upon payment of the petitioning creditor's claim, he is only entitled to such costs as are allowed to party recovering in a suit in equity. No allowance can be made for disbursements or counsel fees. (*In re Daniel Sheehan*, 8 B. R. 353.)

If the motion to dismiss is founded upon new and plausible considerations, the court in denying it may refuse to award costs against either party. (*In re Daniel Sheehan*, 8 B. R. 345.)

### Discontinuance.

None of the creditors who have joined in the petition will be allowed to withdraw unless all do so. (*In re Heffren*, 10 B. R. 213; s. c. 6 Biss. 156; *in re Edward Sargent*, 13 B. R. 144; *in re Philadelphia Axle Works*, 1 W. N. 126.)

If they were induced to join in the petition by false representations, they may be allowed to withdraw on discovering the truth. (*In re Heffren*, 10 B. R. 213; s. c. 6 Biss. 156; *in re Edward Sargent*, 13 B. R. 144.)

The proceedings in involuntary bankruptcy may be withdrawn. (*Hastings v. Belknap*, 1 Denio, 190.)

The petitioning creditor may dismiss the petition without giving notice to the other creditors. There is nothing in the bankrupt act to require such notice until the debtor is adjudged to be a bankrupt; the only parties to the proceedings are the petitioning creditor and the debtor. The petitioning creditor has entire control of the proceedings, and can have them dismissed at his pleasure. The only right which any other creditor has, is to file a new petition, or to ask to be substituted in place of the petitioning creditor, under the last clause of section 5026. The order dismissing the suit may be made by the court, upon the motion of the attorney for the petitioning creditor. (*In re Camden Rolling Mill Co.* 3 B. R. 590; s. c. 2 L. T. B. 112.)

A right to have a cause discontinued does not *per se* operate as a discontinuance or divest the court of jurisdiction. Such jurisdiction continues until there is an actual discontinuance. Even if a court refusing a discontinuance commits an error in such refusal, that does not operate as a discontinuance. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

If the order of discontinuance is not to take effect until the fees of the clerk and marshal are paid, the proceedings are actually pending until the conditions of the order are complied with, whatever may be the hindrances that arise to delay such compliance. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

The proceedings can be discontinued only by an order of the court on special application, especially where they have been allowed to lie for a considerable length of time, and an intervening petition has been filed. (*In re William Buchanan*, 10 B. R. 97.)

If the proceedings are formally adjourned on the return day, the proceedings can not be discontinued until the adjourned day. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

The dismissal of the proceedings will not prevent other creditors from instituting new proceedings. (*In re Mendenhall*, 9 B. R. 380; s. c. 6 C. L. N. 192.)

The creditor can not dismiss the petition after the debtor has been adjudged a bankrupt. Other creditors then have an interest in the proceedings. If the parties desire to make a settlement, they can proceed under section 5103. (*In re Sherburne*, 1 B. R. 558; *in re Lacey, Downs & Co.*, 10 B. R. 477; s. c. 12 Blatch. 322.)

If the proceedings are dismissed, an order reinstating the proceedings without notice to, or appearance by, the debtor, is without authority, and any adjudication following such reinstatement is void. (*Gage v. Gates*, 15 B. R. 145; s. c. 62 Mo. 412)

The expression "such debtor" has relation properly only to the debtor against whom a petition is filed by creditors. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

The provisions of this section apply solely to cases where there has been an adjudication, and confer the power of discontinuance in such cases. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

The provisions of this section do not apply to cases of discontinuance where there has been no adjudication, or restrict or take away the power of discontinuance which existed in such cases independently of this section. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

Where the bankrupt and all the creditors who have proved their debts are willing, the petition may be dismissed and the proceedings discontinued. (*In re W. D. Miller*, 1 B. R. 410; *in re Stern*, 6 I. R. R. 87; *in re Robert Morris, Crabbe*, 70; *in re George R. Magee*, 1 W. N. 21.)

If all the creditors do not consent, there can be no discontinuance without a notice to all the creditors, and a hearing of them, and an approval by the court of the propriety of a discontinuance. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

If all the creditors will not assent to the dismissal of the proceedings, the bankrupt may settle with those who will consent, and give security to the non-assenting creditors for any claim which they may have against the bankrupt, or be able to sustain before a competent tribunal, and the proceedings will then be dismissed. (*In re Great West. Tel. Co.* 5 Biss. 359; *in re Indianapolis R. R.* Co. 8 B. R. 302; s. c. 5 Biss. 287.)

If there is a creditor who *prima facie* has a claim against the bankrupt which is liable to be proved, before the court can dismiss the proceedings, his claim should receive some security or protection. (*In re Indianapolis R. R.* Co. 8 B. R. 302; s. c. 5 Biss. 287.)

Cases may occur in which justice to the bankrupt and to his creditors, and the whole scope and spirit of the system require that an adjudication ought to be revoked and superseded. The district court has the power to revoke it, although the statute has no enumeration of such cases or special provision or grant of power. The court to whom the power is given to make an adjudication has the power to recall it, if it is used as an instrument of fraud, oppression or injustice. (*In re Robert Morris, Crabbe*, 70.)

It is not necessary that a personal notice of an application for a supersedeas shall be personally served on the creditors who have proved their debts. A publication is sufficient. (*In re Robert Morris, Crabbe*, 70.)

The adjudication may be superseded by an order without issuing a writ of supersedeas. (*In re Robert Morris, Crabbe*, 70.)

The adjudication may be revoked even after a discharge has been granted. (*In re Robert Morris, Crabbe*, 70.)

The effect of a supersedeas, if lawfully ordered, is to annihilate the adjudication, and place the bankrupt with his estate and effects in the same situation he would have been in had it never existed. (*In re Robert Morris, Crabbe*, 70.)

If the bankrupt is dead, a supersedeas can have no effect on him or his personal rights; it can only operate on his estate for the benefit of his representatives. Their right does not descend from him, but is cast upon them by law by an event which, occurring after his death, vests no rights or interests in him. The right arises by and from the supersedeas, and has no existence before or without it. (*In re Robert Morris, Crabbe*, 70.)

The possibility of regaining the property by a supersedeas does not give the bankrupt any right or interest in it which he can transmit to another either by an assignment or a devise. (*In re Robert Morris, Crabbe*, 70.)

### Intervention by other Creditors.

The application of a creditor to have the debtor declared a bankrupt inures to the benefit of all the creditors, any of whom may come in and prosecute the application if he thinks proper. (*In re Freedley & Wood, Crabbe*, 544; *in re R. & L. Calendar*, 1 N. Y. Leg. Obs. 200; s. c. 5 Law Rep. 125.)

Other creditors may intervene at any time when necessary for the purpose of preserving and protecting their interests in the estate of the debtor. They may therefore intervene before the return day, and resist a motion made by the debtor for a dismissal of the proceedings upon the consent of the petitioning creditor. (*In re Mendenhall*, 9 B. R. 380; s. c. 6 C. L. N. 192.)

The statute contemplates two possible exigencies; one that the petitioning creditor abandoning the proceedings may not appear; the other that the peti-

tioning creditor may not proceed with the petition. In either event any other creditor may intervene, and, on his application, the court may proceed to an adjudication. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322; *in re William Buchanan*, 10 B. R. 97.)

If any other creditor wishes to have himself substituted in place of the petitioning creditor, he ought to appear on the return day, or adjourned day, and present his petition, if the petitioning creditor does not appear and proceed. If no other creditors appear upon that day, the petitioning creditor may have his petition dismissed, without giving notice of such dismissal to other creditors, and the order of discontinuance will not, in such case, be set aside. The order of dismissal may be made by the court on application of the petitioning creditor. (*In re Camden Rolling Mill Co.* 3 B. R. 590; s. c. 2 L. T. B. 112; *in re Freedley & Wood, Crabbe*, 544.)

The adjourned day on which another creditor may appear and prosecute is any day to which the proceedings on the order to show cause may be adjourned for the purpose of inquiring into the allegations of the acts of bankruptcy. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

The purpose of the statute is that if the petitioning creditor does not appear and prosecute his petition to an adjudication, another creditor may do so while the proceedings are pending; that is to say, on the return day of the order to show cause, or on any day to which the proceedings may be adjourned for showing cause. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

Whether the party filing a supplemental petition is a creditor is a question for the court and not for the jury, and must be established before the debtor can be required to try the questions presented by a denial of the acts of bankruptcy. (*Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142; *in re Richard J. Mendenhall*, 9 B. R. 497.)

The intervening petition may be filed even after the filing of the petition for leave to discontinue the proceedings. (*In re William Buchanan*, 10 B. R. 97.)

Where other creditors have filed supplemental petitions, they have a right on the return day to insist on a trial, though the original petitioners consent to a continuance of the case. (*Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142.)

When the creditor intervenes, he should be allowed to prosecute the original petition in the same manner as the petitioning creditor could have done. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

It is not in the power of the petitioning creditor or of the bankrupt, by any arrangement between them, to cut off or defeat this right of intervention, and any action of the court which prevents or defeats such right is in violation of the statute. (*In re Lacey, Downs & Co.* 10 B. R. 477; s. c. 12 Blatch. 322.)

If other creditors intervene and resist the motion, the petitioning creditor will not be allowed to dismiss the proceedings, although his debt and all of the costs have been paid. (*In re Mendenhall*, 9 B. R. 380; s. c. 6 C. L. N. 192; *in re R. & L. Calendar*, 1 N. Y. Leg. Obs. 200; s. c. 5 Law Rep. 125.)

The application should be made on the return or adjourned day, because the debtor is then in court, advised of the proceedings against him. If a creditor allows that time to pass, he can no longer rely upon the existing petition as his basis of action, but must begin anew and bring the debtor into court upon his own motion and proceedings. (*In re Olmstead*, 4 B. R. 240; *in re Freedley & Wood, Crabbe*, 544.)

### Malicious Prosecution.

In order to recover in an action for maliciously instituting proceedings in bank-



ruptcy, the debtor must show not merely a wrongful prosecution of the proceedings, but a want of probable cause. (*Sonneborn v. Stewart*, 2 Woods, 599.)

In order to justify a party in instituting proceedings in bankruptcy, he must have a legal debt or demand. If he is an actual creditor, he can defend himself from the charge of maliciously instituting the proceedings, by showing that he had probable cause to believe that the debtor had committed an act of bankruptcy. But if he had no legal debt or demand, then he had no right to institute the proceedings, whether he had such probable cause or not. He can not allege that, though he had not a legal debt or demand, yet he had probable cause to believe he had such a demand. He took on himself the risk of having such a demand. (*Sonneborn v. Stewart*, 2 Woods, 599.)

If it is shown by judicial determination that a party had no legal debt or claim, he can not, in an action for maliciously instituting proceedings in bankruptcy, show that he had probable cause to believe that an act of bankruptcy had been committed, but is liable for the damages sustained thereby. (*Sonneborn v. Stewart*, 2 Woods, 599.)

If a party had reason to believe that he had a legal debt or claim, and had probable cause to believe that the alleged debtor had committed an act of bankruptcy, he can not be charged with actual malice. (*Sonneborn v. Stewart*, 2 Woods, 599.)

A decision to the effect that a certain act is an act of bankruptcy, is sufficient to protect a person from a charge of actual malice in reposing on its authority, although it has since been modified. (*Sonneborn v. Stewart*, 2 Woods, 599.)

In order to recover exemplary damages, the debtor must show that the creditor was guilty of actual malice, in other words that he willfully instituted and carried on the proceedings when he knew that there was no ground therefor. (*Sonneborn v. Stewart*, 2 Woods, 599.)

SEC. 5027.—[This section is repealed by act of 22 June, 1874, ch. 390, § 14, 18 Stat. 182.]

SEC. 5028.—If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

Statute Revised—March 2, 1867, ch. 176, § 42, 14 Stat. 537. Prior Statute—April 4, 1800, ch. 19, § 5, 2 Stat. 23.

There is never any propriety in delaying the issuing of the warrant after an adjudication in an involuntary case. On the contrary, it ought to be and can be issued forthwith, as the statute requires, so that the property of the bankrupt may be forthwith taken possession of by the marshal, as the messenger of the court. (*In re Howes & Macy*, 9 B. R. 423; s. c. 7 Ben. 102.)

A day for the first meeting of creditors can be named in the warrant, although the schedule of creditors has not been prepared. The day must be not less than ten nor more than ninety days after the issuing of the warrant. (*In re Howes & Macy*, 9 B. R. 423; s. c. 7 Ben. 102.)

SEC. 5029.—The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to

those hereinafter \* provided for the taking possession, assignment, and distribution of the property of the debtor, upon his own petition.

Statute Revised—March 2, 1867, ch. 176, § 42, 14 Stat. 537. Prior Statute—April 4, 1800, ch. 19, § 6, 2 Stat. 23.

There is no such a thing as a surrender in involuntary bankruptcy. There is a seizure of property. An adjudication in involuntary bankruptcy, even though uncontested, does not make the debtor a voluntary bankrupt or give him the privilege of making, or the register the power of accepting, the surrender which only a voluntary bankrupt can make. Nor can it make any difference, that after an uncontested adjudication in an involuntary case, the bankrupt desires to make a surrender. The machinery of an involuntary case having been set in motion, the case must proceed as an involuntary case. The court has no discretion to vary the mode of procedure, or to substitute the register for the marshal, as the officer to act. (*In re Howes & Macy*, 9 B. R. 433; s. c. 7 Ben. 102.)

An order may be passed allowing the debtor to sell his property at retail, and pay the proceeds to the messenger daily. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

If the marshal under the warrant takes property out of the possession of a receiver appointed by a State court, he must return it. (*In re Glenham Manuf. Co.* 1 Cent. L. J. 100.)

SEC. 5030.—The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five, after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory † and valuation of his estate in the form, and verified in the manner required of a petitioning debtor.

Statutes Revised—March 2, 1867, ch. 176, § 42, 14 Stat. 537; July 27, 1868, ch. 258, § 2, 15 Stat. 228.

\* SEC. 5031.—If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause: and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

Statute Revised—March 2, 1867, ch. 176, § 42, 14 Stat. 537.

The service of the order of adjudication is a necessary incident to the duty of serving the warrant, although it is not embraced within the command of the writ. The service by publication is mainly a right or privilege personal to the bankrupt, and the delay in such service should not retard the general course of proceedings. The return of the service of the order may be made wholly on the warrant or separately on the warrant and order, but the latter course is preferable. (*In re Kennedy et al.* 7 B. R. 337.)

\* So amended by act of 18 February, 1875, ch. 80, 18 Stat. 320.

† So amended by act of 22 June, 1874, ch. 390, § 15, 18 Stat. 182.

## CHAPTER FOUR.

### PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

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SEC. 5032.—The notice to creditors under warrant shall state:  
First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Statute Revised—March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute—April 4, 1800, ch. 19, § 6, 2 Stat. 23.

The fixing of the time for the first meeting of creditors is a matter in the discretion of the register. (*In re Heyes*, 1 B. R. 21; s. c. 1 Ben. 333; s. c. 36 How. Pr. 249.)

Where, after the issuing of the warrant, an amendment is made adding the names of a large number of creditors, a new warrant should be issued, to be served on all the creditors of the bankrupt. This warrant should briefly recite the proceedings that gave rise to the new warrant, and embrace the names contained in the original warrant, as well as those added by the amendment. If the newspaper notices have been properly given under the original warrant, they need not be repeated. (*In re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; *in re Ratcliffe*, 1 B. R. 400; *in re Morgenthal*, 1 B. R. 402; *in re Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

SEC. 5033.—At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

Statute Revised—March 2, 1867, ch. 176, § 12, 14 Stat. 522.

The marshal's return is only *prima facie* evidence of the matters set forth therein. The notice required by the warrant must be given, and until due notice has been given, an assignee can not be chosen or appointed. If by the return it appears that due notice has been given, the proceedings go on. If by the return it appears that due notice has not been given, the meeting is adjourned. But the return is not conclusive. For if, although the return states the due giving of the notice, it satisfactorily appears that due notice has not been given, the meeting must be adjourned. If, however, the return shows that due notice has been given, and there is no satisfactory evidence *aliunde* that due notice has not been given, the return is *prima facie* evidence of the due giving of notice, and is conclusive until rebutted; and is sufficient authority for the register to proceed and cause an assignee to be chosen or appointed. (*In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; *in re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381; *in re Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

When the papers in the case show that notices of the issuing of the warrant and of the first meeting of creditors were duly published, and that a like notice, containing the name of a particular creditor as creditor, and a statement of his residence, and of the amount of his debt, and the other matters required, was duly served by mail upon him, the fact that he did not receive it, will not affect the regularity of the proceedings. (*In re Stetson*, 3 B. R. 726; s. c. 4 Ben. 127.)

The word "given," wherever used in this section, means published as well as served. To make the proceedings regular, the publication must be completed, and the notices served before the commencement of the period of ten days immediately preceding the return day of the warrant. (*In re Devlin & Hagan*, 1 B. R. 35; s. c. 1 Ben. 385; s. c. 1 L. T. B. 32; *in re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.)

A return by the marshal, in a case of involuntary bankruptcy, that he has sent written or printed notices to the creditors named on the schedules and herewith returned, which schedules were made up by him on the best information he could obtain in respect thereto, is sufficient, although it does not state the sources of the information, or that the bankrupt has furnished schedules or refused to furnish them, or that proceedings have been taken ineffectually to compel him to furnish them. (*In re James M. Adams*, 5 Ben. 544.)

A return that the marshal has sent the notices to the creditors on the schedule handed to him by the attorney for the petitioning creditor, is insufficient. (*In re Josiah Ferris, Jr.* 6 Ben. 473.)

A notice addressed to "Levley, New York," can not be presumed to have reached Lawrence J. Levy, although he resides and does business in New York. The two names are not *idem sonans*, and can not, by any stretch of construction, be held to be the same in any respect whatsoever. (*In re Wm. Archenbraun*, 11 B. R. 149; s. c. 7 C. L. N. 99.)

The new notice need only be given to remedy the defects or irregularities in the first notice. If the defect occurs in the publication, the service on the creditors being regular, a new notice must be published, but no new notices need be served on the creditors. If the defect occurs in the service of the notice on the creditors, the publication being regular, a new notice must be served on the creditors, but no new notice need be published. (*In re Devlin & Hagan*, 1 B. R. 35; s. c. 1 Ben. 385; s. c. 1 L. T. B. 32; *in re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381; *in re Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

When, in proceedings in involuntary bankruptcy, proper publication has been made, but no notices have been served upon creditors, because the bankrupt did not have sufficient time to prepare his schedules, the proper course is to adjourn the meeting to a day certain, and to direct the giving for the adjourned day of a new notice in respect of the serving by mail or personally, but not in respect of the publication. When there is no adjournment in a case where the service of the warrant is defective, the proceedings fall through, and there must be a new warrant. (*In re Schepeler et al.* 3 B. R. 170; s. c. 3 Ben. 346.)

A notice not addressed to the creditor by his name does not amount to a notice. The only way in which to cure such an error is by issuing and serving a new and correct notice, unless the creditor will voluntarily appear and waive notice, which waiver will, of course, bind him. (Anon. 1 B. R. 123.)

All proceedings founded upon a defective notice are irregular, and must be set aside. (*In re Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

SEC. 5034.—The creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails, within five days, to express in writing his acceptance of the trust,

the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Statute Revised.—March 2, 1867, ch. 176, § 13, 14 Stat. 522.

### Choice of Assignee by Creditors.

The meeting should be organized at the hour designated in the notice, or as soon thereafter as practicable, and should be kept open until a choice of assignee is made, or it is ascertained that no choice can be made. Where the creditors are so numerous that it is impossible to take the proofs of all the debts on the day designated in the warrant, the meeting may be adjourned from day to day, so as to furnish a proper opportunity to all creditors to prove their debts, and thus qualify themselves to join in selecting an assignee. The several adjournments will constitute but one meeting, and will affect the proceedings in no other way than would a necessary postponement of business from one to another hour in the same day. See Rule VI. (*In re Phelps, Caldwell & Co.* 1 B. R. 525; s. c. 2 L. T. B. 25; *in re C. H. Norton*, 6 B. R. 297.)

No particular mode or manner of voting is prescribed by the act. It may be assumed, therefore, that any mode or manner of voting, by which the choice of each creditor entitled to vote is clearly expressed, is sufficient. It may, no doubt, be taken by ballot or *viva voce*. It may be taken by calling the name of each creditor, or by calling upon the person or persons representing creditors by power of attorney, to name the choice of the creditor or creditors represented by him. The latter mode can not be recommended as the most approved mode, but can hardly be said to be incompetent or irregular, so long as it clearly appears expressed. (*In re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376.)

The register should not in any manner interfere with or influence, either directly or indirectly, the choosing of an assignee by the creditors. His action should in all things be that of strict impartiality, not only in fact, but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person or assignee. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 118.)

No creditor has any right to be heard, either in person or by attorney, upon any part of the proceedings until he has proved his claim. (*In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; *in re Altenhaim*, 1 B. R. 85; s. c. 1 Ben. 431; *in re Brisco*, 3 B. R. 226; *in re Decatur Jones*, 2 B. R. 59; *in re Phelps, Caldwell & Co.* 1 B. R. 525; s. c. 2 L. T. B. 25.)

Votes can not be objected to on the ground that they have been influenced and procured by the bankrupt in his own interest. (*In re Noble*, 3 B. R. 96; s. c. 3 Ben. 332.)

The register has no power, without a special order of court, to inquire into the rights of creditors to vote, save for the purpose of postponing the proof of claims until an assignee is chosen pursuant to the provisions of section 5082. (*In re Noble*, 3 B. R. 96; s. c. 3 Ben. 332; *in re Herman et al.* 3 B. R. 618; s. c. 4 Ben. 126.)

When objections are made to the claim of a creditor, the register should listen to them, and if a *prima facie* case is made out, should postpone the proof of the claim till the assignee is chosen. (*In re Herman et al.* 3 B. R. 618; s. c. 4 Ben. 126; *in re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376.)

A claim may be postponed where the doubts are whether the claim is valid, in view of the receipt of a preference contrary to the provisions of the act by the

creditor. The register ought to exclude from voting for an assignee all persons who appear to him, on proof, to be inhibited from proving their debts on this account. He may do so by postponing the proof of such claims until after the election or appointment of an assignee, although the depositions for the proof of such claim have been produced to and filed with him. Taking property on attachment or execution is receiving a preference. Merely obtaining a judgment is not. (*In re Ezra M. Stevens*, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.)

If the objection to the right of a creditor who has made the proper formal proof of his debt to vote, rests on the sole ground that he has security for the debt upon the bankrupt's property, the better, if not the only proper mode of presenting the question, is to move to expunge the proof. (*In re Jaycox & Green*, 7 B. R. 803.)

A vote may be taken for assignee while a contest is pending over the postponement of the proof of claims. The bankrupt act nowhere directs, nor does it seem to contemplate, a postponement of the vote for assignee, where some creditors have proven their debts, in order to enable others to do so. On the contrary, it seems to contemplate the utmost practical expedition in choosing the assignee, and for a very good reason, because until there is an assignee, there is no one to represent, or whose official duty is to look after, the interests of the estate. The creditors who have proved their claim and are entitled to vote for assignee, may, no doubt, consent, if they see fit to wait for others to prove, before proceeding to choose the assignee. It is, however, optional with them. But even this power should be exercised sparingly, and the vote ought always to be taken at the earliest practical moment. (*In re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376; *in re Northern Iron Co.* 14 B. R. 856.)

In any case where a creditor, whose proof of claims has been postponed by the register, is dissatisfied with the result of the vote for assignee, and considers the postponement of his claim erroneous, such creditor may have the proceedings certified to the court, and if the postponement appears to have been erroneous, the court may set aside the result of the vote, and refer the matter back for a new vote, unless it appears to a reasonable certainty that the result would not be changed by another vote. The postponement of the proof of the claim affects no right of a creditor, except a right to vote for assignee, and where it appears that the exercise of such right would be barren of results, it would be useless to delay the proceedings in order to afford such creditor the opportunity to exercise such right. (*In re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376.)

If debts are objected to, and the register considers them clearly valid and admissible, yet he can not admit them to proof against objection. In such an event the court must be applied to if the objections are not withdrawn. The register has no power to proceed to a choice of assignee without the votes of all the creditors who wish to vote, if their votes can influence the result, unless the register himself considers the claims doubtful. He can not postpone them merely because they are objected to. (*In re Bartusch*, 9 B. R. 578.)

A creditor who makes proof of his debt in due form, but retains the deposition in his own possession, is not a creditor who has proved his debt, within the technical meaning of those terms as used in the bankrupt act. (*In re Shepard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484; *contra*, *King v. Bowman*, 24 La. An. 506.)

A creditor holding security can not vote for an assignee. (*In re Davis & Son*, 1 B. R. 120; s. c. 7 A. L. Reg. 80; *in re Walton et al.* 1 Deady, 442; *in re S. Hanna*, 7 B. R. 502; s. c. 5 Ben. 5; *in re J. F. & C. R. Parkes*, 10 B. R. 82; *contra*, *in re Bolton*, 1 B. R. 370; s. c. 2 Ben. 189.)

A secured creditor who seeks to prove his debt before the choice of an assignee, must abandon his security: whereas, if he seeks to prove his debt after the choice of an assignee, he is permitted to do so when he has complied with

the terms of section 5075. As he has security, the policy of the act is to leave his rights to be settled after there is an assignee to contest his claims to the property, and protect the estate. (*In re High et al.* 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.)

But the security must be upon the property of the bankrupt; otherwise he may prove the full amount of his claim, and vote. (*In re Cram*, 1 B. R. 504; s. c. 1 L. T. B. 65.)

A creditor who holds a mortgage upon the homestead of the bankrupt, has the right to prove his demand and vote. (*In re J. R. Stillwell*, 7 B. R. 226; s. c. 11 A. L. Reg. 706; *in re Tertelling*, 2 Dillon, 342, note.)

Where a creditor has two claims, one of which is unsecured and the other secured, he may prove the former and vote. (*In re J. F. & C. R. Parkes*, 10 B. R. 82.)

An officer of a bankrupt corporation, if he is a creditor, has just as much right to vote for an assignee as any other creditor. (*In re Northern Iron Co.* 14 B. R. 356.)

Agents and attorneys at law can not vote without producing letters of attorney. The party who is entitled to vote for another must be his duly appointed attorney in fact. (*In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19; *in re Knoepfel*, 1 B. R. 23; s. c. 1 Ben. 330.)

A partner may cast the whole vote of his firm, but, in estimating the number of votes, the firm vote will only count as one vote. One of several joint creditors, not partners, can not act or vote without the consent of the others. (*In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19.)

Where the bankrupt petitions alone, the creditors of a firm of which he was a member can not vote. (*In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19.)

There is no such thing known to the law as an informal vote. An expression of opinion *viva voce* by the creditors as to their preference is a vote. (*In re Pearson*, 2 B. R. 477.)

When a creditor sells or assigns his debt after it has been proved, he has no further business in court, although the proceedings must be carried on in his name. The actual owner and assignee must control the debt, vote upon it and receive the dividend. Where several claims have been assigned to one person, he has but one vote. (*In re Frank*, 5 B. R. 194; s. c. 5 Ben 164; s. c. 2 L. T. B. 188.)

Form No. 15 contemplates that each creditor shall vote, and that his name, residence, and amount of debt shall be recorded. If, on the first vote, no choice be made, by reason of a greater part in number and value failing to concur, a second, third, or any number of ballots may be had, until the required concurrence be obtained. If the creditors can not agree upon the first day of the meeting, they may adjourn to another day. If no such concurrence is obtained, and the meeting adjourns *sine die*, the contingency happens which authorizes the judge, or if there be no opposing interest, the register to appoint an assignee. (*In re Phelps, Caldwell & Co.* 1 B. R. 525; s. c. 2 L. T. B. 25.)

The duty of preparing the memorandum for the signatures of the creditors devolves on the register. The recital it contains as to notice must be within his knowledge, derived from the files in the office. In it must be stated the name of the assignee chosen or nominated, and to ascertain this the usual practice is to take a *viva voce* vote of the creditors, and when the required concurrence appears to prepare the memorandum for the signatures of the electing creditors. This memorandum constitutes the evidence of the election of an assignee. Unless it bears the signatures of a majority in number and value of the creditors who have proved their claims, there is no authentic evidence of an election, and the register must certify a failure to make choice by the creditors. (*In re Pfromm*, 8 B. R. 357.)



A creditor who has given a *viva voce* vote in favor of a party may refuse to sign the memorandum, for he has the right to change his vote at any period during the progress of the election. (*In re Pfromm*, 8 B. R. 357.)

No creditor can change his vote after a final adjournment. (*In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

Proofs which are filed after a vote is taken, can not be allowed to come in and change the result. (*In re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376.)

The choice is to be made by the greater part in value and number of those who have proved their debts, and not the greater part, &c., of those present and voting. Such is the plain import of the statute. If the greater part in number and value of those who have proved their debts do not appear and vote for the same person, then there is a failure on the part of the creditors to make a choice. (*In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261; *in re Pearson*, 2 B. R. 477.)

Where, at the first meeting of the creditors, only one creditor appears and proves his debt, and there are no other debts proven, the right to choose an assignee belongs to the sole creditor who has proved his claim. (*In re Haynes*, 2 B. R. 227; s. c. 1 L. T. B. 121.)

It is the policy of the bankrupt act to give the creditors of the bankrupt the choice, in the first instance, of the person who is to take assets and manage them. It is only when the creditors fail to elect, that the register or judge can appoint an assignee. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

Where, after the issuing of the warrant, an amendment is made, adding the names of a large number of creditors, and a new warrant has been issued, the creditors, if they deem it expedient, may, on the return day of the second warrant, elect an assignee, and take steps to remove any assignee that may have been elected or appointed in the proceedings under the first warrant. (*In re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; *in re Ratcliffe*, 1 B. R. 400; *in re Morgenthal*, 1 B. R. 402.)

When the name of only one creditor is added by an amendment, after the meeting has been held, it is not necessary or proper that a new meeting of the creditors to choose an assignee should be held. The creditor should be formally informed of the existence and condition of the suit, and notified to prove his claim if he so desires. (*In re Carson*, 5 B. R. 290; s. c. 5 Ben. 277; s. c. 2 L. T. B. 194.)

### **Appointment of Assignee by the Register or the Court.**

The opposing interest which precludes the register from appointing an assignee is not merely an interest contending by vote, but an interest in opposition to the exercise of the power of appointment by the register. (*In re George Jackson et al.* 14 B. R. 449.)

Where there is a failure on the part of the creditors assembled at a meeting to choose an assignee, the register should state to them that the duty of appointing an assignee devolves upon the register, unless there is an opposing interest; and that any creditor has the right to object to the register's making the appointment. (*In re Pearson*, 2 B. R. 477.)

When the register announces that he has the right to appoint an assignee, unless there is an opposing interest, distinct disclosure should be made if there is any opposing interest. (*In re George Jackson et al.* 14 B. R. 449.)

The appointment by the register is irregular where there is an opposing interest. (*In re Pearson*, 2 B. R. 477; *in re C. H. Norton*, 6 B. R. 297.)

There can be only one first meeting, and all adjournments are but a continuance of the same, and if there is any opposition or opposing interest to an assignee at any stage of such first meeting, such opposition is to be considered as continuing until the termination of such first meeting, whether upon the day first appointed or any other day to which such meeting may be continued, unless it affirmatively appears that such opposition has been withdrawn. (*In re C. H. Norton*, 6 B. R. 297.)

If the register attends at the time and place specified in the warrant and notice for the first meeting of creditors, and no creditor appears, or is represented, the meeting is held within the provisions of the act as fully and effectually as if creditors had appeared or been represented at the meeting, and the contingency happens which the section speaks of, namely, that no choice of assignee has been made by the creditors at the meeting, and the register is authorized to appoint one. (*In re Cogswell*, 1 B. R. 62; s. c. 1 Ben. 388.)

An assignee should be appointed, even though no debts have been proved. (*In re Cogswell*, 1 B. R. 62; s. c. 1 Ben. 388; *in re Anon.* 1 B. R. 123.)

An assignee should be appointed, even though there are no apparent assets, for he is designed by the statute to act as a trustee on behalf of the creditors, and it is his duty to search out and collect every species of property belonging to the bankrupt. (*In re Alexander Graves*, 1 N. Y. Leg. Obs. 213; s. c. 5 Law Rep. 25.)

If the resolution to appoint a trustee is not confirmed by the court, and the first meeting has been adjourned without the election of an assignee, the court may appoint an assignee. (*In re Stuyvesant Bank*, 6 B. R. 272.)

A general order appointing a person assignee in a class of many cases, is invalid unless it enumerates the particular cases in which the person is intended to be appointed. (*In re William Major*, 14 B. R. 71.)

A general order appointing an assignee will not be recognized as valid in any case unless the assignee qualifies specially in such case. (*In re Wm. Major*, 14 B. R. 71.)

### Approval of the Assignee by the Judge.

The creditors are alone interested in the distribution of the estate, and it is to be supposed that creditors having pecuniary interests will carefully canvass and inquire into the qualifications of the assignee to whom they recommend the estate to be intrusted. They are supposed to be commercial men, intimately acquainted with the affairs of the bankrupt and the qualifications essential and proper to fit a man to act as their trustee, and unless good and strong reasons are presented to the court, the opinion of the creditors, representing a large majority in amount and number of the parties interested, is entitled to great weight in determining who is the proper person to administer the estate in which they are interested. The discretion vested in the court of approving or disapproving of an assignee, is a legal discretion—one that must be controlled, not by caprice, prejudice, partiality, likes or dislikes, or any other reason than a due regard to the fitness of the proposed assignee for the position. (*In re Funkenstein & Co.* 1 Pac. L. R. 11.)

When the register is satisfied that any reasons exist why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons freely in submitting the question of approval. (*In re Bliss*, 1 B. R. 78; s. c. 1 Ben. 307; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

Appointments made by registers, as well as selections made by creditors, are in all cases subject to the approval of the judge. In other words, until the judge has approved the selection, no one should enter upon the duties of assignee. If the judge disapproves, the election or appointment fails. The register has no power to approve, nor is his appointment more than the designation

to the judge of a suitable person for the trust. (*In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

When there is no imputation upon the competency or character of an assignee duly elected by the creditors, the judge will not withhold his approval. The assignee is entitled to the position by virtue of the law. (*In re John C. Grant*, 2 B. R. 106; *in re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113; *in re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.)

When objection is taken to the approval of an assignee, the burden of proof is upon the objector; but in so delicate a matter, and one in which direct evidence is not always possible, reasonable cause of suspicion may in some cases be sufficient. (*In re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.)

If the judge is advised that in any particular case the bankrupt has brought in one or more of his particular friends, and has by them chosen an assignee, who is also his friend and in his interest, he will withhold his approval. It is certainly against the policy of the bankrupt act that a bankrupt should select his assignee. It is true that if the creditors do not care sufficiently for the matter to attend the meeting, they ought not to complain. But still the law is no less brought into contempt. The discharge of a debtor who does not surrender all his assets is precisely what those charged with the execution of the law are bound to guard against. (*In re Bliss*, 1 B. R. 78; s. c. 1 Ben. 407.)

A person will not be allowed to make a regular business of seeking out creditors of bankrupts, and soliciting them to prove their debts and vote for him as assignee, with a view to such pecuniary emolument as may legitimately belong to the position. Such a course opens the door to abuses. (*In re A. B.* 2 B. R. 308; s. c. 3 Ben. 66.)

It is improper for a party seeking to be assignee to promise to pay the claim of a creditor in full, in order to obtain his vote, and an election so obtained will not be approved. (*In re Haas & Sampson*, 8 B. R. 189.)

Whether there has been such an influence exercised by the assignee or not as to invalidate his election, must be left to depend upon the circumstances of each case. There might be some solicitation on the part of the assignee, which would in no way influence the choice of the creditors. Neither the bankrupt nor his solicitor can make the proceedings in bankruptcy the proceedings of the bankrupt alone. The bankrupt can not be allowed to elect his assignee. Such an assignee might favor the bankrupt at the expense of the creditors' interest. That the assignee is the confidential clerk of the bankrupt's attorney, may be a good reason for withholding the approval of the choice, if objections are made by the creditors before approval; but such objections should be made, if the facts are known to the creditors, immediately after the election. And if, with full knowledge of the facts, the assignee is allowed to go on and exercise his duties, something more ought to be shown—some misconduct, or that the relation existing is in some way prejudicial to the rights or interests of the creditors. If the creditors, without any undue influence, and with knowledge of the facts, choose such an assignee, and the judge approves, without objection, it is too late to object. (*In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.)

Any general bias either for or against the bankrupt, or his dealings, will not disqualify a person of standing and character. In contested cases it would be almost impossible to find any suitable assignee connected in any way with the estate, who had not formed such an impression. The creditors, moreover, retain an important power over the settlement of the estate, and ought to exercise an oversight of the affairs pertaining to it. (*In re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.)

Under certain circumstances, a relative of the bankrupt will not be approved. (*In re Powell*, 2 B. R. 45; *in re Bogert & Ockley*, 3 B. R. 651.)

The director of a corporation to which a judgment was confessed by the bankrupt shortly before the filing of his petition will not be approved. [He comes within the spirit, if not the letter, of the clause which declares that a preferred creditor shall not be eligible as assignee. (*In re Powell*, 2 B. R. 45.)]

The assignee must reside in the judicial district in which the proceedings are pending. (*In re Havens*, 1 B. R. 485.)

Where a person resides out of the district, but has a permanent place of business in the district, he may be appointed assignee in conjunction with another who resides in the district. (*In re Loder et al.* 2 B. R. 515.)

If the assignee does not reside in the same place as the bankrupt, a person residing in that place may be associated with him as co-assignee. (*In re Jacoby*, 1 W. N. 15.)

An attorney for a creditor of the bankrupt may be assignee. Section 5035 declares who shall be ineligible as assignee. There is no other provision in the bankrupt act rendering a person ineligible for this position. (*In re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202; *in re Lawson*, 2 B. R. 396.)

The attorney of the bankrupt may be chosen assignee, but he can not occupy the position of counsel and assignee at the same time. He must withdraw from the former position. (*In re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.)

When an adjudication of bankruptcy is made against the debtor in three different districts, each district should have an assignee within its jurisdictional limits and a resident thereof. (*In re Boston R. R. Co.* 5 B. R. 233.)

A person can not act both as receiver and as assignee, and have his acts authorized by the State court, which appointed him receiver, and by the bankrupt court. This is a position of incompatibility which the bankrupt court can not permit one of its officers to occupy. If he is to be assignee, he must look to the bankrupt court alone as the source of his authority. If he is to hold and administer, as receiver under the State laws, the property which he has received as receiver, he must so administer it, without looking to the bankrupt court for any authority or direction. If he is to administer such property as an assignee, he must so administer it, without looking to the State court, or to any other court but the bankrupt court, for authority or direction. He must, moreover, account for the property received by him, and it is not proper that an assignee be plaintiff, and, as receiver, be defendant in respect to these matters. (*In re Stuyvesant Bank*, 6 B. R. 272.)

Upon the petition of a creditor, an additional assignee may be appointed. (*In re Overton*, 5 B. R. 366.)

An additional assignee will not in general be appointed at the request of the minority, for the statute does not appear to intend a minority representation. The creditors have the right to decide upon the number of assignees as well as to choose them. (*In re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.)

When the judge refuses to approve the choice made by the creditors, he should order a new election. (*In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

The court will not send a case back for a new election when it is not apparent that a different result would or might be thereby attained. (*In re Pfromm*, 8 B. R. 357.)

The court will not set aside an election of an assignee on account of any irregularity in admitting a claim when its exclusion could not affect the result. (*In re George Jackson*, 14 B. R. 449.)

Where a person acts as assignee in a particular case and is so treated by the

register and the judge, he may be deemed the assignee *pro hac vice* as to that particular transaction, although he was never legally appointed and never qualified. (*In re Wm. Major*, 14 B. R. 71.)

The courts uniformly disapprove of the same person acting as attorney for the bankrupt and the assignee, not because the duties always are conflicting and adverse, but because they may be so. The assignee's attorney is a minister of the court, and his duty is to attend to the estate, even to the prejudice of his own claims, and it is considered inconsistent with his duty if he act also as attorney for the bankrupt. (*In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.)

SEC. 5035.—No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

This clause declares who shall be ineligible as assignee. There is no other provision in the act rendering a person ineligible for this position. (*In re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.)

The director of a corporation to which a judgment was confessed by the bankrupt shortly before the filing of his petition, comes within the spirit, if not within the letter, of this clause. (*In re Powell*, 2 B. R. 45.)

SEC. 5036.—The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

Statute Revised—March 2, 1867, ch. 176, § 13, 14 Stat. 522. Prior Statute—August 19, 1841, ch. 9, § 9, 5 Stat. 447.)

When a creditor demands it, an assignee should be required to give bond. (*In re Fernberg*, 2 B. R. 353)

No one but the district judge can require the assignee to execute a bond. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

The assignee should, if required, give a separate and distinct bond for each case in which he is appointed. A general bond, conditioned for the faithful discharge of his duties in all cases in which he may be appointed, is not sufficient. In Texas, a *feme covert* can not be a security. (*In re McFaden*, 3 B. R. 104.)

The register has the power to require the assignee, upon the request of creditors, to give bond, and may take testimony to determine the amount thereof. (*In re Binninger & Clarke*, 9 B. R. 568.)

An order requiring an assignee to give bond must specify the time within which the bond shall be filed, and if it omits to do so, the assignee can not be deemed in default for not filing a bond. (*In re George E. Sands*, 7 Ben. 19.)

SEC. 5037.—Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

A list of the creditors who have proved their claims is an instrument within the meaning of this section, and the assignee may be compelled to furnish it to the bankrupt. (*In re Blaisdell et al.* 6 B. R. 78; s. c. 42 How. Pr. 274; s. c. 5 Ben. 420.)

SEC. 5038.—An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

SEC. 5039.—The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525. Prior Statutes—April 4, 1800, ch. 19, § 8, 2 Stat. 23; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

A motion to remove an assignee can be entertained by the court alone, and not by the register. (*In re Stokes*, 1 B. R. 489; *in re New York Mail Steamship Co.* 2 B. R. 423.)

The removal of an assignee is a matter in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to remove an assignee when cause is shown rendering such removal expedient or necessary. (*In re Blodgett & Sanford*, 5 B. R. 472; *in re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.)

Upon a petition to remove the assignee for misconduct in instituting a suit, the question is not whether the suit was without a proper legal foundation, but whether its prosecution was fraudulent, malicious, or from unjust motive, and not in good faith for the benefit of the general creditors. (*In re Sacchi*, 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250.)

If one creditor becomes the sole creditor by the purchase of all the other claims, a new assignee may, upon the application of the bankrupt and such sole creditor, be substituted for the one originally elected by the creditors. (*In re Sacchi*, 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250.)

An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to exercise due diligence in collecting and disposing of the property of the bankrupt, and in distributing its proceeds among the creditors. If he is guilty of gross and culpable neglect of duty in this respect, he may be removed. (*In re Morse*, 7 B. R. 56.)

When creditors apply to an assignee to ascertain the condition of the estate,

it is his duty to communicate all material facts within his knowledge, and the willful suppression of such facts is a ground for removal. (*In re Perkins*, 8 B. R. 56; s. c. 5 Biss. 254.)

Such removal will be made where there is an irreconcilable disagreement between the assignee and a large portion of the creditors. The assignee is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching the interests of the creditors. The creditors are the beneficiaries of the court, and have a direct pecuniary interest in the bankruptcy proceedings. Courts of equity sometimes decree a substitution of trustees where there has been no fault on the part of the trustee. Substitution has been made where the trustees would not act together. The assignee must be allowed some discretion in the prosecution of suits, and if he believes the expense of a suit to recover property will be greater than the benefit to be derived from the suit, if successful, he ought not to proceed. The court will not constitute itself the legal adviser of the assignee. He has a right to choose his own counsel, and must proceed with his duties according to his best judgment, being held to no more than a just and reasonable accountability. Should the court direct him when to proceed in a suit, it would find that it had practically decided questions *ex parte* which ought to have been decided only on a hearing of both parties interested. (*In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130; *in re Perkins*, 8 B. R. 56; s. c. 5 Biss. 254.)

Erroneous legal advice, where the errors are so gross and frequent as to be evidence of the incompetency of the legal adviser he has chosen, may be cause for ordering the assignee to employ other counsel, but not necessarily for removing the assignee. (*In re Blodgett & Sanford*, 5 B. R. 472.)

After the majority of the creditors have voted to remove an assignee, the court will exercise a judicial discretion in the matter, notwithstanding the action of the creditors. Parties opposed in interest to the official action of an assignee, do not have the power to dictate his conduct, even if they happen to be able to command a majority vote of the creditors themselves. It is not the intention of the law that the majority should have the absolute control over the rights and interests of the minority. (*In re Dewey*, 4 B. R. 412; s. c. Lowell, 493; s. c. 2 L. T. B. 134.)

When an assignee is guilty of misconduct, the register may be directed, under an order of the court, to serve a notice on the assignee to show cause why he should not be removed, and to employ counsel to represent the estate and the creditors. (*In re Price*, 4 B. R. 406.)

When the costs have been necessarily augmented by a charge of fraud against the assignee, they must all be paid out of the estate. He is fully justified in rebutting the charge and vindicating himself, and the estate must bear the costs. (*In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130; *in re Blodgett & Sanford*, 5 B. R. 472.)

When the assignee is removed for misconduct, he might be compelled to pay the costs of the proceedings for his removal. (*In re Morse*, 7 B. R. 56.)

At the meeting held under the second warrant issued in a case where an amendment has been made, after the issuing of the first warrant, adding the names of other creditors, the creditors may choose a new assignee, and apply for the removal of any assignee that may have been elected under the first warrant. Notice of such application should be given to all creditors who have proved their debts. (*In re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; *in re Ratcliffe*, 1 B. R. 400.)

The right of compelling an assignee to account is a necessary incident to the power of removal. (*Lucas v. Morris*, 1 Paine, 396; *in re Comfort Sauds*, 1 U. S. L. J. 15.)

SEC. 5040.—The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust, and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

SEC. 5041.—Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such persons as the court shall direct.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

This clause more properly pertains to a vacancy caused after an assignee has been duly appointed and approved. (*In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

The removal of an assignee from office is necessary before another assignee can be appointed in his place. (*In re George E. Sands*, 7 Ben. 19.)

SEC. 5042.—When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525.

An action by a surety in a custom house bond against the assignee of the principal does not survive against the personal representatives of the assignee. (*Hall v. Cushing*, 8 Mass. 521.)

Prior to the adoption of this provision, it was held that the right to prosecute an action pending at the time of the death of an assignee vested in his personal representatives. (*Richards v. Md. Ins. Co.* 8 Cranch, 84.)

SEC. 5043.—Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

Statute Revised—March 2, 1867, ch. 176, § 18, 14 Stat. 525. Prior Statute—April 4, 1800, ch. 19, § 8, 2 Stat. 23.

SEC. 5044.—As soon as an assignee is appointed, and qualified the judge, or, where there is no opposing interest, the register shall, by an instrument (a) under his hand, assign and convey to



the assignee all the estate, (b) real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne (c) process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes—April 4, 1800, ch. 19, §§ 6, 10, 11, 18, 27, 50, 2 Stat. 23, 24, 26, 28, 34; August 19, 1841, ch. 9, § 3, 5 Stat. 442.)

### Assignment of the Bankrupt Estate.

(a) The register should not make an assignment of the bankrupt's estate until he receives a certificate of the judge's approval of the assignee elected or appointed. (*In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

The adjudication of bankruptcy is an essential prerequisite and precedent condition of the power of the register, to make an assignment. The adjudication is the judicial ascertainment and declaration of the fact that the debtor is legally bankrupt, upon which all the subsequent proceedings are founded. It is the act by which the court takes hold of the subject-matter, applies to its jurisdiction, and gives legal effect to what the statute declares to be an act of bankruptcy. Until that adjudication, the debtor may, in a voluntary case, withdraw his application. (*Wright v. Johnson*, 4 B. R. 627; s. c. 8 Blatch. 150.)

The register should make the assignment when there is no opposing interest, even though the title to the property is in dispute. (*In re Wm. H. Wylie*, 2 B. R. 137.)

The assignment should be handed to the clerk and recorded, and should then be delivered to the assignee. (*In re A. Alexander*, 3 B. R. quarto, 20; s. c. 2 L. T. B. 137.)

The assignment when made by a register, should be under the hand of the register and the seal of the court. The State laws in regard to the acknowledgment of deeds need not be complied with. The only system of bankrupt laws which Congress has the power to pass is a uniform one—one which requires the same acts and the same duties from the officers appointed to execute the law in all the States, and producing the same general results in all the States, without regard to the important differences existing in the laws of the different States. If, in preparing and passing the present system of bankrupt laws, Congress had omitted to make any provision in regard to executing and registering the conveyances or assignments required, then the State laws would have to be conformed to. The act prescribes the forms to be observed in preparing and executing an assignment. Registers of deeds must record the same upon a certificate of the clerk of the district court that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that the same shall be recorded, and a tender to them of the fees allowed to them for such service by the laws of the State. (*In re Neale*, 3 B. R. 177; s. c. 1 L. T. B. 295; *contra*, *Zeigler v. Shomo*, 78 Penn. 357.)

Although the act prescribes that as soon as the assignee is appointed and qualified, the judge or register shall, by an instrument under his hand, assign and convey all the estate, real and personal, of the bankrupt, yet this provision must be regarded as directory, and not essential to the assignment where some equally formal mode has been adopted, sanctioned by the seal of the court, which

imparts verity and gives authenticity to all judicial acts of the judge. (*Zantzein-gar v. Ribble*, 4 B. R. 724; s. c. 36 Md. 32.)

The language of the statute will not be controlled or modified by any inadvertence or mistake on the part of the register in stating the time from which the assignment operates. (*In re Wm. H. Pierson*, 10 B. R. 107.)

### Rights of the Bankrupt.

Until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property remains in the bankrupt. (*Hampton v. Rouse*, 11 B. R. 472; s. c. 22 Wall. 263.)

The bankrupt has the right, prior to the appointment of an assignee, to offer to redeem property sold for taxes. (*Hampton v. Rouse*, 11 B. R. 472; s. c. 22 Wall. 263.)

Under the act of 1841, the decisions were conflicting as to whether the title of the assignee related back farther than the decree. (*Berthelon v. Betts*, 4 Hill, 577; *in re John Ziegenfuss*, 2 Ired. 463; *Miller v. Black*, 1 Penn. 420; *Smith v. —*, 4 Edw. Ch. 653; *Spaulding v. Dixon*, 21 Vt. 45; *in re Anon.* 1 Penn. L. J. 323; *in re Bennet*, 1 Penn. L. J. 145; *in re Dudley*, 1 Penn. L. J. 302; *vide in re Mellor & Co.* 1 Penn. L. J. 135; *McLean v. Rockey*, 3 McLean, 235; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151; *in re Newhall*, 2 Story, 360; *in re W. C. H. Waddell*, 1 N. Y. Leg. Obs. 53; *in re Samuel Harris*, 3 N. Y. Leg. Obs. 152; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; *in re Elam Rust*, 1 N. Y. Leg. Obs. 326.)

The intent and purport of this provision is that the property which was the property of the bankrupt at the time of the filing of the petition in bankruptcy, and no other property, shall vest in the assignee. Property acquired by the bankrupt after the petition is filed belongs to the bankrupt alone. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; *in re Barnett*, 16 Pitts. L. J. 73; *in re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re Rosenfield*, 1 B. R. 319; s. c. 1 L. T. B. 81; *Rugely v. Robinson*, 19 Ala. 404; *Bond v. Baldwin*, 9 Geo. 9; *Deadrick v. Armour*, 10 Humph. 588.)

A debtor has no right to reserve from his estate a sum of money sufficient to meet the expenses of procuring his discharge. (*In re James Thompson*, 13 B. R. 300.)

If the debtor does not set up the bar of the limitation, the bankrupt can not claim the money after a recovery on the ground that it did not belong to the assignee. (*Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. [N. S.] 21.)

The earnings and acquisitions of the bankrupt subsequent to the commencement of the proceedings are his own, subject to his eventual discharge. If he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. (*Mays v. Manufacturers' National Bank*, 4 B. R. 446; s. c. 4 B. R. 660; s. c. 64 Penn. 74.)

When the contract of an attorney is that of an ordinary retainer to conduct a cause, he is entitled to be paid for his services as he renders them. For the services rendered before the filing of his petition he had a claim upon his clients, and that passes to his assignee, but for the value of services subsequently rendered in the cause, he is entitled to retain the compensation. (*In re Jones*, 4 B. R. 347.)

If the stock has not been transferred on the books of the corporation, the bankrupt, with the consent of the assignee, may vote thereon at a meeting of stockholders. (*State v. Ferris*, 42 Conn. 560.)

If the bankrupt's wife takes out a policy of insurance upon her life, payable upon her death to her husband, paying one premium out of her separate estate before the commencement of proceedings in bankruptcy, and others afterwards,

without a claim to the policy being made by the assignee, the money upon her death belongs to her husband, and not to his assignee. (*In re Owin & Murrin*, 8 B. R. 6; s. c. 2 Dillon, 120.)

The moment the petition is filed, the bankrupt is civilly dead. During the interval existing between the filing of the petition and the appointment of the assignee, a condition of things exists not unlike that in the case of a person dying intestate and before the appointment of an administrator. On the death of a person intestate, no one is authorized to dispose of or assign his assets. A bankrupt is *civiliter mortuus* from the day on which he files his petition, and during the interval between the filing of his petition and the appointment of the assignee no assignment of his assets can be made. (*Johnson v. Geisritter*, 26 Ark. 44; *Barron v. Newberry*, 1 Biss. 149.)

The expression that a bankrupt is *civiliter mortuus* means that he is dead only as to the control of his old property and contracts. His assignee stands like an administrator in respect to these. But the bankrupt is still alive for other purposes in law, as he is in fact. He is alive to acquire new property, to do and to receive wrong, to commit trespasses or crimes, and to be prosecuted for either, and to prosecute for either when committed on himself. (*Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.)

The bankrupt may, after the commencement of the proceedings in bankruptcy, enter into business and hold property, subject to the contingency of obtaining a discharge. (*In re Benjamin B. Grant*, 2 Story, 312.)

An agreement signed by the bankrupt after the commencement of proceedings in bankruptcy is a nullity so far as the estate is concerned. (*In re Geo. W. Anderson*, 9 B. R. 360.)

By the bankrupt act the records of the court in bankruptcy are always open for inspection, and it is not until the petition is filed in court that the statute declares that the property shall be divested. The fact is, therefore, within the means of knowledge of any one dealing with another, if he will take the trouble to consult the records of the court. It is a record of the same public nature as the registry of deeds. The record of a deed is legal notice to all parties interested, and, in the same manner, Congress has enacted that the filing of the petition in court shall be conclusive upon the rights of all parties, and from that time the bankrupt shall have no control or disposition of the property formerly belonging to him. Any subsequent conveyance or transfer by him is a nullity, and absolutely void as against the assignee. This assignment is subsequently executed, but its effect must depend entirely on the language of the act, and it is expressly enacted that the assignment, when made, shall relate back to the commencement of the proceedings, which is declared to be the filing of the petition. Parties must, in law, be deemed to have constructive notice of the filing of the petition, and of its effects under the operation of the bankrupt law. (*In re Gregg*, 3 B. R. 529; s. c. 1 L. T. B. 298; *Mays v. Manufacturers' National Bank*, 4 B. R. 446; s. c. 4 B. R. 660; s. c. 64 Penn. 74; *in re J. J. Lake*, 6 B. R. 512; s. c. 3 Biss. 204; *Perley v. Dole*, 38 Me. 558; *Oakey v. Corry*, 10 La. An. 502.)

If the notice that a warrant has been issued, and that the payment of any debts to the bankrupt is forbidden by law, is published, as required by the act, it is binding upon all persons, whether they have or have not actual knowledge thereof, and any subsequent payment to the bankrupt will not discharge the debt, nor afford any greater protection than if it had been made to any other person not authorized to receive it as against the assignee. (*Stevens v. Mechanics' Savings Bank*, 101 Mass. 109.)

When the debtor of a bankrupt, in good faith and without knowledge or notice of the proceedings in bankruptcy, pays him a debt after the commencement of such proceedings, he can be compelled to pay it over again to the as-

signee. (*Mays v. Manufacturers' National Bank*, 4 B. R. 446; s. c. 4 B. R. 660; s. c. 64 Penn. 74.)

The burden of proving that the property did belong to the bankrupt prior to the filing of the petition rests upon the assignee. (*Mays v. Manufacturers' National Bank*, 4 B. R. 446; s. c. 4 B. R. 660; s. c. 64 Penn. 74.)

A purchaser of negotiable paper, who is domiciled in the district where the proceedings in bankruptcy are pending, is concluded by the notice given to him by the records of the bankrupt court, and can not claim to be an innocent purchaser. (*In re J. J. Lake*, 7 B. R. 542; s. c. 3 Biss. 204.)

If the sheriff, after the commencement of proceedings in bankruptcy, levies an execution upon and sells the bankrupt's property, he is liable to the assignee, although he pays the proceeds of the sale to the execution creditor before he receives actual notice of the bankruptcy. This principle does not involve any conflict between the State courts and the Federal courts. If the property is no longer liable to levy for the satisfaction of the judgment, it is no matter of conflict between the one court and the other, which of them is called upon to recognize or administer the law. (*Miller v. O'Brien*, 9 B. R. 26; s. c. 9 Blatch. 270.)

Payments made after the filing of the petition in bankruptcy, *mala fide*, or with a view of defeating the bankrupt act in any of its essential requirements, are void, and the person by whom such payment is made can be held to answer to the original demand to the assignee. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169; *Turner v. Shenkmeyer*, 1 W. N. 266.)

If the bankrupt passes a note to another before the commencement of the proceedings in bankruptcy, with the intent thereby to transfer the property, but omits to endorse it, he may endorse it after that time. (*Smoot v. Morehouse*, 8 Ala. 370.)

Where the right to use an alley is reserved in a deed so long as the grantor shall continue to own an adjoining piece of land, the right is not terminated by the grantor's bankruptcy, if the proceedings are settled, and the property reconveyed to him by the assignee. (*Colie v. Jameson*, 13 B. R. 1; s. c. 6 N. Y. Supr. 576; s. c. 11 N. Y. Supr. 281.)

A party who borrowed property from the bankrupt, after the commencement of the proceedings in bankruptcy, can not defeat an action to recover the same by proof that it passed to the assignee, without connecting himself with the assignee's title. (*Lain v. Guither*, 72 N. C. 234.)

### Acts of Third Parties to the Estate.

A creditor can not, by a bill in equity, obtain payment out of property which passed to the assignee. (*McCabe v. Cooney*, 2 Sandf. Ch. 314.)

If a creditor's bill is filed after the commencement of the proceedings in bankruptcy, the objection that the property belongs to the assignee must be taken by the assignee, and not by the debtor. (*Smith v. —*, 4 Edw. Ch. 653.)

A judgment creditor can not file a bill in equity, alleging that an execution has been issued on the judgment and returned unsatisfied, and seek to have property alleged to have belonged to the bankrupt prior to the commencement of the proceedings in bankruptcy applied to the payment of his judgment in preference to the claims of the other creditors. (*Haastun v. Corse*, 4 Edw. Ch. 585; s. c. 2 Barb. Ch. 506; *Kane v. Pilcher*, 7 B. Mon. 651.)

A party who holds funds or property belonging to the bankrupt may, in an action brought by a creditor to subject the same to the payment of his debt, plead that the assignee alone has the right to claim the same. (*David v. Ferrand*, 2 La. An. 596.)

A plea by a third party to show that the property vested in the assignee, must show that the district court had jurisdiction to entertain the petition, and that the requirements of the act were complied with. (*Seaman v. Stoughton*, 3 Barb. Ch. 344.)

Where a petition for a partition merely alleges that the petitioner claims title under an attachment, a plea of the bankruptcy of the defendant prior to the issuing of the attachment, without averring that the attachment was issued against him, is insufficient. (*Onion v. Clark*, 18 Vt. 363.)

### What Property Vests in the Assignee.

(b) The expression, "estate of a bankrupt," means such property and rights of property of the bankrupt as the bankrupt act vests in the assignee. The assignee can not take anything more than the bankrupt himself had, in any case, except the case of a fraudulent conveyance by the bankrupt. (*In re Hambricht*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201.)

The words, "all the estate real and personal," are broad enough to cover every description of vested right and interest attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. (*Comegys v. Vasse*, 1 Pet. 193; s. c. 4 Wash. 570.)

The language of the statute is sufficiently comprehensive to embrace the most minute and temporary interest in property. (*French v. Carr*, 7 Ill. 664.)

Every definition of property ignores the idea of value in the thing owned. If there is an exclusive right to a thing, the law immediately presumes it to have at least a nominal value to the owner. (*Kinzie v. Winston*, 4 B. R. 21; s. c. 56 Ill. 56.)

The assignment vests the property in the assignee, although it was not placed on the bankrupt's schedules. (*Holbrook v. Coney*, 25 Ill. 543; *Burton v. Lockert*, 9 Ark. 411; *Jewett v. Preston*, 27 Me. 400.)

A certificate of title to a burying vault, granted by a corporation whose charter limits its use to the interment of the dead, and declares that it shall not be reached by private creditors nor for public dues, is no more than a license to the bankrupt to hold personally the privilege of sepulchre for his friends, and does not pass to the assignee. The interest is no more than the charter generates or declares, and the charter denotes a purpose to separate this acquisition from the estate or property of the holder. (*In re Abner S. Ely*, 1 N. Y. Leg. Obs. 131.)

The title to real estate situated in a foreign country does not vest in the assignee, for a statutory conveyance can have no extraterritorial effect upon real estate. (*Oakey v. Bennett*, 11 How. 33; *Barnett v. Pool*, 23 Tex. 517.)

Where the services have been rendered by the bankrupt, the right to the compensation passes to the assignee, although it depends on a contingency. (*Burton v. Lockert*, 9 Ark. 411.)

The right to redeem property sold under an execution passes to the assignee, and can not be exercised by any judgment creditor after the commencement of the proceedings in bankruptcy. (*Pillow v. Langtree*, 5 Humph. 389.)

If the rights of the debtor and of a creditor to redeem property sold under an execution are distinct and independent, the right of the creditor is not defeated by the bankruptcy of the debtor, but is a right or incident attached to the judgment, and may be deemed a part of its lien. (*Trimble v. Williamson*, 49 Ala. 525.)

A claim for improvements made on the public lands of the United States passes to the assignee. (*French v. Carr*, 7 Ill. 664.)

A franchise consisting of a right to take tolls for crossing at a bridge is property that passes to the assignee. (*Stewart v. Hargrove*, 23 Ala. 429.)

A receiver appointed under a creditor's bill in a State court, can not enter another political jurisdiction and claim a fund allowed on a claim against a foreign government in preference to an assignee appointed in proceedings instituted after the filing of the bill. (*Booth v. Clark*, 17 How. 322.)

If a party in pursuance of a decree delivers property of a bankrupt to a receiver before any notice or demand by an assignee, the surrender is a complete defense to any future action by the assignee. (*Long v. Converse*, 91 U. S. 105.)

If by the terms of the trust, the income of a certain fund is to be paid to the bankrupt or his wife, to be applied to the support of the bankrupt, his wife and children, the assignee is not entitled to any part thereof. (*Durant v. Mass. Hosp. L. Ins. Co.* 15 A. L. J. 436.)

As soon as a will of real or personal estate is admitted to probate, the title of the legatee or devisee takes effect by relation from the death of the testator. If the devisee or legatee is declared a bankrupt in proceedings commenced after such death and before the probate of the will, the legacy or devise will pass to his assignee if he has never renounced or disclaimed the legacy or devise. After the commencement of the proceedings in bankruptcy he has no right to disclaim or renounce it. (*In re Henry W. Fuller*, 2 Story, 327.)

If the bankrupt was entitled to a distributive share in the estate of a deceased person, and was also indebted to that estate, the assignee can only claim the balance that remains after deducting the debt from such distributive share. (*In re Newhall*, 2 Story, 360.)

A devise of property to cease on the bankruptcy of the devisee is good, and the limitation valid. (*Nichols v. Eaton*, 13 B. R. 421; s. c. 91 U. S. 716.)

If a will confers an absolute discretion on a trustee which he is under no obligation to exercise in favor of the bankrupt, it does not grant such an interest to the latter as his assignee can assert. (*Nichols v. Eaton*, 13 B. R. 421; s. c. 91 U. S. 716.)

A devise of property to a trustee, to pay the income thereof to a third person free from liability for his debts, is not such an interest as will pass to the latter's assignee. (*Nichols v. Eaton*, 13 B. R. 421; s. c. 91 U. S. 716.)

Where a will devises property to trustees to hold until the devisee reaches a certain age, the estate passes to the assignee of the devisee, although the devisee had not attained that age at the time of the commencement of proceedings in bankruptcy. (*Sandford v. Lackland*, 2 Dillon, 6.)

If an estate is devised to A., subject to the payment of a certain sum to B. in trust for C., A. is not a trustee for C. By the terms of the devise, B. is the person in whom the trust is reposed, and is the direct trustee, made so by the act and choice of the deviser. If A. becomes a trustee, he will only be an implied trustee. The statute of limitations will run in favor of a party who enters into possession of property in his own right and holds for his own benefit, but whose title is subsequently, by matter of evidence or construction of law, turned into that of trustee. (*In re A. G. O'Neale*, 6 B. R. 425.)

If a mortgagee devises his interest in the land on which he holds a mortgage, to the mortgagor and others, this will pass the mortgage debt, and the mortgagor's interest therein will pass to his assignee. (*Clark v. Clark*, 56 N. H. 105.)

A claim to indemnity for an illegal capture of a vessel by a foreign government passes by abandonment to the insurer, and upon his bankruptcy vests in his assignee. (*Comegys v. Vasse*, 1 Pet. 193; s. c. 4 Wash. 570; *Phelps v. McDonald*, 2 McArthur, 375.)

If money is to be paid under a treaty to a foreign government on account of a claim due to a bankrupt, the court has no jurisdiction to compel the bankrupt to make an assignment thereof. (*Phelps v. McDonald*, 2 McArthur, 375.)

If the surety, upon a note given to a guardian, marries the ward, his assignee can not maintain an action against the maker before a settlement and adjustment of the guardian's account. (*Ohilton v. Cabiness*, 14 Ala. 447.)

Property which has been transferred by a deed contrary to law will pass to a trustee appointed under a deed of trust subsequently executed, and when such deed was made more than six months prior to the commencement of proceedings in bankruptcy, and is not assailed as fraudulent, no claim to the property vests in the assignee. (*Stewart v. National Union Bank et al.* 2 Abb. C. C. 424.)

When an execution attachment is laid in the hands of a tenant for a term of years under rent reserved, payable quarterly, and the owner of the reversion is adjudged a bankrupt, after the laying of the attachment, but before the rent becomes due, the attachment will not bind the rent. The rent which had not fallen due was an incident of the reversion, followed it, and passed with it to the assignee. There was, therefore, no debt of the bankrupt for the attachment to operate upon. When the rent became due it belonged to the assignee. A levy upon the reversion would have fastened upon the rent as its incident. (*Evans v. Hamrick*, 61 Penn. 19.)

The growing crop passes to the assignee, and should be placed upon the schedules as personal property. (*In re Schumpert*, 8 B. R. 415.)

A franchise to construct a turnpike road and collect the tolls thereon is a personal trust, not assignable without the consent of the granting power, and does not pass to the assignee by virtue of the assignment. The assignee can take nothing which the bankrupt could not voluntarily assign. (*People v. Duanean*, 41 Cal. 507.)

Where an instrument executed at the same time with an absolute deed, declares that the grantee holds two-thirds of the estate for others, the assignee, of the grantee is only entitled to one-third. (*Ford v. Belmont*, 7 Robt. 97, 508; s. c. 35 N. Y. Sup. 135.)

A purchaser, at a sale under a *fi. fu.* of a debtor's interest in a firm, only acquires his interest in the chattels actually seized, and the interest in the credits passes to the assignee. (*Moore v. Rosenberger*, 7 Phila. 576.)

A purchaser of firm property at a sale under an execution against an individual partner, obtains only the interest of such partner in the surplus that may remain after the firm debts are paid. (*Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 570)

The fact that the purchaser obtains the interest of both partners on separate executions, does not enlarge the interest acquired on the separate interest against either. (*Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 570.)

On an individual petition, property in the possession of the bankrupt at the time of the commencement of proceedings in bankruptcy, which belongs to a firm of which he has been a member, passes to the assignee, who will hold as tenant in common with the solvent partner. (*In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.)

A legal possibility is an estate founded on a contingency. The fee simple title to a street, with the right to accretions thereto, is not in the eye of the law a possibility, for the estate is not founded on a contingency. (*Kinzie v. Winston*, 4 B. R. 21; s. c. 56 Ill. 56; *Banks v. Ogden*, 2 Wall. 58)

The bankrupt is personally released by a discharge, but the property and rights of property vested in the assignee are subject to the creditors, and are held in trust for them in whatsoever hands these may be found. (*Clark v. Clark*, 17 How. 315.)

The statute does not create any estate of inheritance in the assignee himself, although he may by his official action convey lands. Whatever rights vest in

him are official, and not personal, and are not heritable or corporate. (*Stevens v. Earles*, 25 Mich. 40.)

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial, as well as legal, interest in, and which is to be applied for the payment of his debts. (*Rhoades v. Blackiston*, 106 Mass. 334; *Blin v. Pierce*, 20 Vt. 25; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Hynson v. Burton*, 5 Ark. 492.)

The assignee can not have a sale made by a trustee in insolvency for a nominal consideration set aside if it was made in good faith and the value of the property was not equal to the debts due by the estate. (*Goldsmith v. Hapgood*, 1 Holmes, 454.)

If the assignee forecloses a mortgage which the bankrupt had fraudulently taken with the funds of another and receives the money, the fraudulent grantor's creditors can not recover the money from the assignee. (*Aiken v. Edrington*, 15 B. R. 271.)

A certificate of membership in a board of trade where no profits are given to the members further than what is derived from the incidental use made by a member of the privileges which his membership gives him, is a mere personal privilege, and does not pass to the assignee. (*In re Israel Sutherland*, 6 Biss. 526.)

### Rights Under Contracts.

In general, the assignee does not stand in a better predicament than the bankrupt himself, and can claim only what the latter might claim. (*Winsor v. Kendall*, 3 Story, 507; *Fiske v. Hunt*, 2 Story, 582.)

A transfer of an attorney's receipts entitles the party in equity to the proceeds of the judgment, and the title to the judgment does not pass to the assignee. (*Anderson v. Miller*, 15 Miss. 586.)

The interest and rights of the bankrupt under contracts are transferred to the assignee. Whatever the rights are, the assignee can claim and enforce. It is not the purpose of the bankrupt law to interfere with or avoid contracts made by the bankrupt with other parties, or to prevent their execution. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137.)

If goods are actually delivered to the vendee, the vendor has not, independent of any special agreement, any lien entitling him to claim or hold the goods as against the assignee of the vendee. If there is a special agreement, he must abide by the actual agreement made. If the instrument is not effectual by reason of the failure of the vendor to do what is by law necessary for his protection, he can not fall back upon any supposed or possible agreement qualifying the delivery, and securing a lien for the price. (*In re Simeon Leland et al.* 10 Blatch. 503.)

An agreement that the title to property sold to the bankrupt should not vest in him until all the purchase money had been paid, binds the assignee, even if the bankrupt has paid all but a small portion of the purchase money. The ownership remains in the vendor until the final payment. Creditors can not enforce their claims without paying to the vendor the remaining portion. (*In re J. H. Lyon*, 7 B. R. 182; s. c. 4 C. L. N. 421.)

The condition that the title shall not vest in the vendee until all the purchase money is paid, is not waived by taking indorsed notes from the vendee. (*In re J. H. Lyon*, 7 B. R. 182; s. c. 4 C. L. N. 421.)

Where the sale is absolute, the vendor can not claim the property from the assignee. (*Woods v. Oakman*, 116 Mass. 599.)

A contract to deliver and set up scales and receive a note and security on



the scales for the price, is entire, and no note or security can be demanded until the scales have been all delivered and set up, and, until so delivered and set up, and the note and security given, the property in the scales does not pass to the vendee, unless there is a waiver of the conditions. The assignee of the vendee can claim no greater rights in the scales than the vendee had. (*In re Pusey*, 6 B. R. 40.)

The delivery of the goods to the marshal who is in possession of the store of the vendee under a warrant does not terminate the right of stoppage *in transitu*. (*Sutro v. Hoile*, 2 Neb. 186.)

If the delivery of a note in payment for the goods is a condition of the sale, a delivery to the marshal who is in possession of the vendee's store under a warrant, is not a waiver of the condition, and the vendor is entitled to the goods. (*Sutro v. Hoile*, 2 Neb. 186.)

If the debtor at the time of the purchase did not believe or expect that the goods would ever be paid for, the vendor may reclaim them on the ground of fraud, and has a better title than the assignee. (*Donaldson v. Farwell*, 5 Biss. 451.)

In order to render a sale void as against the assignee, the vendor must show a fraud which enters into and forms a part of the purchase. If the purchase was made without fraud and in good faith, the mere fact that the bankrupt had concealed a crime committed by him, the exposure of which would render him insolvent, does not make a purchase voidable. (*Comins v. Coe*, 117 Mass. 45.)

If a warehouse receipt is sent by mail to a creditor who has not previously agreed to accept grain in payment of his debt, and is received by him after the commencement of the proceedings in bankruptcy, the assignee is entitled to recover the grain, although the receipt was mailed before the commencement of the proceedings. (*Brooke v. Seaggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

Where the vendor reserves the right to take possession of the chattels in case of the non-payment of the purchase money, and does take possession before the commencement of the proceedings in bankruptcy, his title is valid, although the right was reserved in a mortgage which was not recorded. (*Field v. Baker*, 11 B. R. 415; s. c. 12 Blatch. 438.)

If the goods are detained in the course of transportation and deposited in a warehouse, the giving of a conditional authority to the warehouseman to sell is not such an assumption of possession as to terminate the right of stoppage *in transitu*. (*In re Norman B. Foot*, 11 B. R. 153; s. c. 11 Blatch. 530.)

The acceptance of a delivery order by a warehouseman where the goods are in a bonded warehouse and the duties thereon are unpaid, is not a sufficient acceptance of the goods within the statute of frauds, and the vendor, if the price remains unpaid, has a better title than the assignee of the vendee. (*In re George Clifford*, 2 Saw. 428.)

If the vendor has complied with his part of the contract, the assignee of the vendee can not recover the partial payments made by the vendee where the vendor has sold the property to another in consequence of the vendee's default. (*Kane v. Jenkinson*, 10 B. R. 316.)

If the vendor has been in no manner in fault, he may, in an action by the assignee to recover partial payments made by the vendee, recoup the damages which he may have suffered in consequence of the non-performance on the part of the purchaser. (*Kane v. Jenkinson*, 10 B. R. 316.)

Where the depositor of grain in a grain elevator knows that by the custom of the trade it will be mingled with other grain and its identity lost, the bulk in the elevator being subject to constant fluctuations, and that he has only the right to call for an equal amount of grain or the value thereof, the transaction

constitutes a sale and not a bailment, and he can not claim the grain in the elevator at the time when the warehouseman becomes bankrupt. (*Rahilly v. Wilson*, 3 Dillon, 420; s. c. 5 C. L. N. 217.)

If a miller converts grain deposited with him to his own use, the depositor has no interest in other grain owned by the miller. His only interest is that of a general creditor of the estate. (*Adams v. Myers*, 1 Saw. 306.)

A party can not recover specific property from the assignee, unless it possesses *indicia* or earmarks by which it may be distinguished from all others of the same description. (*Wood M. & R. Co. v. Brooke*, 9 B. R. 395.)

An agreement concerning the sale of specific and ascertained chattels is *prima facie* a bargain and sale, and transfers the property therein to the purchaser in consideration of his becoming bound to pay the price therefor, and the vendor can not reclaim the property, unless he proves that there was an agreement that the title should not pass until payment should be made therefor. (*Wood M. & R. Co. v. Brooke*, 9 B. R. 395.)

A bond under seal, with coupons attached, is a negotiable instrument if it is made payable to bearer, and a purchaser in good faith for a valuable consideration obtains a good title against the assignee. (*In re Simeon Leland et al.* 6 Ben. 175.)

If parties by their bond, given on the dissolution of a firm, covenant to indemnify the retiring partner, and to pay the firm debts, the right of action will vest in his assignee, although he receives a discharge, for the covenant is to pay as well as indemnify. (*Hood v. Spencer*, 4 McLean, 168.)

If an attorney and a debtor agree that an assignment shall be made of dividends to be received from an estate of which the former is assignee, to be credited upon an account held by him against the debtor for collection, the assignee of the debtor may recover the money, if he is declared a bankrupt before the assignment of the dividends is made or the dividends credited upon the claim, for the courts can not enforce such loose, incomplete, and unexecuted contracts. (*Foster v. Lowell*, 4 Mass. 408.)

If the bankrupt transferred his property to another under an agreement that the latter should sell it and apply the proceeds to pay the former's debts, the bankrupt has a beneficial interest in the agreement, which passes to his assignee, and the assignee may bring a suit on the agreement. (*Steele v. Aylesworth*, 18 Conn. 244.)

Where the right to a conveyance under a bond has been forfeited by a failure to comply with its terms, the right which the bankrupt may acquire after the commencement of the proceedings in bankruptcy by a waiver of the forfeiture, will not pass to the assignee. (*Kittridge v. McLaughlin*, 33 Me. 327.)

Although the assignment of a bond is made and signed by the obligee, yet if it is never accepted, either actively or constructively, by the party to whom it was to be assigned prior to the commencement of the proceedings in bankruptcy, the bond will pass to the assignee. (*Perley v. Dole*, 38 Me. 558.)

If a party buys a judgment against the bankrupt, and purchases land at a sale under an execution issued thereon, under a parol agreement that out of the proceeds he shall retain a debt due to him and the money paid to purchase the judgment, and pay the balance to the bankrupt, the agreement is without consideration. (*Hyde v. Findlay*, 8 Pac. L. R. 147.)

Under the warrant, the marshal has the right to take possession of personal property leased by the bankrupt. If the lease stipulates that the lessor may take possession of the property whenever he deems himself unsafe or the property not well taken care of, the lessor must show that fact in order to entitle himself to take the property. (*Hathaway v. Quimby*, 1 N. Y. Supr. 386.)

If the assignee sells the equity of redemption in realty, to which fixtures

are attached, for a sum equal to the value of the fixtures, he must be considered to have received it for the fixtures, clear of the mortgage. The owner of fixtures can, in writing, and for a valuable consideration, convey severable chattels in such a way as to bind himself and his assignee in bankruptcy at least, and if he has done so, the grantee will be entitled to the proceeds. (*In re McKay & Aldus*, 7 B. R. 230; s. c. *Lowell*, 561.)

An agreement that a building erected upon land owned by the bankrupt shall be considered personal property, may be shown by inference from the subsequent recognition of rights which can result only from its existence. A purchaser from the assignee, with notice of the facts, can make no better title than the assignee, notwithstanding the representations made by the latter. (*Morris v. French*, 106 Mass. 326.)

The bankrupt having been directed to invest a certain sum of money in stock for a party, purchased the stock in his own name, and hypothecated it for money loaned to him. Being embarrassed, he deposited securities in the hands of another, to be used for the purpose of purchasing or replacing the stock, and these securities were subsequently sold, but the stock could not be repurchased. The securities, whose sale resulted in the proceeds in question, never belonged to the party, and were not, prior to the time when the rights of the assignee in bankruptcy intervened, put into the hands of the party, or any agent of his, or of any person, with his assent or privity, nor was the placing of such securities in the hands of the bailee made known to the party, or adopted or ratified by him prior to the transfer of the title to them to the assignee in bankruptcy. The property in them was in no manner changed, nor did any legal or equitable lien, or interest, or trust, or charge arise in respect to them which would not have been revocable by the bankrupt himself; at least, at all times before the transaction was made known to the party. It was not made known to him, or to any agent of his, until some time after the appointment of the assignee in bankruptcy, and such appointment must be considered a revocation of anything done by the bankrupt, if such revocation were needed. Moreover, the delivery of the securities having been made for a specified purpose, and the purpose not having been carried out, the property in the securities remained in the bankrupt, and passed to his assignee free and clear from any charge in favor of the party. (*Ungerwitt v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195.)

To succeed in a suit for the recovery of property, the assignee must show title in himself. When the bankrupt has formed a bank with other associates, but is himself the sole owner, the assignee is not entitled to its assets as against a receiver appointed under a State law relating to insolvent banks. The making, recording, and filing of the certificate of the organization, and the acts of user under it, must be held to be sufficient to establish the existence of the bank as a corporation, as against the associates and third persons. (*Goodrich v. Remington*, 6 Blatch. 515)

A covenant in a lease that fixtures shall not be removed until the rent is paid, binds the assignee. The act of affixing them to the freehold takes them out of the category of chattels, and is notice to creditors and to all the world that the right of removal will depend on the contract between landlord and tenant. The right of a tenant to remove trade fixtures may well enough be called rather a privilege than property, and it is one that he may lawfully waive or modify by the terms of the lease, without the form of either a pledge or a mortgage. (*In re J. H. Morrow*, 2 B. R. 665; s. c. *Lowell*, 386.)

An agreement that chattels on the premises shall be at the disposal of the lessor as security for rent, is not valid against creditors of the lessee before entry, where distress for rent is not allowed. The bankrupt law does not undertake to enforce a mere covenant of this kind, which by the law of the place creates no valid lien. (*In re J. H. Morrow*, 2 B. R. 665; s. c. *Lowell*, 386.)

If the bankrupt, by the terms of the lease, merely has the right to possess and enjoy the use of the property, without any power to convey it to a third person unless the lessor consents, the estate will not pass to the assignee. (*In re Michael O'Dowd*, 8 B. R. 451.)

Property owned by the bankrupt, and used in carrying on business in the name of another, will pass to the assignee, free from all claims to priority for debts contracted in such business. There can not be any fair suggestion of considerations of supposed hardship to such third person. If he choose to suffer himself to be involved in debts incurred in carrying on the bankrupt's business in order to cover it against former creditors, those former creditors ought not, for this reason, to be postponed in the distribution of such property to other creditors, whose debts may have been afterward contracted in his name. Nor, in case of his death, are there any equities in favor of the creditors of his estate, against the interests of the general body of the bankrupt's creditors. (*In re Wm. H. Long*, 3 B. R. quarto, 66.)

The assignee of a bankrupt corporation may sue stockholders to recover unpaid subscriptions sufficient to meet all the debts and liabilities of the corporation. (*Payson v. Stoeper*, 2 Dillon, 427.)

The estate of the bankrupt is not liable for the tortious acts of the assignee. (*Adams v. Meyers*, 1 Saw. 306.)

At common law the termination of all interest of the insured in the property defeats the policy. The transfer to the assignee in bankruptcy terminates all interest of the bankrupt in the property insured. A transfer to an assignee in bankruptcy is within the terms of a provision of the policy, which declares that the policy shall be void in case of any change or transfer of the title to the property insured. The fact that the bankruptcy is involuntary, or that the transfer is made by operation of law, is immaterial. (*Starkweather v. Cleveland Ins. Co.* 4 B. R. 341; s. c. 2 Abb. C. C. 67; *Perry v. Lorillard Ins. Co.* 14 B. R. 339; s. c. 6 Lans. 201; s. c. 61 N. Y. 214.)

The assignee of a bankrupt insurance company may recover upon a note given for the payment of the annual premium upon a policy issued by the company to the maker. (*Carey v. Nagel*, 2 Abb. C. C. 156; s. c. 2 Biss. 244.)

An insured who has given a note for the premium can not surrender the policy and have the note delivered to him upon paying the amount due for the time that the policy has run, for there is no implied contract that he shall have the right to surrender the policy and receive back a portion of the premium as unearned. (*In re Western Ins. Co.* 6 Ben. 159.)

If the drawer of a check becomes bankrupt before the presentation and acceptance thereof by the bank, the holder is not entitled to any priority as against the assignee. (*In re Charles A. Smith*, 15 B. R. 459; s. c. 2 C. L. B. 119.)

A party who gave his check to the bankrupt on account of a debt due to him, is not liable to an action by the assignee for the original debt without a surrender of the check, although he stopped the payment thereof, and it has been outstanding for a long time. (*Woodin v. Frazee*, 38 N. Y. Sup. 190.)

Where a party advances money to a corporation upon an agreement that he shall collect certain calls on its stockholders and apply them to the debt, and in pursuance of this agreement receives a list of the stockholders, and the amount due from each, this is an equitable assignment of the calls that is not defeated by the subsequent bankruptcy of the corporation. (*Farmers' & Drovers' Savings Bank v. Publishing Co.* 3 Dillon, 287.)

If a note is discounted by a bank, and the proceeds credited to the account of the depositor, which is then overdrawn, he will not, upon subsequently making his account good by other deposits, be entitled to demand the drafts received for the note from the bank or its assignee, although the note was also taken for collection. (*In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.)

A party dealing with an insolvent bank in the ordinary way must make out a very clear case before a court will sustain a preference in his favor over other creditors. (*In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.)

A banker, in receiving a note for collection from one of his customers, does not act as an agent, but is presumed to undertake the collection for the profit that may result from the deposit and use of the money. When he collects money for his customer, it is regarded as deposited, and in the light of any other deposit, not as the money of the customer, nor is the customer entitled to it, but only to its equivalent as any other deposit. If the collection is remitted by a draft, the customer is not entitled to demand the draft from the banker or his assignee. (*In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.)

A draft drawn for a part of a fund in bank is not an equitable assignment of the money, and does not entitle the holder to a priority of payment out of such money in the hands of the assignee. (*Bank of Commerce v. Russell*, 2 Dillon, 215; *Randolph v. Canby*, 11 B. R. 296; *Dickey v. Harmon*, 1 Cranch C. C. 201; *Walker v. Seigel*, 12 B. R. 394; s. c. 2 Cent. L. J. 508.)

If a party draws a check for a sum in bank, which is presented after he has made an assignment to a trustee for the benefit of creditors, the assignee, if the trustee subsequently transfers all his rights under the assignment to him, may recover the sum from the bank, although the latter holds a note not due at the time of the assignment or the commencement of the proceedings in bankruptcy. (*First National Bank of Mount Joy v. Wilson*, 72 Penn. 13.)

If the bankrupt has his note discounted and leaves the proceeds on deposit, the holder in good faith and for value of a check, which was presented for payment before the maturity of the note and before the commencement of the proceedings in bankruptcy, is entitled to be paid out of the proceeds. (*Fourth National Bank v. City National Bank*, 10 B. R. 44; s. c. 68 Ill. 398; s. c. 1 A. L. T. [N. S.] 386.)

If an agent procures the discounting of a draft upon the bankrupt, at a time when the latter has determined to stop payment, and the package of notes delivered to the agent on such draft is intercepted before delivery to the bankrupt, and the contract rescinded, the assignee has no title to the notes. (*Purviance v. Union Nat'l Bank*, 8 B. R. 447; s. c. 21 Pitts. L. J. 33; s. c. 30 Leg. Int. 392.)

If an order for the whole of a fund is given for a valuable consideration to a third person prior to the commencement of the proceedings in bankruptcy, it amounts to an equitable assignment of the fund, although the drawee did not accept the order, and the right to the fund does not pass to the assignee. (*Blin v. Pierce*, 20 Vt. 25.)

If the holder of an order on a general fund, the acceptance whereof has been refused, proves his claim, he will be restrained from subsequently prosecuting a suit against the holder of the fund in a State court. (*Walker v. Seigel*, 12 B. R. 394; s. c. 2 Cent. L. J. 508.)

An order drawn upon an agent not in possession of the fund out of which it is to be satisfied, and accepted by him, fixes the fund irrevocably, and amounts to an equitable assignment. Nothing vests in the assignee of a bankrupt but the real and personal estate of which the bankrupt had the equitable as well as legal interest. The moment the money comes into the hands of the agent, he is bound to pay it over to the holder of the accepted order, although bankruptcy of the drawer has occurred between the acceptance and the receipt of the money. (*McMenomy v. Ferrers*, 3 Johns. 71.)

The filing of a petition in bankruptcy is an attempt to sell within the meaning of a clause giving the mortgagee the right to take possession in case of an attempt to sell. (*Moore v. Young*, 4 Biss. 128.)

If a deed is dated prior to the commencement of proceedings in bankruptcy,

the bare fact that the acknowledgement is dated after that time is not sufficient to defeat the grantee's title. The deed vested the legal title in the grantee at the time of its delivery. In the absence of proof to the contrary, the presumption of law is that it was delivered on the day of its date, and the subsequent date of the certificate of acknowledgement can not overcome this presumption. (*Hardin v. Osborne*, 60 Ill. 93.)

A deed of the bankrupt without any certificate of acknowledgement is good against the assignee, for he is a grantee with full notice, and takes no greater interest or right than the bankrupt had. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

The doctrine that ratification relates back to the inception of the transactions and renders the ratified act the same as if it had been originally authorized by the principal, is a fiction of the law, for the act of one can not be made the act of another; but by relation the law gives to the act of one the effect of an act of another. The law, however, will not feign a fiction to do a wrong, to make valid an invalid act, or to defeat the rights of others. Hence this doctrine can not be extended to the prejudice of strangers to the transaction. The act of ratification, in order to have a retroactive effect, must take place at a time and under circumstances when the ratifying party may himself lawfully do the act which he ratifies. The validity of an unauthorized deed of a corporation must be determined according to the circumstances which exist at the time when it is ratified. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

Where a party purchased from the bankrupt a part of certain bonds to which the latter was entitled upon complying with certain conditions, he obtained a right that may be enforced against the assignee if the conditions were performed, although the bonds were not separated from the others if they were all alike. (*Hamilton v. National Loan Bank*, 3 Dillon, 230.)

If the bankrupt proved and filed his claim in the probate court and then transferred it, the dividends should be paid to the assignee, and not to the transferee, irrespective of any question of fraud on the bankrupt law. (*Miller v. Parker*, 47 Ala. 312.)

If a deed of trust to secure the payment of a note contains a power authorizing the creditor, his agent, attorney or assignee, to sell the property in default of payment of the note, the assignee of the creditor may sell under the power, and his deed will convey a legal estate. (*Wood v. Boyd*, 28 Ark. 75.)

A claim for compensation for the destruction of a vessel by a confederate cruiser, equipped and sent out in England through the negligence of the British Government, is susceptible of a transfer that may be sustained in equity. (*Williamson v. Colcord*, 13 B. R. 319.)

A mere agreement to give what may be realized from a claim is a promissory arrangement, and does not constitute a complete and perfect gift. (*Williamson v. Colcord*, 13 B. R. 319.)

An agreement by a guardian to discharge one mortgage and take a new one, although he transcends his power in making it, is not absolutely void but is voidable only at the election of the infant on coming of age, and until so avoided is valid as against the assignee of the mortgagor. (*Burdick v. Jackson*, 15 B. R. 318; s. c. 14 N. Y. Supr. 488.)

If the bankrupt, being the holder of a mortgage pledged to secure a loan, and then for a valuable consideration promised the mortgagor to redeem and cancel it, the assignee, if he redeems it may enforce it. (*McLean v. Cadwallader*, 15 B. R. 383; s. c. 34 Leg. Int. 140.)

If an attorney institutes a suit under an agreement with the bankrupt for a certain portion of what may be recovered, he is entitled to that share although the recovery took place after the commencement of the proceedings in bankruptcy. (*Maybin v. Raymond*, 15 B. R. 353; 4 A. L. T. [N. S.] 21.)

Where goods are obtained through a misrepresentation by a firm composed of three members, a return of the goods or their proceeds to the creditor will be valid as against the assignee of two of the partners, if they have not lost their identity so as to form a part of the property of the bankrupts. (*Montgomery v. Bucyrus Machine Co.* 14 B. R. 193; s. c. 92 U. S. 257.)

The creditor who holds collaterals as securities need not sell them at public auction, but may sell them at the stock exchange or brokers' board. (*Sparhawk v. Drexel*, 12 B. R. 450.)

Where an insolvent debtor acquiesces in a sale of the securities, the assignee is bound by his acquiescence, although the securities are sacrificed. (*Sparhawk v. Drexel*, 12 B. R. 450.)

A creditor who is vested with the power to sell securities holds it in trust for the debtor's benefit as well as his own, and can not sacrifice the securities. (*Sparhawk v. Drexel*, 12 B. R. 450.)

A voluntary agreement between certain persons to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him. (*In re Oregon B. Printing & Publishing Co.* 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.)

An order passed in proceedings supplemental to an execution restraining a bank from paying money to the bankrupt is no defense to any action brought by an assignee subsequently appointed in proceedings instituted before that time. (*Morris v. First Nat'l Bank*, 15 B. R. 281.)

### Title Subject to Equities.

The assignee takes the property of the bankrupt, subject to all legal and equitable claims of others. He is affected by all the equities which can be urged against the bankrupt. (*Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332; *Kelly v. Scott*, 49 N. Y. 595; *Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, 2 Story, 555; *Mitchell v. Winslow*, 2 Story, 630; *Winsor v. McLellan*, 2 Story, 492; *Talcot v. Dudley*, 5 Ill. 427.)

If the bank is estopped, his assignee is also estopped. (*Kelly v. Scott*, 49 N. Y. 595; *Rockford, Rock Island & St. Louis R. R. Co. v. McKay & Aldus*, 3 B. R. 50; s. c. Lowell, 345; s. c. 1 L. T. B. 133.)

When the bankrupt has contracted to manufacture an engine, and on the representation that it had been finished and delivered to a company for transportation to the purchaser, has obtained payment therefor, but the engine in fact was not finished or delivered for transportation, remaining in the possession of the bankrupt, and being designated as belonging to the purchaser, it belongs to the purchaser, and not to the assignee. The bankrupt and the assignee are estopped to say that the engine was not set apart, or that it was not *in esse* when the representations were made. (*Rockford, Rock Island & St. Louis R. R. Co. v. McKay & Aldus*, 3 B. R. 50; s. c. Lowell, 345; s. c. 1 L. T. B. 133.)

If the resolution of the directors of the bankrupt corporation approving of a deed of trust previously executed by its officers, and purporting to be passed by a proper quorum, was shown to the creditor before he discounted the note thus secured, the assignee is estopped from proving that it is untrue, and that a quorum was not present. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

An agreement to sign a bond to a person to indemnify him for his liability in becoming surety for the bankrupt confers a right to an assignment which may be enforced in a court of equity and binds the assignee. (*Tucker v. Daly*, 7 Gratt. 330.)

If a bill of sale is recorded in the clerk's office at one place, upon a representation by the bankrupt that he resided there, it will bind the assignee although the bankrupt actually resided in another place. (*Allen v. Whittemore*, 14 B. R. 189.)

### Rights under Statutes.

The assignee has no larger interests in regard to usurious contracts than the bankrupt had, although they are void in law. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

The assignee has no power to institute proceedings for the recovery of a statutory forfeiture claimed by the bankrupt, either prior or subsequent to proceedings against him in bankruptcy. The power to institute proceedings for a forfeiture under the laws of Wisconsin against usury, is a privilege conferred upon the borrower alone, and the assignee is not the borrower in the sense of the law, but a purchaser. (*Bromley v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511.)

Section 5198 only forfeits the interest for usury, but does not affect the principal. (*First Nat'l Bank of Mount Joy v. Wilson*, 72 Penn. 13.)

Mere accommodation paper can have no effective or legal existence until it is transferred to a *bona fide* holder. The discounting of such paper at a higher rate of interest than the law allows is usurious, and not defensible as a purchase of the paper. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

If a party purchase a negotiable note at a discount greater than the legal rate of interest from a broker in the usual course of business, and without any notice that the broker is acting for the maker, the assignee of the maker can not recover the excess above the legal rate of interest as usury. (*Sparhawk v. Cochran*, 30 Leg. Int. 232.)

Where the right to recover usurious interest is a redress for a personal wrong, it does not pass the assignee. (*Nichols v. Bellows*, 22 Vt. 581.)

Where the statute gives to the party paying usurious interest the right to recover it back, that right passes to the assignee. (*Moore v. Jones*, 23 Vt. 739; *Wheelock v. Lee*, 10 B. R. 363; s. c. 64 N. Y. 242.)

The assignee has all the rights and powers which are given to the whole body of creditors, or to the whole of any one class of creditors whether at law or in equity. (*Wilkins v. Davis*, 15 B. R. 60.)

An assignee of a general partner may maintain an action to recover a division of profits made to a special partner in reduction of the capital. (*Wilkins v. Davis*, 15 B. R. 60.)

The assignee of a bankrupt corporation can not maintain an action to enforce the collateral liability of the stockholders for the debts of the corporation. (*Dutcher v. Marine Nat'l Bank*, 11 B. R. 457; s. c. 12 Blatch. 435.)

An assignee can not under the laws of New York recover money paid by an insolvent bank in the usual and ordinary course of its business to a creditor who was ignorant of its insolvency. (*Dutcher v. Importers' & Traders' Nat. Bank*, 59 N. Y. 5; s. c. 1 N. Y. Supr. 400.)

### The Property of the Bankrupt's Wife and Children.

Marriage is a qualified gift to the husband of the wife's *choses in action*, upon condition that he reduces them to possession during its continuance. The assignment in bankruptcy vests in the assignee all the rights of the husband of the *choses in action* of the wife, and, as a consequence, the assignee may do all that the husband could do prior to the assignment, and this embraces the right to sue for, recover and receive them. It makes no difference in regard to the rights of the assignee, whether the *choses in action* have or have not been placed upon the schedules by the bankrupt. (*In re Boyd*, 5 B. R. 199; *Butler v. Merchants' Ins. Co.* 8 Ala. 146.)

The husband's interest in his wife's *choses in action* is not ownership but power, and does not pass to his assignee. If they have not been reduced to



possession by him at the time of the bankruptcy, they do not pass to the assignee. (*Wickham v. Valle*, 11 B. R. 83.)

If the distributive share of the bankrupt's wife in her father's estate remains in the hands of the administrator or executor at the time of the commencement of the proceedings in bankruptcy, it does not pass to the assignee. (*Shaw v. Mitchell*, 2 Ware, 220; *Shay v. Sessaman*, 10 Penn. 432; *Wickham v. Valle*, 11 B. R. 83.)

The wife's distributive share will not vest in the assignee, although the husband is administrator, for he holds the property in his representative and not in his personal character. (*Shaw v. Mitchell*, 2 Ware, 220.)

A conveyance by the bankrupt to his wife of his interest in her *choses in action* is inoperative and void, and they pass to the assignee. (*Butler v. Merchants' Ins. Co.* 8 Ala. 146.)

If the bankrupt's wife has no other means of support, she may be allowed a portion of the income derived from real estate owned by her. (*In re Ernst Brandt*, 5 Biss. 217.)

If the husband at the time of joining with his wife in a mortgage on her real estate, received a sum of money equal to the value of his estate by curtesy, the assignee will not be entitled to any part of the residue on a sale under the mortgage. (*Shippen's Appeal*, 15 B. R. 553.)

If the wife, without the knowledge of her husband, takes a note payable to her husband or bearer for a debt due to her before marriage, and the husband asserts no title to it or authority over it, but allows her to keep possession of it and collect the interest, she is entitled to it as against the assignee. (*In re George W. Snow*, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.)

A possibility which is held under a will by the bankrupt's wife, and made dependent upon her surviving another legatee, does not pass to the assignee. (*Krumhaar v. Burt*, 2 Wash. C. C. 406.)

Articles of jewelry given to the wife previous to marriage, and continuing in her use since, do not pass to the assignee. (*In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; *in re Chester S. Kasson*, 4 Law Rep. 489.)

Gifts from the husband to the wife of personal ornaments or attire, compatible in value and character with his circumstances at the time, are her sole property as paraphernalia, and do not pass to the assignee. (*In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; *in re Chester S. Kasson*, 4 Law Rep. 489; *contra*, *in re Benjamin B. Grant*, 2 Story, 312.)

Mourning rings given to the bankrupt's wife since her marriage are from their very nature and character purely personal and for her sole and separate use, and do not pass to the assignee. (*In re Benjamin B. Grant*, 2 Story, 312.)

The legal title to an insurance policy on the life of the bankrupt for the benefit of his wife, belongs to the wife, and, if he is solvent when the premiums are paid, the policy can not be assigned by him. (*In re Bear & Steinberg*, 11 B. R. 46; s. c. 1 Cent. L. J. 607.)

If the husband pays premiums on a policy upon his life for the benefit of his wife after he becomes insolvent, the assignee may recover from the wife the amount so advanced, with interest, to be taken out of the policy when that shall be paid. (*In re Bear & Steinberg*, 11 B. R. 46; s. c. 1 Cent. L. J. 607.)

Gifts made by a bankrupt to his children which were proper and suitable to him in his circumstances and condition, may be retained by them. (*In re Benjamin B. Grant*, 2 Story, 312.)

The children of the bankrupt may retain watches given to them by persons other than their parents. (*In re Benjamin B. Grant*, 2 Story, 312.)

If the bankrupt, when insolvent, paid only part of the money to purchase a

watch for his child, the assignee is only entitled to the amount so paid. (*In re Benjamin B. Grant*, 2 Story, 312.)

Where the bankrupt has, in good faith, made an agreement with his minor children that they shall have a certain share of their earnings, and such share has always been kept by them in their own name, separate from his property, the share will not pass to the assignee. (*Tebbets v. Torr*, 5 Law Rep. 503.)

Gifts made by the bankrupt to his children which were not suitable and appropriate to his circumstances are fraudulent, and pass to the assignee. (*In re Benjamin B. Grant*, 2 Story, 312.)

### Rights in Representative Character.

An adjudication of bankruptcy is in the nature of a statute execution for all the creditors. (*In re Elam Rust*, 1 N. Y. Leg. Obs. 326.)

Proceedings in bankruptcy are in the nature of an equitable attachment as against the equitable estate of the bankrupt, and the assignee, as the representative of all the creditors of the bankrupt, thereby becomes the owner of such equitable interest, with an equity superior even to a judgment creditor who has an execution returned unsatisfied, but who had not obtained an equitable lien by filing a creditor's bill or taking other proceedings to reach such equitable estate before the filing of the petition in bankruptcy. (*In re Hinds et al.* 3 B. R. 351.)

The assignee represents the creditors, and for their benefit the ratification of an unauthorized deed will not be permitted to relate back to the time of its execution, so as to bind him, where it would be void under the bankrupt law if executed at the time of the ratification. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

The assignee in bankruptcy more nearly resembles a purchaser of the bankrupt's property at an executor's sale than any other familiar character to which he may be likened. He acquires the rights of the debtor in the property, and also the rights of creditors to impeach any prior fraudulent conveyance, but takes subject to all equities against the debtor in the property purchased. A fund paid into a State court upon a judgment rendered in favor of the bankrupt is subject to be applied according to its usual practice. The clerk may retain the costs due his office out of the fund, and pay the residue to the assignee. (*Clerk's Office v. Bank*, 66 N. C. 214)

The assignee succeeds to the rights of the creditors as well as to those of the bankrupt, and may contest the validity of a conveyance, even though the bankrupt could not. He may institute a suit to recover property conveyed in fraud of creditors, as well as to recover property, or its value, which, by sections 5128 or 5021, has been transferred in fraud of the bankrupt act. (*In re Metzger*, 2 B. R. 355; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.)

The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee represents them. He is trustee for them, and whatever right they might assert as creditors if they had obtained judgments, he may assert for their benefit, whether it be to set aside conveyances which are fraudulent and void as against creditors, or which are otherwise as against them invalid. (*In re Simeon Leland et al.* 10 Blatch. 503.)

Transactions by or with debtors which are void as to creditors, whether for fraud, want of completeness in any of their incidents, or for any cause whatever, are equally void as against the assignee. (*Kane v. Rice*, 10 B. R. 469.)

The assignee is not bound by any lien or incumbrance which is not valid against creditors. (*In re Tills & May*, 11 B. R. 214.)

The assignee occupies the position of a judgment creditor to all intents and purposes, so far as he represents creditors, and whenever such creditor can enforce rights which the debtor could not, the assignee can also enforce them. (*Kane v. Rice*, 10 B. R. 469; *Miller v. Jones*, 15 B. R. 150.)

Any defense that would not be good as against creditors in an equitable suit, can not be maintained against the assignee. His position is analogous to that of a receiver appointed by a court of chancery. A resolution releasing stockholders from their liability is not good as against him when it is not valid as against creditors. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.)

The assignee of a bankrupt corporation may recover money or property obtained from the corporation under a void contract, and will not be affected by the illegal acts of the corporation or its officers. (*In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.)

The assignee may impeach a transaction between a bankrupt corporation and its stockholders, which creditors could impeach. (*Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610.)

The capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. The assignee has a right to inquire into a conventional payment of his stock by one of the shareholders of the company. If the payment is merely conventional through the exchange of checks, thus changing the character of the debt from one of a stock subscription unpaid to that of a loan of money, it is void. It would be just the same if agreeing beforehand to turn the stock debt into a loan, the shareholder should bring the money with him, pay it, take a receipt for it, and carry it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as a valid payment. (*Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610.)

A judgment confessed upon an insufficient verification is valid against all except judgment creditors, who may institute proceeding to set it aside. The assignee is not a judgment creditor, and the bankrupt act nowhere confers upon him the rights of such creditors. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.)

Although the property at the time of the commencement of proceedings in bankruptcy is held by one who claims it by transfer, still, if it be shown that such transfer is void, it follows that the bankrupt did own such property at the time when bankruptcy proceedings were commenced, and therefore the title to such property vests in the assignee under the deed of assignment. (*Poster v. Hackley & Sons* 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *in re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *Shackleford v. Collier*, 6 Bush. 149.)

If a party refuses to take less than the full amount of his demand, and on receiving that signs a composition article, the assignee may recover the money, although the composition failed because it was not signed by all the creditors, according to the requirement of its terms. (*Bean v. Brookmire*, 7 B. R. 568; s. c. 2 Dillon, 108; s. c. 6 L. T. B. 114; s. c. 3 C. L. N. 314; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

An assignee does not represent creditors so as to be able to prosecute their claims against a trustee of a corporation who has rendered himself liable to them for filing a false report. (*Bristol v. Sandford*, 13 B. R. 78; s. c. 12 Blatch. 341.)

Although a composition is not by its terms to be valid unless signed by all the creditors, yet, if the signature of a party misleads and injures other creditors,

he is estopped as against them to deny its validity, even though it is not signed by all. (*Bean v. Brookmire*, 7 B. R. 568; s. c. 2 Dillon, 108; s. c. 6 L. T. B. 114; s. c. 3 C. L. N. 314; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

If the compromise agreement stipulates for the payment of seventy per cent. in six, twelve, and eighteen months, a secret agreement whereby a creditor accepts fifty per cent. in cash in full of his claim, is a fraud on the agreement. (*Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

If one partner receives all the assets of the firm, and executes a compromise agreement with the firm creditors, his assignee may recover money given to a creditor in fraud of such agreement, although the firm is not declared bankrupt. (*Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

It is now held to be the better policy to allow the debtor, though a participant in the fraud, to recover the amount paid to a creditor who refuses to join in a composition agreement, unless he can obtain a preference, and having obtained it, pretends to come into the composition with other creditors on equal terms. The right to recover such bonus passes to the assignee. (*Bean v. Brookmire*, 1 Dillon, 151.)

### Unrecorded Deeds.

If a mortgage has never been delivered, the property passes to the assignee free from the incumbrance, although the mortgage was made prior to the commencement of the proceedings in bankruptcy. (*Jewett v. Preston*, 27 Me. 400.)

When the statutes of a State expressly declare that a deed shall be void as to creditors until and except from the time it is duly admitted to record, the title of the assignee will prevail against any claim under a deed, if it remained unrecorded when the petition in bankruptcy was filed. It is not an unreasonable construction of the bankrupt act which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which, at the time of the filing of the petition, are valid only *inter partes* under the statute of the State in which they are claimed to exist. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Brock v. Terrell*, 2 B. R. 643; *Allen v. Mussey*, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 2 Abb. C. C. 60; s. c. 1 Dillon, 40; s. c. 17 Wall. 351; s. c. 1 L. T. B. 218; *National Bank v. Hunt*, 4 B. R. 616; s. c. 11 Wall. 391; *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; *Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; *in re Perrin & Hance*, 7 B. R. 283; *Moore v. Young*, 4 Biss. 128; *Barker v. Smith*, 12 B. R. 474; s. c. 2 Woods, 87; *in re Thomas C. Gurney*, 15 B. R. 373; s. c. 9 C. L. N. 255; *contra, in re Charles Collins*, 12 B. R. 379; s. c. 12 Blatch, 548; *National Bank v. Conway*, 14 B. R. 175, 513; *Winsor v. McLellan*, 2 Story, 492; *in re Griffiths*, 3 B. R. 731; s. c. Lowell, 431; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75; *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.)

If the State statute deprives the mortgage of effect until it is deposited with the proper officer, as to creditors, subsequent purchasers, and mortgagees in good faith, it will be valid against the assignee if it is deposited for record prior to the commencement of proceedings in bankruptcy, for the assignee does not belong to either of the classes protected by the statute. (*Gibson v. Warden*, 14 Wall. 244.)

Where a chattel mortgage takes effect as against third persons as well as between the parties from the time of its execution, although it is not recorded or accompanied by possession, unless intervening rights have been obtained, it will

be valid against the assignee if it is recorded before the commencement of the proceedings in bankruptcy. (*Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.)

If a deed of trust is actually delivered to a trustee with power to record it when he deems proper, it is valid as against the assignee, although it is not recorded until after the grantor's failure. (*National Bank v. Conway*, 14 B. R. 175, 513.)

Although a mortgage be regarded as having no validity whatever until it is filed, as against creditors of the mortgagor, yet it will be valid if it is filed before the filing of the petition in bankruptcy, for the title of the assignee relates back only to the filing of the petition. (*In re Perrin & Hance*, 7 B. R. 283)

If a mortgage, although it is not recorded in time, is valid as against general creditors and there are only general creditors at the time of the filing, it will be valid as against the assignee. (*Johnson v. Patterson*, 2 Woods, 443.)

If judgment creditors have levied upon the property covered by a chattel mortgage, which is void under the recording laws of the State, the assignee may maintain an action to set it aside. (*Platt v. Stewart*, 13 Blatch. 481.)

Under the laws of Illinois, a mortgagee who takes possession of the property before any other person has acquired any lien or vested rights therein, has a better title than the assignee, although the mortgage was not properly acknowledged. (*In re Burnett*, 6 C. L. N. 366.)

Where the statute declares that a mortgage of chattels shall be void, if the mortgagor remain in possession, unless the mortgage is filed in the record office of the place where the mortgagor resides, the mortgage will be void as against the assignee for want of filing, although it was given to secure a note payable one day after date. (*In re Simeon Leland*, 10 Blatch. 503.)

Under the laws of Iowa, the assignee in assailing a mortgage which was recorded at the time of the commencement of proceedings in bankruptcy, must show something more than that debts were created without notice of it before it was recorded. (*Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519.)

By the laws of Michigan, a mortgage of chattels is absolutely void as against the creditors of the mortgagor unless it is filed in the clerk's office in the township where the mortgagor resides. If the mortgage is given by more than one, and the mortgagors reside in different townships, it will be void, although it is filed in the clerk's office in the township where one of them resides and where the property is located. (*Kane v. Rice*, 10 B. R. 469.)

If a mortgage of chattels is void on account of the omission to record it, the mortgagee does not obtain a right to them by taking possession before the commencement of proceedings in bankruptcy. (*Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; *Kane v. Rice*, 10 B. R. 469; *contra*, *Miller v. Jones*, 15 B. R. 150.)

The assignee in attacking a conveyance as invalid under the laws of the State has precisely the rights which an attaching or judgment creditor would have, and no more. (*Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519; *Miller v. Jones*, 15 B. R. 150.)

### Rejection by Assignee.

As a general rule, contracts to be performed to a party and his rights of action are deemed property, and such contracts and rights of action pass by the operation of the bankrupt law to the assignee. But to this general rule there are many exceptions, some from the nature of the contracts, and some from the nature of the interests involved. (*Streeter v. Sumner*, 31 N. H. 542)

The assignee has an election to repudiate a contract, if it may more prop-

erly be regarded as a burden than a privilege, as for instance, where from the conditions of the contract, he can derive no benefit for the creditors, and may subject the estate to loss if he assumes the contract. Such a contract is not property within the meaning of the law. (*Streeter v. Sumner*, 31 N. H. 542; *Oakey v. Gardner*, 2 La. An. 1005; *Rugley v. Robinson*, 19 Ala. 404.)

The assignee is not at least ordinarily bound to take into his possession property which will be a burden instead of a benefit to the estate. If he elects not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee. (*Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.)

If the assignee may elect to take or not to take any part of the bankrupt's property, some period of time must be limited, within which the election is to be made, for he can not be allowed to hold the title in abeyance for an indefinite period. If, with the knowledge of the bankrupt's title or with means of knowledge, he stands by for a length of time without asserting his claim, and allows third persons to acquire an interest in the property, it is too late to assert his claim, and the time for an election is past. (*Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.)

The right of the assignee to reject property is confined to those cases where he would be charged with a burden or liability if the property passed to him. (*Berry v. Gillis*, 17 N. H. 9.)

The neglect of the assignee to impeach a fraudulent conveyance does not enable a creditor to pursue it and appropriate it to the payment of his debt. (*King v. Dietz*, 12 Penn. 156.)

The assignee of an individual partner may relinquish all right to a judgment rendered in favor of the firm if the firm is insolvent. (*Oakeley v. Gardner*, 2 La. An. 1005.)

The taking of the title to a debt or claim does not charge the assignee with a liability to the party from whom it appears to be due. He can not therefore reject it. The debtor is entitled to know to whom he is indebted, and it should not be left to the election of the assignee to determine whether he shall be a debtor to the bankrupt or a debtor to the assignee. (*Berry v. Gillis*, 17 N. H. 9; *Deadrick v. Armour*, 10 Humph. 588.)

The assignee may elect to abandon a contract which stipulates for the personal services of the bankrupt. (*Streeter v. Sumner*, 31 N. H. 542.)

If the assignee of a lease under seal continues to occupy the premises after the commencement of the proceedings in bankruptcy, without any arrangement with the assignee in bankruptcy, he holds under the landlord as a tenant at will, and is liable in assumption and not in covenant upon the lease. (*Ryers v. Farwell*, 6 Barb. 615.)

### Effect of Surrender to the Assignee.

When the defendant in an action of replevin, after the commencement of the suit, delivers the property in controversy to the assignee of the party from whom the plaintiff obtained it, by a transfer which is void under the bankrupt law, he may set up such delivery as a defense to the action of replevin. (*Bolander v. Gentry*, 36 Cal. 105.)

A sheriff who is sued for the conversion of certain property, seized by him under an attachment, which is claimed by the plaintiff under a mortgage, may show that before the commencement of the action he delivered the property to the assignee of the mortgagor, and that the mortgage is void under the bankrupt law as a fraudulent preference. It is a familiar principle, that the defendant in an action of trover may always show in mitigation of damages, especially when the taking or conversion was not willful, that the property has gone from

his possession, by process of law or otherwise, to the plaintiff, or to his use, or to a party who, as against the plaintiff, had the better title to it. The United States courts have exclusive jurisdiction of proceedings in bankruptcy, but all questions of title to property derived through such proceedings are within the jurisdiction of the State courts. The question presented by such defense is not a question of jurisdiction but of title. (*Hanson v. Herrick*, 100 Mass. 323; *Perry v. Chandler*, 56 Mass. 237; *contra*, *Bromley v. Goodrich*, 15 B. R. 289; s. c. 40 Wis. 131.)

If the action was instituted before the commencement of the proceedings in bankruptcy, the proof will prevent the recovery of more than nominal damages. (*Perry v. Chandler*, 56 Mass. 237.)

If the sale is good at common law, the purchaser can recover in an action against the sheriff for a levy on the property. If it is a fraud on the bankrupt act, the assignee can recover to a like extent against the purchaser. The pendency of such an action is no defense to the action against the sheriff. (*Hathaway v. Brown*, 18 Minn. 414.)

In an action by a preferred creditor to recover the value of property taken by the sheriff, under an attachment against the debtor, the defendant can not plead a surrender of the goods to the assignee as a bar to the action. (*Stanley v. Sutherland*, 16 A. L. Reg. 298.)

A sheriff who is sued for the value of property taken by him under an attachment can not prove that the transfer to the plaintiff was made by the debtor in violation of the bankrupt law. (*Stanley v. Sutherland*, 16 A. L. Reg. 298.)

### Dissolution of Attachments.

(c) "Mesne process" is all process issued in a suit before execution. (*Pennington v. Louenstein*, 1 B. R. 570; *Corner v. Mallory*, 31 Md. 478.)

The term "attachment on mesne process" embraces any process by which a lien is first acquired. (*Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.)

An attachment under the C. C. P. of North Carolina is prior to final judgment, and is therefore in its nature *mesne process*. (*Mixer v. Excelsior Co.* 65 N. C. 552.)

An attachment on mesne process is a statute lien. (*Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 2 Vt. 599; s. c. 5 Law Rep. 392; *Haughton v. Eustis*, 5 Law Rep. 505; *Ingraham v. Phillips*, 1 Day, 117; *Kittredge v. Emerson*, 15 N. H. 227; *Wells v. Brander*, 18 Miss. 348; *Shaffer v. McMaken*, 1 Ind. 274; *Kittredge v. Warren*, 14 N. H. 509; *Davenport v. Tilton*, 51 Mass. 320; *contra*, *in re John S. Foster*, 2 Story, 131; *Everett v. Stone*, 3 Story, 446; *in re Belows & Peck*, 3 Story, 428.)

Congress has the power, by the operation of a general bankrupt law, to divest the conditional lien acquired by the levy of an attachment. (*Corner v. Miller*, 1 B. R. 403; *in re Ellis*, 1 B. R. 551; *in re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374; *in re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; *Mixer v. Excelsior Co.* 65 N. C. 552; *Payson v. Payson*, 1 Mass. 283; *Flagg v. Tyler*, 6 Mass. 33; *Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244; *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.)

The provision applies to attachments sued out in State courts. (*Bank v. Overstreet*, 13 B. R. 154; s. c. 10 Bush, 148.)

The language of this clause is broad and comprehensive, and not restricted, and made to have reference to the time at which the act was to become operative. The period of four months was not intended to have reference to the first day of June, 1867, when the act was to go into effect as to all its provisions, but was fixed as a period within which no preference should be gained by one creditor,

by attachment, over the claims of other creditors of the bankrupt. An attachment made after the passage of the act, but before the first day of June, 1867, and within a period of four months next preceding the commencement of proceedings in bankruptcy, was dissolved. (*Corner v. Mallory*, 31 Md. 478.)

The appointment of a receiver and the transfer of the custody of the attached property from the sheriff to him alters no one's rights. His custody is that of the law, and is in its nature provisional and suspensive, leaving the rights of the parties concerned to be controlled by the ultimate judgment of the court. (*Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253.)

The commencement of proceedings in bankruptcy against one partner within four months after the issuing of an attachment against a firm does not dissolve it. (*Mason v. Warthens*, 14 B. R. 341; s. c. 7 W. Va. 532.)

A resolution of composition which is passed without calling the first meeting of creditors and electing an assignee, does not dissolve an attachment issued within four months before the commencement of such proceedings. (*In re W. D. Clapp & Co.* 14 B. R. 191; *in re Shields*, 15 B. R. 532; s. c. 4 Cent. L. J. 557; s. c. 24 Pitts. L. J. 190; *contra*, *Miller v. Mackenzie*, 13 B. R. 496; s. c. 43 Md. 404; *Smith v. Engle*, 14 B. R. 481; s. c. 9 C. L. N. 46.)

An attachment is not a fraud on the bankrupt law, and rights which have accrued thereby under the State law other than expenses are not affected by proceedings in bankruptcy. (*Whithed v. Pillsbury*, 13 B. R. 241.)

This section only refers to attachments which are pending at the time the petition in bankruptcy is filed. If the attachment is prosecuted to judgment prior to that time, the judgment can not be examined or impeached in a collateral action. (*Henkleman v. Smith*, 12 B. R. 121; s. c. 41 Md. 164; *in re Enoch Cook*, 2 Story, 376; *Fiske v. Hunt*, 2 Story, 582.)

When an execution is not in fact levied upon a fund in the hands of the garnishee, neither the judgment nor execution create any lien upon the fund other than that under which it has been previously held. The mere fact that a judgment has been rendered and an execution issued, but not levied, does not have the effect to convert the attachment lien upon a fund in the hands of a garnishee into a lien upon final process. In such a case the attachment lien remains, after the judgment and before the levy of the execution, precisely what it was before, to wit, an attachment under *mesne* process. (*Howe v. Union Ins. Co.* 42 Cal. 528; s. c. 4 L. T. B. 41.)

An attachment made March 8, 1867, at seven o'clock in the afternoon, was dissolved by the commencement of proceedings in bankruptcy on July 8, 1867, at two o'clock and fifteen minutes in the afternoon, for it was made within the period of four months prior to such commencement. Fractions of a day will be considered and the very hour ascertained where the means for an accurate computation are afforded. (*Westbrook Manuf. Co. v. Grant*, 60 Me. 88; s. c. 6 L. T. B. 545.)

If a lien is obtained by the filing of a bill to reach the equitable assets of the bankrupt, it will be preserved although an attachment was issued with the summons, for the attachment may be regarded as mere surplusage. (*House v. Swanson*, 7 Tenn. 32.)

If a mechanic issued an attachment within the time required by law, he retains his lien although the attachment is dissolved. (*London v. Blanford*, 56 Geo. 150.)

A judgment obtained in the courts of one State, can not be collected in another State, except by a suit thereon at common law, or by process of attachment; and in either case, the writ issued in the suit to collect it is *mesne* process. An attachment on such judgment will be dissolved, if issued within four



months before the commencement of proceedings in bankruptcy. (*Randall & Co. v. McLain*, 40 Geo. 162.)

An attachment properly issued is legal and valid until dissolved. It is not vacated or made void *ab initio* by the commencement of proceedings in bankruptcy, but simply dissolved. All proceedings under it up to that time are regular and valid. (*In re Housberger et al.* 2 B. R. 92; s. c. 2 Ben. 504; *in re C. H. Preston*, 6 B. R. 545.)

A bankrupt can not plead the pendency of the proceedings in bankruptcy in abatement of the attachment. (*Sims v. Jacobson*, 51 Ala. 186.)

The bankrupt can not claim the dissolution of the attachment for the lien continues as to him. (*Sims v. Jacobson*, 51 Ala. 186.)

A trustee in bankruptcy is entitled to all the assets seized on attachment on *mesne* process issued from a State court within four months before the commencement of the proceedings in bankruptcy, and the State court, on the petition of the trustee, will order that they be delivered to him. (*Ballin v. Ferst*, 55 Geo. 546.)

The assignee cannot be made a party plaintiff in an attachment suit pending against the bankrupt. The assignee is the representative of the bankrupt's estate, but he is not the representative of the plaintiff in an attachment. (*Smith v. Lawton*, 39 Geo. 29)

The assignee may, on his own motion, be made a party, if for no other reason than to have it properly made known to the court that the defendant has become a bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the State court in some authentic mode. It may be denied. Order is one of the first requisites of legal proceedings, and the State court can not take notice of the judgments of other courts by instruction. They must be brought to the notice of the court, and this can not be done without parties. (*Kent v. Downing*, 10 B. R. 538; s. c. 44 Geo. 116; *Johnson v. Bishop*, 8 B. R. 533; s. c. 1 Wool. 324; *Hurrod v. Burgess*, 5 Rob. [La.] 449.)

Where the attachment was issued within four months before the commencement of the proceedings in bankruptcy, it will, on motion, be dissolved by the State court, although a judgment has been entered and the proceeds of a sale of the property under an execution paid over to the plaintiff by the sheriff. (*Dickerson v. Spaulding*, 15 B. R. 313; s. c. 14 N. Y. Supr. 288.)

An assignee may move for a dissolution of the attachment, although the property has been sold, and it is not proper to put him on terms in this respect. (*King v. Loudon*, 14 B. R. 383; s. c. 53 Geo. 64.)

When a motion for the dissolution of an attachment asks that the sheriff be directed to deliver the property to the assignee, notice thereof must be given to the sheriff. (*Dickerson v. Spaulding*, 15 B. R. 313; s. c. 14 N. Y. Supr. 288.)

A claim by the assignee of the defendant that the attachment has been dissolved by the bankruptcy, presents substantive material facts to abate the proceedings, and those facts should be pleaded in an issuable shape and verified by the oath of the claimant instead of being set forth in a motion. (*Hecht v. Wasell*, 27 Ark. 412.)

A plea of the commencement of the proceedings in bankruptcy is insufficient, for the filing of the petition is but an incipient step in the proceeding for an adjudication. (*Wells v. Brander*, 18 Miss. 348.)

If the defendant files a petition in bankruptcy after the levying of an attachment, the proceedings should be stayed until an assignee is appointed. (*Fisher v. Vose*, 3 Rob. [La.] 457; *Kittredge v. Emerson*, 15 N. H. 227.)

The assignee has a right to appear in the State court, and on motion have the attachment dissolved. (*Loudon v. King*, 50 Geo. 302.)

An allegation that the attachment has been dissolved by the bankruptcy of the defendant, is matter in abatement, and should be properly pleaded and verified, instead of being set forth in a general vague motion. (*Hecht v. Wassell*, 27 Ark. 412.)

Where the garnishee files a petition in bankruptcy within four months after the service of the writ of garnishment upon him, the attachment is dissolved. (*Janes v. Beach*, 1 Mich. N. P. 94.)

No intervention by the assignee in the attachment suit is essential to the dissolution of a garnishment. When the bankruptcy of a garnishee occurs, the fund falls back into the estate, and is unaffected by a judgment between a bankrupt and a third person assuming to direct it. (*Janes v. Beach*, 1 Mich. N. P. 94.)

From the date of the dissolution of the attachment, the sheriff, or other person having then actual possession of the attached property, becomes divested of all official relations to that property, and becomes a simple bailee thereof to the use of the person by virtue of the bankrupt act entitled to the same. If he afterwards, by sale or in any other way, disposes of the property otherwise than to transfer the bankrupt's interest in the same to him, to whom by the bankrupt law it falls, his act has no official character, and needs, to make it valid, the ratification of the person having title under the law. (*In re C. H. Preston*, 6 B. R. 545.)

An attaching creditor whose attachment has been dissolved by an order of the court, has no lien on the fund. (*Loudon v. Blanford*, 56 Geo. 150.)

The clerk has no right to his costs until the fund has been adjudged subject to costs on the termination of the suit. (*Ballin v. First*, 55 Geo. 546.)

The attaching creditor can not prove the costs incurred in the attachment, because, until judgment is obtained, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request. (*In re Fortune*, 2 B. R. 662; s. c. *Lowell*, 306; *Gardner v. Cook*, 7 B. R. 346; *in re C. H. Preston*, 6 B. R. 545; *in re Hatje*, 12 B. R. 548; s. c. 6 Biss. 436.)

The lien for the debt and for the costs is precisely the same in all respects, in regard to the means by which it is acquired, and the tenure by which it is held, and when such lien ceases by reason of the dissolution of the attachment as to one, it must necessarily cease as to the other. (*In re Geo. S. Ward*, 9 B. R. 349; *in re C. H. Preston*, 6 B. R. 545; *in re Fortune*, 2 B. R. 662; s. c. *Lowell*, 306; *contra, in re Housberger et al.* 2 B. R. 92; s. c. 2 Ben. 504; *in re C. H. Preston*, 5 B. R. 293; *Loudon v. King*, 50 Geo. 302; *in re John S. Foster*, 2 Story, 131.)

When the claim on which the attachment was issued is merged into a judgment rendered after the commencement of proceedings in bankruptcy, the lien for fees and expenses is lost and extinguished in the judgment. (*In re David B. Williams*, 2 B. R. 229; s. c. 3 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374.)

The rights of the officer making the attachment are no greater than those of the attaching creditor. In case of the dissolution of the attachment, he has no lien whatever for his costs and disbursements. In such case he must look to the attaching creditor alone for the same, and in no case can he withhold the property from the marshal or assignee on account thereof, or look to the assignee or the bankrupt's estate for the payment thereof. (*In re Geo. S. Ward*, 9 B. R. 349.)

An officer must look to the party who employs him for his fees. He has no claim upon the adverse party for them. (*Zeiber v. Hill*, 8 B. R. 239; s. c. 1 Saw. 268.)

If the sheriff sells the property after the commencement of proceedings in bankruptcy, his lien is lost when he lets it go. Nothing less than the consent

of the person entitled at the time of the sale to the property can preserve the lien to take effect on the proceeds. (*In re C. H. Preston*, 6 B. R. 545.)

The sheriff can not retain the property until the fees and charges are paid; for when the attachment, by virtue of which he holds the property, is dissolved, he has no means of enforcing his lien against the property. His remedy, if he has a lien, is to apply to the bankrupt court to have it allowed and paid out of the assets that may come into the hands of the assignee. (*In re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 373.)

The costs are but an incident, and the debt or principal must be proven and allowed before the costs can be proven and allowed. (*In re C. H. Preston*, 5 B. R. 293.)

Costs which are made after the commencement of proceedings in bankruptcy can not be allowed. (*In re C. H. Preston*, 5 B. R. 293.)

Costs incurred in attaching property which is not liable to attachment can not be allowed. (*In re C. H. Preston*, 5 B. R. 293.)

The State court can not direct any of the fund to be paid to the attaching creditor, but the whole must be paid over to the assignee. (*Harmon v. Jameson*, 1 Cranch C. C. 283.)

When the attachment is dissolved, the State court may adjust the lien for costs before turning the money over to the assignee. (*Loudon v. King*, 50 Geo. 302.)

The bankrupt court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed, and not protected by an absolute lien. When the assignee receives the benefit of the costs of an attachment, he should sustain the burden. (*In re Fortune*, 2 B. R. 662; s. c. Lowell, 306; *Gardner v. Cook*, 7 B. R. 346; *Zeiber v. Hill*, 8 B. R. 239; s. c. 1 Saw. 268; *in re Geo. S. Ward*, 9 B. R. 349; *in re Holmes et al.* 14 B. R. 493; *in re H. E. P. Jenks*, 15 B. R. 301.)

If the attaching creditor is not the petitioning creditor for the adjudication of bankruptcy, this fact raises a presumption against the allowance of the claim for expenses. (*In re Geo. S. Ward*, 9 B. R. 349.)

Where the interval between the levying of the attachment and the filing of the petition in bankruptcy by another creditor is brief, the omission to file such petition is not unreasonable. (*In re Geo. S. Ward*, 9 B. R. 349.)

Where the costs are incurred solely for the benefit of the attaching creditor, they can not be allowed. (*In re Archenbrow*, 8 B. R. 429.)

The attachment can not be sustained as against property which will be set apart to the bankrupt as exempt. (*In re C. H. Preston*, 5 B. R. 293; *in re Ellis*, 1 B. R. 551; *contra*, *Robinson v. Wilson*, 14 B. R. 565; s. c. 15 Kans. 595.)

If the assignee files a petition to set aside a sale of exempted property made under an attachment, the petition will be dismissed with costs to the assignee personally. (*In re C. H. Preston*, 6 B. R. 545.)

If an attachment for a firm debt is laid upon the property of a firm composed of three members, of whom one only is bankrupt, it may be dissolved as to the interest of the latter, and bind the interests of other members. (*Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.)

If the bankrupt is not a debtor to the firm, his interest may be considered to be his proportionate share of the property. (*Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.)

While the lien created by an attachment continues, the sheriff may at any

time demand a return of the property from a receptor, and if it is refused, he has an immediate right of action, irrespective of the question whether it will or will not be needed for the payment of the debt on which it was attached. Such a liability will not be discharged or in any manner affected by the bankruptcy of the debtor. If the receptor refuses to deliver the property to the sheriff, after an execution has been issued upon a judgment rendered in the attachment proceedings, he can not take advantage of his own fault and claim that the attachment has been dissolved. (*Parks v. Sheldon*, 36 Conn. 466.)

If an insolvent debtor in an attachment suit gives a bill of sale of the attached goods to a receptor, with an understanding that the property shall be sold and the proceeds applied toward the payment of the debt of the attaching creditor, without regard to the attachment and without a demand perfected in an execution, that is a preference, but if the understanding is that the proceeds shall be held by the receptor as security against his liability on his receipt, and applied to the debts only upon demand duly made on execution, the bill of sale is valid. (*Parsons v. Topliff*, 14 B. R. 547; s. c. 119 Mass. 245.)

Where the attachment was against an individual partner, a receptor may show that the firm at the time of the attachment was insolvent, and subsequently became bankrupt, and that the property was firm property, and was delivered to the assignee. (*Lewis v. Webber*, 116 Mass. 450.)

If a judgment is entered in the attachment suit, even after the commencement of the proceedings in bankruptcy, the subsequent discharge of the defendant will not relieve the receptor from liability. (*Smith v. Brown*, 14 N. H. 67.)

If the defendant fails to apply for a stay of the proceedings, and judgment is rendered against him, it is conclusive against his surety on the bond to dissolve the attachment, although the plaintiff proved his debt. (*Cutter v. Evans*, 11 B. R. 448; s. c. 115 Mass. 27; *Haber v. Klauberg*, 15 B. R. 347; s. c. 4 Cent. L. J. 342.)

The provisions of this clause do not apply to the collateral liability of sureties upon a bond given to dissolve the attachment, and by which the lien is discharged. The bond is not a mere substitute for the attachment. It does not merely restore the possession of the property to the debtor, subject to the attachment: it dissolves the attachment utterly. It is not given for the property itself, nor as security for its value; but for the payment absolutely of the judgment when recovered in suit, whatever may be its amount. It is not the equivalent of the attachment, and has not its incidents. The discharge, when obtained, may be pleaded in bar to the action, and the sureties on the bond may thus be released, even though the attachment was issued more than four months prior to the commencement of proceedings in bankruptcy. (*Carpenter v. Turrell*, 100 Mass. 450; *Williams v. Atkinson*, 36 Tex. 16; *vide Zollar v. Janvrin*, 49 N. H. 114; *Holyoke v. Adams*, 10 B. R. 270; s. c. 2 N. Y. Supr. 1; s. c. 8 N. Y. Supr. [Hun], 223.)

Where an attachment issued more than four months before the commencement of the proceedings in bankruptcy, was dissolved by filing a bond, the bankrupt will not be allowed to file a supplemental answer setting up his discharge. (*Holyoke v. Adams*, 13 B. R. 413; s. c. 59 N. Y. 233.)

The bankrupt may give a bond to dissolve the attachment, although it was issued more than four months prior to his bankruptcy. (*Braley v. Boomer*, 12 B. R. 303; s. c. 116 Mass. 527.)

No matter or thing which has arisen since the judgment in the original writ can, upon review, be pleaded in bar of the original action. A plea of a subsequent discharge in bankruptcy is irregular, and can not defeat the attachment. (*Zollar v. Janvrin*, 49 N. H. 114.)

An action of review is merely a chose in action, which, in virtue of the ad-

judication of bankruptcy, became vested in the assignee. Whatever may be recovered upon the review, in the way of damages or costs, or in reduction of either, must be recovered by the assignee for the benefit of the creditors, whose rights, as well as those of the bankrupt, the assignee represents. If the action is prosecuted in the name of the debtor, instead of the assignee's, the judgment must be for the adverse party. (*Zollar v. Janvrin*, 49 N. H. 114.)

Every State court owes obedience to an act of Congress, concerning a matter within the power of Congress, as fully as a court of the United States. An adjudication of the district court of another State is equal in all respects to a similar adjudication by the district court of the State in which the attachment is pending. (*Mixer v. Excelsior Co.* 65 N. C. 552.)

A proceeding by way of distress for rent, under the statutes of the State of Illinois, is in the nature of an attachment, and the property is attached upon *mesne* process; but the certificate given by the court, setting forth the amount found to be due to the landlord, together with the costs of court, is in the nature of final process. (*In re Joslyn et al.* 3 B. R. 473; s. c. 2 Biss. 235.)

In Connecticut, the first attaching creditor has sixty days in case of personal property, and four months in case of real estate, after final judgment, within which to levy his execution, and thus enforce his attachment lien. After he has done so, or if his time has expired, then the second attaching creditor has the same length of time within which to levy his execution. The third attaching creditor has the same time after the second that the second does after the first; and so on till the property is exhausted or the attachments are all satisfied. The levy of an execution, while there is a subsisting prior encumbrance by attachment on the same property, is void. The assignee represents the creditors of the bankrupt, as well as the bankrupt himself, and can take advantage of any remedy which would be open to a subsequent attaching creditor. (*Beers v. Place & Co.* 5 B. R. 459; s. c. 36 Conn. 579; s. c. 1 L. T. B. 262.)

No attachment made prior to the period of four months next preceding the commencement of proceedings in bankruptcy is dissolved. Not being dissolved, it remains in full force. When the attachment is so made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment. The lien may be enforced by any requisite proceedings therefor which do not involve a judgment *in personam*. A judgment only to be enforced against the property attached, but not to be enforced against the person of the defendant, or any other property, may be entered, even though a discharge has been granted, and is pleaded in bar of the action. (*Bates v. Tappan*, 3 B. R. 647; s. c. 99 Mass. 376; *Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me. 559; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Leighton v. Kelsey*, 4 B. R. 471; s. c. 57 Me. 85; *Perry v. Somerly*, 57 Me. 552; *Stoddard v. Locke*, 9 B. R. 71; s. c. 43 Vt. 574; *Daggett v. Cook*, 37 Conn. 341; *May v. Courtney*, 47 Ala. 185; *Peck v. Jenness*, 7 How. 612; *Ingraham v. Philips*, 1 Day, 117; *Kittredge v. Emerson*, 15 N. H. 227; *Kittredge v. Warren*, 14 N. H. 509; *Davenport v. Tilton*, 51 Mass. 320; *Johnson v. Collins*, 116 Mass. 392; *Munson v. B. H. & E. R. R. Co.* 14 B. R. 173; s. c. 120 Mass. 81; *Stockwell v. Silloway*, 113 Mass. 382; *vide in re Bellows & Peck*, 3 Story, 428.)

An attachment by garnishment gives a valid lien if made more than four months before the commencement of the proceedings in bankruptcy, although no notice was given to or process served on the bankrupt. (*In re J. L. A. Peck*, 16 B. R. 48.)

The rules of law by which the amount for which the plaintiff is entitled to judgment is determined, are not affected by the bankruptcy of the defendant. (*Johnson v. Collins*, 116 Mass. 392.)

No special judgment can be entered to be enforced against the bond, if the defendant pleads his discharge, where the attachment was issued more than four months before the commencement of the proceedings in bankruptcy, although

the bond was filed after the adjudication of bankruptcy. (*Hamilton v. Bryant*, 14 B. R. 479; s. c. 114 Mass. 543; *Fickett v. Durham*, 119 Mass. 159.)

Where the attachment was laid more than four months prior to the commencement of proceedings in bankruptcy, no personal judgment should be rendered against the debtor if he pleads a discharge. (*Shearon v. Henderson*, 38 Tex. 245)

If the State law allows a bond to dissolve an attachment to be filed at any time before judgment, it can not be filed after a trial, but before the entry of a special judgment to bind the property. (*Johnson v. Collins*, 12 B. R. 70; s. c. 117 Mass. 343.)

A demurrer to a plea of discharge in bankruptcy is erroneous in an attachment suit. The proper practice is to file a replication stating the time of suing out the attachment, and the date of the proceedings in bankruptcy. (*Gibson v. Green*, 45 Miss. 209.)

The assignee should be made a party to the attachment suit, or at least be afforded the opportunity by citation to come in, if he will. He represents the creditors of the bankrupt, whose interests are entitled to protection. He takes the property attached, subject to all legal liens upon it, and in his hands he can interpose every defense open to the bankrupt, whether to the demand itself or to the attachment, interposing a defense, in his discretion, in the best interests of the estate. (*Gibson v. Green*, 45 Miss. 209.)

A creditor, having a valid attachment, can at any time be prohibited from selling the property attached. The assignee has a right to free the estate from the attachment lien, if that course becomes advisable, and the district court can protect him in the exercise of that right, and interpose its authority at such time as may be most expedient or proper. (*Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.)

The lien of an attachment is incident to the process. It can not exist without it. When the process dies, the lien must necessarily die with it. How then can a lien of attachment on process issued by a State court be preserved and enforced in the Federal courts? (*Daggett v. Cook*, 37 Conn. 341.)

The return of the sheriff, showing a valid attachment, is conclusive, and can not be impeached by proofs *ab extra*. (*Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me. 559.)

Where by law the plaintiff having a judgment may issue an attachment thereon, instead of any other execution, such an attachment is final and not *mesne* process. It is true it originates a new suit between the plaintiff and the garnishee, which may result in a judgment and execution against the latter, but this makes it none the less final process as against the defendant in the original judgment, and such process does not fall within the operation of this clause of the bankrupt act. (*The First National Bank of Baltimore v. Jaggars*, 31 Md. 38; *Wilbur v. Wilson*, 2 W. N. 496; *Stewart v. Warden*, 1 W. N. 3.)

The title to the property attached vests in the assignee as soon as the assignment to him is executed, and with this title he acquires the right to immediate possession. He can not sue the sheriff by an action at law in the district court. Whether the attachment has ceased to have any binding force depends not only upon a proposition of law, but also upon two questions of fact—that is, whether the debtor has been adjudicated bankrupt, and whether he is entitled to the property. Of the principle of law, that bankruptcy operates to dissolve the attachment, the State court is bound to take judicial notice; but of the two facts stated it is not bound to take such notice. No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings; and if the allegations are denied, they must be proved by the record. The State court should be informed in a proper way of the proceedings in bankruptcy before its possession of property

held under an attachment is interfered with or assailed. It would be a violation of judicial comity, and provoke unseemly conflicts, to seize the property out of the hands of its officer. If the assignee desires possession of the property, and it is withheld, he must seek relief in the State courts. (*Johnson v. Bishop*, 8 B. R. 533; s. c. 1 Wool. 324; *Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.)

The assignee can not treat the judgment in the attachment suit as a nullity, for he claims under the defendant by a transfer subsequent to the attachment. He may come in as a party, and can not, therefore, be regarded as a stranger to the judgment which may be rendered. (*Kittredge v. Emerson*, 15 N. H. 227.)

Where the attachment was issued more than four months prior to the commencement of the proceedings in bankruptcy, a purchaser at a sale under a decree made after that time acquires a title which can not be attacked collaterally by the assignee, although the assignee was not made a party to the suit. (*Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.)

The sheriff is not liable to the assignee for the value of property sold under a *feri facias* issued upon a judgment entered in an attachment suit after the commencement of the proceedings in bankruptcy, although the attachment was issued within four months before that time. (*Bradley v. Frost*, 3 Dillon, 457; *contra*, *Miller v. O'Brien*, 9 B. R. 26; s. c. 9 Blatch. 270.)

If the plaintiff in an attachment suit, issued within four months before the commencement of the proceedings in bankruptcy, obtains a judgment and issues an execution after that time, under which the attached property is sold, he is liable to the assignee for the value. (*Bracken v. Johnson*, 15 B. R. 106; s. c. 3 A. L. T. [N. S.] 637; s. c. 4 Cent. L. J. 9.)

If judgment is entered and the property sold after the commencement of the proceedings in bankruptcy, the assignee may recover the proceeds from the attaching creditor. (*Bradley v. Frost*, 3 Dillon, 457.)

If real estate is subject to an attachment that is valid as against the assignee, the taxes thereon should be paid out of the fund realized therefrom if they were allowed and deducted from the valuation at the time of the levy. (*Foster v. Inglee*, 13 B. R. 239.)

If an attaching creditor pays off a prior incumbrance under the provisions of a State law, which gives him a right to be repaid from the proceeds of the property, he will, upon the dissolution of the attachment, be entitled to repayment from the proceeds received therefrom by the assignee. (*Whithead v. Pillsbury*, 13 B. R. 241.)

An attachment issued by a State court against a corporation more than four months before the commencement of the proceedings in bankruptcy, will not be dismissed for want of jurisdiction. (*Munson v. B. H. & E. R. R. Co.* 14 B. R. 173; s. c. 120 Mass. 81.)

After a qualified judgment has been entered, the sheriff may maintain an action against the receptor upon his receipt. (*Lamprey v. Leavitt*, 20 N. H. 544.)

The lien of an attachment upon property delivered to a receptor follows the property into the hands of the debtor's assignee. (*Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.)

If property taken under an attachment issued more than four months before the commencement of the proceedings in bankruptcy is delivered to a receptor, the plaintiff is entitled to take a judgment *in rem* and levy an execution upon the money which may be collected from the receptor. (*Batchelder v. Putnam*, 13 B. R. 404; s. c. 54 N. H. 84.)

If an attachment is laid in the hands of a garnishee prior to the period of four months next preceding the commencement of the proceedings in bankruptcy, it is not dissolved. (*Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.)

If the defendant is adjudged bankrupt after the issue and levy of an attachment to perfect a mechanic's lien, an order of notice may be issued against the assignee to appear at the next term and show cause why judgment should not be rendered against the property attached for the lien, and if he neglects to appear the plaintiff may then proceed with his case and take a judgment *in rem* against the property. (*Marston v. Stickney*, 55 N. H. 383.)

Where the attachment is on both real and personal property, evidence that the attachment has by agreement been dissolved as to the personal property is incompetent, for it remains an existing lien on the real estate. A qualified judgment does not determine the right to levy on the personal property, but that question can be raised when the levy is made. (*Bosworth v. Pomeroy*, 112 Mass. 293.)

The commencement of proceedings in bankruptcy within four months after the issuing of an attachment renders it illegal for a receptor who merely undertook to produce the property to satisfy any execution that might be issued on any judgment rendered therein to perform his contract, and releases him from the same. (*Kaiser v. Richardson*, 14 B. R. 391; s. c. 5 Daly, 301.)

The only right which a judgment creditor has under a levy made subsequent to an attachment, is an interest in the property subject to the attachment. When the attachment is dissolved, his right remains the same, and the assignee takes the interest covered by the attachment. The provisions of the act preserving existing securities do not indicate any intention to improve the condition of any creditor, or create new rights. (*In re Julius Klancke*, 4 B. R. 648; s. c. 4 Ben. 326; *in re H. Badenheim & Co.* 15 B. R. 370.)

The nature or comparative efficiency of the means provided by the statute to secure the property for the benefit of all the bankrupt's creditors does not affect the operation of the adjudication of bankruptcy to bring all his assets at once into the custody of the law, and prevent their subsequent attachment by one creditor for his own benefit. A sheriff who makes an attachment, pending the proceedings in bankruptcy, can not dispute the title of a party who claims the property by a transfer from the debtor, on the ground that such transfer is fraudulent. (*Williams v. Merritt*, 4 B. R. 706; s. c. 103 Mass. 184.)

The sheriff, in an action against him for neglecting to execute an attachment, can not excuse the non-performance of his duty by averring that its discharge might not have availed the plaintiff to satisfy his debt, because the bankrupt law might have intervened and taken the property, when attached, from the custody of the State law. The plaintiff had the right to have the command of his process obeyed, and the attachment made by the sheriff, whether it availed him or not. (*Carlisle v. Soule*, 44 Vt. 265.)

Sec. 5045.—There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or



order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

Statutes Revised—March 2, 1867, § 14, 14 Stat. 522; June 8, 1872, ch. 330, 17 Stat. 334; March 3, 1873, ch. 235, 17 Stat. 577. Prior Statutes—April 4, 1800, ch. 19, §§ 18, 34, 35, 53, 2 Stat. 26, 30, 31, 34; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

### What Property May be Exempted.

Exempted property does not pass to the assignee. It is excepted, by this section and Form No. 18, from the operation of the assignment. (*In re Lambert*, 2 B. R. 426; *Rix v. Capitol Bank*, 2 Dillon, 367.)

The bankrupt act secures to the bankrupt certain parts of his estate which are set off to him free from the claims of creditors. Of these he, in fact, becomes the purchaser, the consideration for the purchase being the surrender of all his estate, and the sanction for his title being in the supreme law of the land. The lien of a creditor upon property so set apart can not, therefore, be enforced. (*In re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201.)

A bankrupt who has received his discharge has no standing in court to ask for an exemption not existing at the time of his discharge. (*In re Kean et al.* 8 B. R. 367.)

The assignee is not entitled to any of the exempted property, and it is no concern of his who may have the right to it. Upon the death of the bankrupt the title to such property vests in his executor or administrator. (*In re Hester*, 5 B. R. 285.)

When the partnership assets are not exempted from execution by the State laws, the bankrupt is not entitled to any portion of them. All the provisions of the exemption clause, except the last, relate only to the separate property of the bankrupt. (*In re Hafer*, 1 B. R. 457; *Anon.* 1 B. R. quarto, 187.)

Where property that would be exempted under the bankrupt act has been seized and sold under an attachment on *mesne* process, which is subsequently dissolved by the commencement of proceedings in bankruptcy, the bankrupt is entitled to the fund, and he need not wait to ascertain if the assignee will be able to collect enough from the assets assigned to pay the expenses of the proceedings. The expenses are to be paid from the assets of the bankrupt when collected, but not from property which is exempt from the assignment. The same prop-

erty which is exempted upon a petition filed by the debtor is also exempted where the proceedings are commenced by creditors. (*In re Ellis*, 1 B. R. 551.)

The exemption may be allowed, although the property has within four months prior to the petition been attached on *mesne* process. (*In re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 373.)

A sale after the filing of the petition in bankruptcy, of property exempt both by the bankrupt act and the State law, under a levy made prior to the commencement of proceedings in bankruptcy, will be set aside. (*In re J. H. Griffin*, 2 B. R. 254; s. c. 2 L. T. B. 28.)

A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy. (*In re Nicholas Martin*, 13 B. R. 397; *in re John Owens*, 12 B. R. 518; s. c. 6 Biss. 432.)

If the bankrupt, after filing his petition in bankruptcy, takes the benefit of the State insolvent law, he must file an account of his property, for the exempt property does not pass to the assignee, nor is the title of the bankrupt thereto impaired or affected. (*Bullymore v. Cooper*, 2 Lans. 71; s. c. 46 N. Y. 236.)

The estate of the bankrupt may be all personal property, and every article may be subject to a lien to secure a debt owing to some one or another creditor. By the operation of the bankrupt law, no such lien, except at the option of its holder, would be extinguished. Every such lien would constitute for the person holding it a special property in the thing covered by the lien, and might be the most valuable part of his estate, and for the law to divest it might be to make one bankrupt in the endeavor to relieve another. (*In re C. H. Preston*, 6 B. R. 545.)

Property can not be exempted to the prejudice of a creditor who holds a valid vendor's lien thereon. The lien must prevail; Congress did not intend that the bankrupt act should override cases of that nature. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279; *in re Whitehead*, 2 B. R. 599; *in re Jas. B. Brown*, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 C. L. N. 409; *in re Hutto*, 3 B. R. 787; s. c. 1 L. T. B. 226; s. c. 3 L. T. B. 197.)

Where the property claimed to be exempted is subject to a mortgage, the assignee will discharge his whole duty if he designates the exempted property, and then leaves the bankrupt and mortgagee to settle their respective rights by themselves. (*In re Lambert*, 2 B. R. 426.)

A mortgage, though fraudulent and void as against creditors is good as between the parties. A decree of the district court, declaring a mortgage fraudulent as against creditors, does not affect its validity as between the parties, nor its operation upon property in which the creditors have no rights. A mortgagee who has done nothing by proof of his debt or otherwise to waive his mortgage, may hold the exempted property as security for his debt, and this right can not be affected by the bankrupt's discharge. (*Tuesley v. Robinson*, 103 Mass. 558.)

The bankrupt can not claim any exemption in property conveyed by him prior to the commencement of proceedings in bankruptcy in fraud of his creditors, and afterward recovered to the estate. The sale is good as against him, and in attempting to place his property beyond the reach of his creditors, he placed his exemption beyond his own reach. (*In re Graham*, 2 Biss. 449; *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; *in re Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *contra*, *Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290; *Ox v. Wilder*, 5 B. R. 443; s. c. 7 B. R. 241; s. c. 2 Dillon, 132; s. c. 5 L. T. B. 500; *Penny v. Taylor*, 10 B. R. 200; *McFarland v. Goodman*, 11 B. R. 134; s. c. 6 Biss. 111; s. c. 13 A. L. Reg. 697.)

If a transfer of exempted property is surrendered as a preference by the grantee, the debtor may claim his exemption. (*In re Detert*, 11 B. R. 293; s. c. 14 A. L. Reg. 166; s. c. 7 C. L. N. 130.)

If the assignee proceeds to sell exempted property, or to treat it as assets, the court, on the application of the bankrupt, will restrain him. The district court has no concern with the property exempt under a State law, and will not enjoin a judgment creditor from selling it. The decision of the rights of the parties properly belongs to the tribunals of the State under whose laws they are claimed. (*In re C. Hunt*, 5 B. R. 493; s. c. 2 L. T. B. 197; s. c. 4 C. L. N. 5; s. c. 2 Pac. L. R. 146; *in re Fetherston*, 5 C. L. N. 193; s. c. 20 Pitts. L. J. 77; *in re Jared Everett*, 9 B. R. 90; *vide in re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 373.)

The exemption relates back to the filing of the petition. The exempted property in contemplation of law remains the property of the bankrupt, subject to all legal incumbrances. A lien on articles so exempted, can not be enforced in the bankruptcy court, because that court has not possession of the articles the lien affects. It has sent them beyond or rather declined to receive them within its jurisdiction, and would need to obtain jurisdiction, setting aside the action of the assignee, before it could enforce the lien. Only such liens as are on property in the possession of the court will be enforced by it. (*In re C. H. Preston*, 6 B. R. 545; *contra, in re Wylie*, 5 L. T. B. 330.)

The bankrupt court has no jurisdiction to order a sale of the exempted property, although some of the creditors hold notes waiving the benefit of the exemption laws. (*In re Miles Bass*, 15 B. R. 453; s. c. 9 C. L. N. 303; s. c. 13 Pac. L. R. 190.)

After a decree has been entered declaring that the bankrupt is not entitled to a homestead, an order may be passed requiring him to vacate the premises, although his wife lives with him. (*In re Boothroyd & Gibbs*, 15 B. R. 368.)

If a person takes a mortgage after the entry of a decree declaring that the bankrupt is not entitled to the premises as a homestead, an order may be entered on a summary petition requiring the mortgagee to discharge his mortgage. (*In re Boothroyd & Gibbs*, 15 B. R. 368.)

If a mortgagee who holds a mortgage upon land claimed as a homestead, but worth more than the law allows to be exempt, proves his claim and obtains a sale of the property, the purchaser may obtain an order from the bankrupt court upon the bankrupt to surrender the possession thereof. (*In re Betts*, 15 B. R. 536; s. c. 4 Cent. L. J. 558; s. c. 13 Pac. L. R. 203.)

If a judgment creditor did not prove his debt, he may enforce his lien against the land set apart as a homestead, as soon as the bankrupt abandons it, although he obtained a discharge. (*Jackson v. Allen*, 30 Ark. 110.)

A State court can not review the action of the bankrupt court in directing the assignee to sell exempted property to satisfy a mortgage existing thereon. (*Maxwell v. McCune*, 10 B. R. 206; s. c. 37 Tex. 515.)

If a creditor has a mortgage upon the bankrupt's homestead, he may be required to exhaust that remedy before he can enforce his other remedies against the bankrupt's estate. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

The assignee in bankruptcy is not a judicial officer. His act in designating and setting apart exempt property is not a judgment *in rem* conclusive against all the world. His act of setting apart property to the bankrupt under the exemption clause of the bankrupt act, does not divest the valid lien of a judgment creditor, nor invalidate the title of a purchaser at a sheriff's sale under execution upon that judgment. (*Fehley v. Barr*, 66 Penn. 196; *Bush v. Lester*, 15 B. R. 36; s. c. 55 Geo. 579.)

The allotment of property by the assignee as exempt does not impair the lien of a judgment. (*Haworth v. Travis*, 13 B. R. 145; s. c. 67 Ill. 301.)

If a mortgagee neither appears in the bankrupt court nor is brought in by adverse proceedings, he may foreclose his mortgage in a State court although

the property has been set apart to the bankrupt as exempt. (*Hatcher v. Jones*, 14 B. R. 387; s. c. 53 Geo. 208; *Cumming v. Clegg*, 14 B. R. 49; s. c. 52 Geo. 605.)

The assignee should first ascertain what is exempt under the State laws. If the bankrupt, under the State laws, has selected his furniture, he can not have any other allowance in lieu thereof. (*In re Noakes*, 1 B. R. 592; *in re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 488.)

The sheriff can not protect himself from an action for levying upon exempted property, nor mitigate the damages by showing a delivery upon demand to the assignee even under protest. The assignee has no right of his own motion, and without an order of the court, to take exempted property which has been levied upon by the sheriff, and compel the bankrupt to abandon his remedy against the sheriff, and follow the assignee into the district court. Nothing which transpires after the taking of the property and the refusal to deliver it when demanded, can defeat the action or mitigate the damages below the value of the property at the time of the conversion and interest. (*Wilkinson v. Wait*, 44 Vt. 508.)

### Exemption under the Bankrupt Act.

The true construction of this clause will allow the bankrupt the following exemptions without qualifications, viz.:

1. Necessary household and kitchen furniture to an amount not exceeding \$500.
2. Wearing apparel of the bankrupt, his wife, and children.
3. Uniform, arms, and equipments, if the bankrupt has been or is in the military service of the United States.
4. Other property exempt by the laws of the United States; and
5. Property exempt by State laws of different species from that already specified.

In addition to the foregoing, it is the duty of the assignee, in the exercise of a sound legal discretion, taking into consideration "the family, condition, and circumstances of the bankrupt," to set apart other articles and necessities, but so that, with the household and kitchen furniture, the amount shall not exceed the sum of \$500. In considering the family, the assignee must have regard to the number composing it; in inquiring after the condition, he must ascertain the social status, and whether ill health prevails or not; and, in regard to the "circumstances," he must inquire how the bankrupt is employed, what is his income, and, if any, how many of the family earn their own living, and whether they contribute to the support of others; and, also, how much and what property the bankrupt is entitled to under the State laws. (*In re Feely*, 3 B. R. 66; s. c. 15 Pitts. L. J. 291; *in re Ziba Williams*, 5 Law Rep. 155; *in re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.)

The words import a limitation upon the amount to be allowed to the bankrupt. It is in no case to exceed the sum of \$500; but it may be below that, and vary according to the circumstances of particular cases from a very small allowance up to the full sum. (*In re Ziba Williams*, 5 Law Rep. 155.)

Every bankrupt is entitled to have his necessary household and kitchen furniture exempted from the operation of the bankrupt act, to any amount not exceeding \$500. The furniture so exempted must be necessary. It can not be necessary, in the sense of the law, unless the bankrupt is a householder—the head of a family. He need not have a wife; his household may consist of servants, or any person residing with him and under his control. In exempting other articles, the assignee has a discretionary power, but his discretion must be a sound legal discretion. The furniture and the other exempted articles must not exceed \$500. (*In re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; *in re Noakes*, 1 B. R. 592; *in re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 488.)

The act evidently intends that every bankrupt householder shall be permitted to retain as much household and kitchen furniture as may be reasonably necessary to enable him to keep house in a plain and convenient manner. The fact that his wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference. Such separate property does not belong to him; he has no right to its possession and control, and she may, at any moment and against his will, remove and dispose of it. The bankrupt act does not intend to make a man dependent upon his wife for the necessary means of keeping house. (*In re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; *in re D. H. Tonne*, 13 B. R. 170.)

This action, so far as it relates to "necessary household and kitchen furniture," is imperative on the assignee, though he must judge and determine what furniture of the kind described is under the circumstances necessary. (*In re W. H. Thiell*, 4 Biss. 241.)

In exempting articles other than household or kitchen furniture, an exemption to the full amount of \$500 should not be made without discrimination. The allowance is conditional, and is measured with reference not merely to value, but also to subjects and their suitability to personal requirements. (*In re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438.)

In making an allowance for "other articles and necessities," the assignee should not allow anything of mere luxury or ornament. Gold watches, silver watches, pianos, and the like, are not embraced in the discretionary power of the assignee. (*In re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; *in re Graham*, 2 Biss. 449; *in re Chester S. Kasson*, 5 Law Rep. 489; *in re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; *in re W. H. Thiell*, 4 Biss. 241.)

The other necessary articles should be *ejusdem generis* as to utility to the family with those specifically enumerated. (*In re E. D. Comstock*, 1 N. Y. Leg. Obs. 326; *in re Ziba Williams*, 5 Law Rep. 155.)

The phrase "other articles" is a very indefinite expression. It may include family pictures, keepsakes, a cheap watch or clock, and many other things of small value. (*In re W. H. Thiell*, 4 Biss. 241.)

The statute contemplates only that description of property which is palpably of immediate necessity to the bankrupt or his family. The "other articles and necessities" ought accordingly to be understood as having relation to things not precisely furniture or wearing apparel, but manifestly useful to the individual or his family in a like sense. (*In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.)

"Other articles or necessities" do not include articles of mere fancy, taste or convenience. (*In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.)

The term "necessaries" may include things other than household and kitchen furniture. It may, for example, include the tools of a tradesman and the books of a professional man. (*In re W. H. Thiell*, 4 Biss. 241.)

Cases may exist where a moderate quantity of material for carrying on a trade may be fairly comprehended under the term "other articles." (*In re W. H. Thiell*, 4 Biss. 241.)

The phrase "other articles" does not include manufactured articles kept for sale. (*In re W. H. Thiell*, 4 Biss. 241.)

A cow may or may not be necessary, according to circumstances. (*In re Ziba Williams*, 5 Law Rep. 155.)

A pew can not be set apart as a necessary. It is no more than desirable or convenient. (*In re E. D. Comstock*, 2 N. Y. Leg. Obs. 326.)

The auction stand and flag of an auctioneer may be exempt, as things in daily use and necessary to his business. (*In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.)

Clocks and desks which are not peculiar to the bankrupt's employment can not be set apart, for they are mere conveniencies. (*In re* Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.)

A fowling piece, fishing tackle, paintings or breast-pins are not necessities. (*In re* Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.)

The common implements or tools of trade by which a daily support is gained, may justly be ranked as necessities. (*In re* Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.)

A clock is not a necessary. (*In re* Ziba Williams, 5 Law Rep. 155.)

Silver spoons may or may not be necessary, according to circumstances. (*In re* Ziba Williams, 5 Law Rep. 155.)

A family sewing machine may be set apart as a necessary article. (*In re* Graham, 2 Biss. 449.)

Provisions may be allowed as necessary articles. (*In re* Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; *in re* Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.)

The term "other articles and necessities" can not be so construed as to embrace land. A fair and proper construction of this section, as well as the true spirit and object of the law, will not justify or authorize such an exemption. (*In re* Thornton, 2 B. R. 189; s. c. 8 A. L. Reg. 42; *contra*, *in re* Edwards, 2 B. R. quarto, 109.)

Under the head of other articles and necessities, money may be allowed, for it not unfrequently happens that money is quite as necessary to the temporary subsistence of a bankrupt and his family as any articles that can be mentioned. (*In re* Thornton, 2 B. R. 189; s. c. 8 A. L. Reg. 42; *in re* Lawson, 2 B. R. 54; *in re* Ira Hay, 7 B. R. 344; *in re* Benjamin B. Grant, 2 Story, 312; *in re* James Thompson, 13 B. R. 300; *contra*, *in re* Welch, 5 B. R. 348; s. c. 5 Ben. 230.)

When the money is the proceeds of articles which could and ought to be set apart under the head of "other articles and necessities," it may be exempt. The items of the property that has been sold should be stated, so that it may be determined whether they come within the description of "other articles and necessities." (*In re* Welch, 5 B. R. 348; s. c. 5 Ben. 230.)

A gold watch or breast-pin is not wearing apparel. (*In re* Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.)

The exemption should be so made as not to operate adversely to the interests of the creditors. (*In re* Edwards, 2 B. R. quarto, 109.)

When the property is incapable of division, it may be sold, and the exemption allowed out of the proceeds. (*In re* Jas. B. Brown, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 C. L. N. 409)

Under the provision of section 986 the practice of the Federal and State courts is in general the same as to the exemption of the property of debtors. (*In re* Ruth, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *in re* Ap-  
pold, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83.)

If no rule has been adopted by the Federal court of the State, no exemption can be claimed under section 986. (*In re* E. A. Vogler, 8 B. R. 132.)

The property exempt by the territorial statutes from levy and sale on execution may be allowed. (*In re* McKercher & Pettigrew, 8 B. R. 409.)

### Exemptions under State Laws.

The words "other property not included in the foregoing exceptions" mean property other than and not included among the articles set apart under the first

clause, and embrace all the property, whether of the same or a different kind, which is by State law exempted from forced sale. (*In re Erwin Davis*, 2 Saw. 255.)

The assignee can not set apart to the bankrupt, under the State law, any property specifically exempted by the bankrupt act, but he may set apart any property not so designated. It is not necessary that the State law should name specifically the articles of property exempted by it. (*In re Feely*, 3 B. R. 66; s. c. 16 Pitts. L. J. 291.)

The system of bankruptcy is, in a relative sense, uniform throughout the United States, when the assignee takes in each State whatever would have been available to the recourse of execution creditors if the bankrupt law had never been passed. Though the States vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors. The bankrupt act does not in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets, and as the thing is attained by the bankrupt law, it is uniform. (*In re Beckerford*, 4 B. R. 203; s. c. 1 Dillion, 45; s. c. 1 L. T. B. 241; *in re Jordan*, 8 B. R. 180; *in re Appold*, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *in re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *in re Wylie*, 5 L. T. B. 330; *in re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. [N. S.] 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 33.)

A bankrupt law to be constitutional must be uniform, and whatever rule it prescribes for one, it must for all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect. The provision that in each State property specified in the laws thereof, whether actually exempted by virtue thereof or not, shall be exempted, is unconstitutional and void. (*In re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. [N. S.] 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 310; *in re Kerr & Roach*, 9 B. R. 566; *in re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re George Duerson*, 13 B. R. 183; *in re Shipman*, 14 B. R. 570; *Bush v. Lester*, 15 B. R. 36; s. c. 55 Geo. 579; *contra, in re Kean et al.* 8 B. R. 367; *in re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; *in re Willis A. Jordan*, 10 B. R. 427; *in re John W. A. Smith*, 14 B. R. 295; s. c. 2 Woods, 458.)

The uniformity required is as to the general policy and operation of the law. The bankrupt act in some minor particulars must necessarily operate differently in the different States. Thus, the bankrupt law regards as valid the legal and equitable liens existing by law in the several States, and as the nature, force, and effect of such liens are dependent upon the local laws, they will in some respects be different in the different States. (*In re Jordan*, 8 B. R. 180.)

When the property is encumbered by a lien, it is only the bankrupt's *sub modo*. The lien creditor has a vested interest in it also, and the bankrupt can only be allowed an exemption out of such estate as remains to him after the vested interests of others have been satisfied. (*In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. [N. S.] 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 310; *contra, in re Jordan*, 8 B. R. 180; *in re Kean et al.* 8 B. R. 367; *in re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; *in re Jared Everett*, 9 B. R. 90.)

A State exemption law which attempts to divest a prior judgment lien impairs the obligation of contracts, and is unconstitutional. (*In re Jared Everett*, 9 B. R. 90.)

An act of Congress can not give validity to a State law which is unconstitutional. (*In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490.)

The establishment of a uniform system of bankruptcy involves the idea of a discharge greater or less from precedent obligations. So far Congress has the

right to impair the obligation of contracts. It is also clearly within the competency of Congress to grant a retrospective exemption, so as to discharge antecedent obligations. Congress may, if it chooses, insert a homestead provision, making it good against debts already contracted, although its inevitable effect would be to impair the obligation of contracts, for the simple reason that the power to such an end is expressly given by the Constitution. Congress, in the enactment of a bankrupt law, has the power to make exemptions embracing past as well as future debts. (*In re Wylie*, 5 L. T. B. 330; *in re Kean et al.* 8 B. R. 367; *in re E. A. Vogler*, 8 B. R. 132; *in re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; *in re Jared Everett*, 9 B. R. 90.)

The relation of the bankrupt to his property is fixed in voluntary bankruptcy the moment he files his petition, and in involuntary bankruptcy as soon as he is adjudicated a bankrupt. The rights of his creditors to his estate are determined at the same time. What the homestead exemptions are at these times both the bankrupt and his creditors are presumed to know. He petitions and they resist, or they petition and he resists, with a full knowledge of the then existing law of bankruptcy. Every bankrupt and his creditors are concluded as to his and their interest in the estate by the law of bankruptcy then existing. What is then surrendered must be distributed, and what is then exempt he may retain. (*In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re Kerr & Roach*, 9 B. R. 566; *contra, in re E. A. Vogler*, 8 B. R. 132; *in re Kean et al.* 8 B. R. 367; *in re Wylie*, 5 L. T. B. 330.)

When Congress chooses to add to its own list of exemptions further exemptions under the State laws, it refers the Federal courts, in their action thereupon, to the State laws. A statute consists not merely of its terms, but of the judicial expositions thereof. If a law of the State has been construed by the highest court of the State, the Federal courts are bound by that construction. (*In re Wylie*, 5 L. T. B. 330.)

A bankrupt is entitled to the exemption allowed by the State laws in force in 1871, although those laws have since been amended so as to reduce the amount. (*In re Albert Cohen*, 3 Dillon, 295.)

If the State law was changed during the year 1871, the exemption can only be allowed according to the law that was in force at the close of the year. (*In re Anthony Baer*, 14 B. R. 97.)

The bankrupt can not claim any exemption out of property conveyed away prior to the commencement of proceedings in bankruptcy. (*In re Jared Everett*, 9 B. R. 90.)

Where a homestead has been duly allotted under the State law, and there is no fraud, such allotment will be recognized and allowed. (*In re E. A. Vogler*, 8 B. R. 132.)

Where an allotment has not been made previous to the commencement of proceedings in bankruptcy, the homestead may be ascertained and set apart by the assignee. (*In re E. A. Vogler*, 8 B. R. 132.)

Where no fraud is alleged, an allotment of a homestead under a State law will not be set aside for mere excess of value. Where fraud, complicity, or irregularity are alleged and established by proper special proceedings, the allotment of homestead may be set aside in the State courts, and in such cases similar relief will be furnished in the bankrupt court. Mere excess of value in the allotment is not fraud, and to successfully impeach such proceedings it must be shown that the debtor by some fraudulent representation or deception, or by complicity with the appraisers, procured such excessive allotment. (*In re Jack Hall*, 9 B. R. 366.)

A judgment of the court of ordinary allowing an exemption creates a lien upon the property set apart. An appeal does not vacate but merely suspends the judgment until the case is reviewed and passed upon by the appellate court.



If the judgment was rendered prior to the commencement of proceedings in bankruptcy, the assignee should become a party to the proceedings on appeal if he desires to contest it. (*In re Moseley, Wells & Co.* 8 B. R. 208.)

The allowance of the exemption in the bankrupt court does not affect the property with the local restrictions in regard to title and power of disposition as if it had been set apart under the State law. (*Farmer v. Taylor*, 15 B. R. 515; s. c. 56 Geo. 559.)

The property exempted by this clause is in addition to that exempted by the preceding clauses. (*In re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *in re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59.)

If the State law allows personal property to a certain amount to be selected by the debtor, he may claim that amount in addition to what is allowed by the bankrupt law itself. (*In re Hezekiah*, 11 B. R. 573; s. c. 2 Dillon, 551.)

The bankrupt act expressly limits the exemptions to be allowed a bankrupt in bankruptcy to the State exemption laws in force in 1871. When his wife makes an application in the State court to have the homestead set apart on the same day that he files his petition, the exemption may be considered as a transfer which is void under section 5129. The survey and setting apart of the homestead by the State court after the commencement of proceedings in bankruptcy are null and void. (*In re Askew*, 3 B. R. 575.)

The exemptions are regulated by the laws of the State where the bankrupt has his domicile, although the property is located in another State. (*In re W.* S. Stevens, 5 B. R. 298; s. c. 2 Biss. 373.)

As to the subjects of the claim for an exemption under the State law, the only function of the assignee is to see to their proper appraisal. In seeing to it, he should proceed as conformably to the laws of the State as may be possible. (*In re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *Fehley v. Barr*, 66 Penn. 196; *in re Feely*, 3 B. R. 66; s. c. 15 Pitts. L. J. 291; *in re Kean et al.* 8 B. R. 367.)

A waiver by the bankrupt of his homestead rights in favor of a particular creditor, does not confer any special rights upon his general creditors, nor operate in their favor. The bankrupt is therefore entitled to his exemption, although the land is subject to a mortgage wherein the homestead is waived. (*In re Poleman*, 9 B. R. 376; s. c. 5 Biss. 526; *in re Jones*, 2 Dillon, 243; *Rix v. Capitol Bank*, 2 Dillon, 367.)

If the homestead is subject to a mortgage, the amount will be allowed out of the equity of redemption. (*In re Poleman*, 9 B. R. 376; s. c. 5 Biss. 526; *in re Charles C. Pratt*, 1 Cent. L. J. 290; s. c. 7 Pac. L. R. 202.)

If personal property is covered by a mortgage, the assignee may sell it for the purpose of liquidating the mortgage, and the bankrupt may then, without a previous demand, claim his exemption out of the proceeds. (*In re Henry May*, 2 C. L. B. 152.)

No exemption can be allowed to a partner out of the firm property until all the partnership creditors are paid in full. (*In re J. S. & J. Price*, 6 B. R. 400; *in re Handlin & Venny*, 12 B. R. 49; s. c. 3 Dillon, 290; *in re Blodgett & Sandford*, 10 B. R. 145; *in re D. H. Tonne*, 13 B. R. 170; *in re Stewart & Newton*, 13 B. R. 295; *in re Boothroyd & Gibbs*, 14 B. R. 223; *contra*, *in re Rupp*, 4 B. R. 95; s. c. 2 L. T. B. 123; *in re Young et al.* 3 B. R. 440; *in re McKercher & Pettigrew*, 8 B. R. 409; *in re S. H. Richardson & Co.* 11 B. R. 114; s. c. 7 C. L. N. 62.)

If an insolvent firm transfer a note to one partner, who purchases land therewith, he can not claim that as a homestead. (*In re Boothroyd & Gibbs*, 14 B. R. 223.)

One of two or more partners can not have a portion of the partnership effects set

apart to him as his personal property exemption without the consent of the other partner or partners, because the property is not his. But if the other partner or partners consent, then it may be done. The creditors of the firm can not object, because they no more have a lien upon the partnership effects for their debts than creditors of an individual have upon his effects. (*Burns v. Harris*, 67 N. C. 140.)

A partner may claim a homestead where the house was built on the land of such partner with partnership funds, with the knowledge and consent of his co-partner, but not in excess of the debt due by the firm to him. The house became a part of the realty, and as much the separate property of the partner as the realty itself. No reimbursement can be claimed by the copartner on account of such use of the firm funds, because the firm owed the partner more than the amount of the funds so used. The firm, therefore, has not only no interest or ownership in the house, but no claim for reimbursement. (*In re J. F. & C. R. Parks*, 9 B. R. 270.)

The ownership will be deemed to be in severalty, although the title bond is taken to the firm, if the partners have divided the land and entered into an agreement that each shall hold his part in severalty. (*Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290.)

Where the State laws exempt a certain amount of property, real or personal, and the bankrupt has nothing but claims against other parties, he can not have an allowance of money equal to the amount exempted under the State laws. (*In re Lawson*, 2 B. R. 54.)

Expectant interests which can not be sold, even though they may be reached by proper process in the State court, may be exempt. (*In re Erben*, 2 B. R. 181; s. c. 8 A. L. Reg. 34; *in re Bennett*, 2 B. R. 181; s. c. 8 A. L. Reg. 34; 25 Pitts. L. J. 316.)

Where, by the State law, real estate to a certain amount is exempted from levy and sale, provided the debtor comply with certain requirements, and the bankrupt has failed to comply, no property can be claimed as exempted under that law. (*In re Farish*, 2 B. R. 168; *in re Jackson & Pearce*, 2 B. R. 508; *in re Gainey*, 2 B. R. 525.)

A law which exempts property from debts existing at the time when the homestead is set apart is unconstitutional and void, as it impairs the obligation of contracts. (*Kelly v. Strange*, 3 B. R. 8.)

A homestead law is unconstitutional so far as it affects debts contracted after its adoption. (*In re Henkel*, 2 B. R. 546; 2 Saw. 305.)

If a decree for alimony is a lien on land, the exemption will be made subject to the wife's right of alimony. (*In re Edward Garrett*, 11 B. R. 493.)

But property mortgaged to secure a loan before the passage of the State exemption law may be exempted, even though the mortgage debt is not paid. This right is given to the bankrupt by the bankrupt act. (*In re Jas. B. Brown*, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 C. L. N. 409.)

The exemption is a fixed and determinate right, and not dependent upon the discretion of the assignee or the court. When the claim is made by the bankrupt before sale, though not recognized by the assignee, the right may be asserted against the proceeds in court for distribution. (*In re Jones*, 2 Dillon, 243.)

If the bankrupt selects money or personal property for his homestead, he must indicate the mode in which it shall be preserved or invested for the use of himself or family, as a homestead provision, subject to the limitations of the State law. (*In re Kean et al.*, 8 B. R. 367.)

The object of a homestead exemption law is as much to protect the wife and children as the husband. Mere absconding will not give rise to a presumption

of a fixed intention not to return. While the family remain in the State, occupying the premises as a home, the exemption is secured, inasmuch as it continues to be owned and occupied by the bankrupt while his family resides upon it. Their occupancy is his occupancy. His residence is where his family reside. (*In re Charles E. Pratt*, 1 Cent. L. J. 290; s. c. 7 Pac. L. R. 202.)

As the title to the homestead does not pass to the assignee, a subsequent abandonment of it by the bankrupt gives no right to the assignee. (*Rix v. Capitol Bank*, 2 Dillon, 367.)

The proof of an intention to abandon the homestead should be clear and decisive. (*Rix v. Capitol Bank*, 2 Dillon, 367.)

If a judgment is docketed before the execution of a general deed of trust to secure all creditors, the judgment, with its priority, remains intact, and no exemption can be allowed unless there is a surplus after paying all the debts. (*In re W. S. Coons*, 5 C. L. N. 515.)

If a judgment is subject to an exemption, the exemption can be claimed against a *fi. fa.*, for it is an emanation from the judgment, and its lien falls with the lien of the judgment. (*In re Anon.* 5 C. L. N. 515.)

If the bankrupt sells his homestead and moves into his store, under a scheme to defraud his creditors, he can not claim the latter as a homestead, for he has no right to shift his homestead to the prejudice of his creditors and in violation of the principles of fair dealing. (*In re Geo. C. Wright*, 8 B. R. 430; s. c. 3 Biss. 359.)

Although a bankrupt upon becoming insolvent moves into a block erected for business purposes and not in any manner constructed so as to have the appearance or character of a dwelling-house, yet he can not claim it as exempt under the laws of Wisconsin. (*In re Lammer*, 14 B. R. 460; s. c. 8 C. L. N. 386; s. c. 3 Cent. L. J. 574.)

A bankrupt may enforce a trust deed assigned to him with his homestead and as a muniment of his title. (*Holloman v. White*, 41 Tex. 52.)

When stock out of the State is brought into the State and mixed with other goods without any fault of the bankrupt, the two should be taken as together constituting the stock in trade of the bankrupt. (*In re Jones*, 2 Dillon, 243.)

If a party who has executed a mortgage to secure future advances subsequently declares a homestead on the premises so mortgaged, and then obtains further advances without disclosing the fact that he has thus declared a homestead, the mortgagee will be protected for any advances made without notice of the declaration of a homestead. (*In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231)

Exemption laws founded on the humane policy of making provision for the support of the poor man and his family are to be liberally rather than strictly construed. They should receive such fair construction as will best promote the beneficent intention of the legislature. (*In re Jones*, 2 Dillon, 243; *in re McKercher & Pettigrew*, 8 B. R. 409; *in re E. A. Vogler*, 8 B. R. 132.)

If a debtor has two pairs of oxen in his possession, the title to one of which is to remain in the vendor until paid for, the other is his only pair of oxen, and is exempt under the laws of Vermont. (*Wilkinson v. Wail*, 44 Vt. 508.)

In Pennsylvania the right of exemption does not affect or impair the vendor's lien for the purchase money, and can not be set up against his judgment. (*Fehley v. Barr*, 66 Penn. 196.)

The constitution of Virginia took effect, so far as it relates to the provision for exemptions, on July 6, 1869. It follows that the exemption laws passed to give effect to that are to become operative from that date. (*In re Daniel*

Deckert, 10 B. R. 1; s. c. 1 A. L. T. [N. S.] 336; s. c. 6 C. L. N. 310; s. c. 9 A. L. J. 390.)

The constitution of Virginia grants the exemption as a privilege to the householder. It declares that he shall be entitled to hold property to be selected by him. Whether he will make his claim or not is optional with him. He may, therefore, waive his right to the exemption. (*In re Joseph Solomon*, 10 B. R. 9; s. c. 1 A. L. T. [N. S.] 351; s. c. 9 A. L. J. 391.)

The act of Congress, passed June 25th, 1868 (15 Stat. 73), approving of the constitution of the State of North Carolina, did not alter or affect the provision of this section in respect to exemptions. No amendment of the bankrupt law was intended by the act of acceptance, nor did that act have that effect. (*In re Archibald McLean*, 2 B. R. 567.)

In North Carolina, the law of February, 1867, entitled "an act restoring to married women their common-law right of dower," declaring that the dower shall be laid off before any sale can be made on execution in the lifetime of the husband, is only an effort to create a new and additional exemption, and to this extent is unconstitutional and void as to debts existing at the time of the passage of that law. The law of 1868 has the same purport, and must be similarly construed. (*Kelly v. Strange*, 3 B. R. 8.)

The vendor's lien was not preserved by the code which went into force in Georgia on the 1st of January, 1863. Courts will presume that the property which has been set apart to the bankrupt is property that was exempt, and that the bankrupt court saw to it that all the requisites necessary to make its judgment binding was complied with. A judgment rendered upon a note for the purchase money, prior to the filing of the petition, can not be enforced against the land, and the fact that the creditor did not prove his claim is of no avail. (*Rushin v. Gauze*, 41 Geo. 180.)

Under the laws of Georgia, there is no property or right of property in the family until the homestead is laid off. The right of the wife and family to a homestead does not stand on the footing of an equitable title or lien, which follows the property into the hands of a purchaser with notice. It is a right which depends for its existence upon the judgment of a court. If the husband is declared a bankrupt before a homestead is set apart, the right of the wife and family is a matter for the adjudication of the bankrupt court, and the State courts have no jurisdiction over the same. The true course for them to pursue is to present their claims to the bankrupt court, not as an exemption of the husband's property, but as a claim of their own. (*Woolfolk v. Murray*, 10 B. R. 540; s. c. 44 Geo. 133; *Lumpkin v. Eason*, 10 B. R. 549; s. c. 44 Geo. 339.)

Under the laws of Georgia, real estate mortgaged by the vendee, at the time of the purchase, to the vendor, to secure the payment of the purchase money, can not be claimed as exempt from the claim of the mortgagee until the mortgage debt is paid; such property can not be exempted. (*In re Whitehead*, 2 B. R. 599.)

Under the laws of Georgia, to constitute a head of a family it is not necessary that a man shall have either a wife or a child. If he resides in a house of which he is proprietor, and has no other inmates than hired servants, he is in law the head of a family. When the bankrupt rents a house, hires servants, and allows an adopted daughter and her children to live with him, he is entitled to the exemption allowed to the head of a family, but he is not entitled to any enlargement of his exemption on account of the children. (*In re Wm. Taylor*, 3 B. R. 158.)

Under the constitution of Florida, the bankrupt's shop, store, mill or farm, where he pursues his usual trade or avocation, if connected with and adjacent to his dwelling, is included in his homestead. (*Greely v. Scott*, 12 B. R. 248; s. c. 2 Woods, 657.)

Under the laws of Kentucky, a homestead can not be acquired by a mere naked intention. The present purpose to erect at a future time a dwelling-house on land and to occupy it as a home is not sufficient to constitute a homestead in it. There must be a dwelling-house on it which is occupied or has been occupied, and which has not been abandoned, or to which at least the bankrupt if he has never occupied it, looks as his home. (*In re Geo. T. Duereson*, 13 B. R. 183.)

If a bankrupt under the laws of Texas acquires a right to a rural homestead, the subsequent extension of the limits of a city so as to embrace a part thereof, does not affect his right. (*In re W. C. Young*, 15 B. R. 205.)

Under the State law in Texas, an unmarried man who keeps a house, and has orphan children apprenticed to him, is not entitled to the homestead allotted to a family. He is entitled to fifty acres under the act of 1839. (*In re Summers*, 3 B. R. 84.)

Under the laws of Texas, a homestead can not be claimed by the bankrupt to the prejudice of a vendor's lien thereon. (*In re Hutto*, 3 B. R. 787; s. c. 1 L. T. B. 226; 3 L. T. B. 197.)

Under the laws of California, a homestead may be declared at any time before the lien of a judgment has actually attached to the land. (*In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305.)

A person indebted, or even insolvent, may apply his property to the acquisition of a homestead, or the discharge of incumbrances thereon, without depriving it of the exemption from forced sale by law. (*In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305; *contra*, *in re Boothroyd & Gibbs*, 14 B. R. 223.)

If the bankrupt has placed a mortgage on his homestead to the amount of the full value thereof, the bankrupt under the laws of Ohio is entitled to an exemption of five hundred dollars out of the personal property. (*In re Henry May*, 2 C. L. B. 152.)

Under the laws of Ohio, providing that a certain amount of real estate used as a homestead, shall be exempt from sale on execution, the debtor does not acquire in the homestead so set off to him a fee simple absolute title, but he possesses only a qualified right, a right to possess and occupy it so long as he uses it as a homestead for his family, and otherwise complies with the requirements of the law. The remainder or reversion in such property, after that right is ended, belongs to his creditors, and passes by the assignment to the assignee, who may sell the same. (*In re John Watson*, 2 B. R. 570; s. c. 2 L. T. B. 93.)

Under the laws of Indiana, a bankrupt is not entitled to an exemption as against a judgment for damages and costs in an action of replevin. (*In re John Owens*, 12 B. R. 518; s. c. 6 Biss. 432.)

In Missouri, a bankrupt is entitled to have a homestead set apart in the leasehold estate owned by him at the time he was declared bankrupt, if he is the head of a family. (*In re Beckerford*, 4 B. R. 203; s. c. 1 Dillon, 45; s. c. 1 L. T. B. 241.)

It is lawful and proper, when there is no individual ownership by the head of a family of the property referred to in section 11, chapter 63, of the Revised Statutes of Missouri, to make the allowance out of partnership assets, even though they are not sufficient to pay all the partnership debts. It is true that there can be no individual interest of a partner in partnership property until partnership debts are paid, yet his right of exemption in his individual property disregards the otherwise legal rights of his creditors. (*In re Young et al.* 3 B. R. 440.)

In Kansas, a merchant is not entitled to an exemption of four hundred dollars out of his stock in trade. (*In re Schwartz*, 4 B. R. 588.)

A merchant tailor who does not sell goods as merchants usually do, but manufactures them for customers upon special orders under his own superintendence, is entitled to the exemption of four hundred dollars, under the laws of Kansas. The fact that he did not do all the work himself, but employed workmen, makes no difference. (*In re Jones*, 2 Dillon, 243.)

Under the laws of Kansas, the whole house occupied by the bankrupt as a home is exempt, though a portion of it may be used and may have been constructed with a view to be used for other purposes. (*In re Tertelling*, 2 Dillon, 339.)

In order to come within the provisions of the homestead laws of Michigan, the dwelling-house must be owned by the occupant, as well as the land upon which it is located. (*In re J. F. & C. R. Parks*, 9 B. R. 270.)

Under the laws of Nebraska, it is not necessary that the ownership of the land must be of the full legal title. It is sufficient that the interest be such as may be sold on execution or subjected to the payment of debts. A title bond makes the holder the owner in such a sense as to entitle him to the benefit of the homestead exemption. (*Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290.)

### Practice in making Exemptions, and Exceptions thereto.

The register does not hold a court auxiliary to the district court. His duties are purely ministerial, and he can not pass upon questions of fact, except when a special case is referred to him. He has nothing to do with the report of exemption, unless it is referred to him, and certainly has no authority to take testimony, and thereupon determine its correctness. The report must be filed in court, and the court can not recognize a deposit of it with the register. It is the groundwork for movements in court, and is the basis of a contest in which the court may call a jury for its aid in reviewing the discretion and judgment exercised by the assignee in setting aside and issuing his certificate for property claimed to be exempt under State laws, or otherwise. If the court does not have upon its files a report, duly and properly returned according to law, all proceedings resting thereon are irregular. (*In re Cordes*, 1 Pac. L. R. 165.)

Where a doubt exists as to whether the bankrupt has made full disclosures of all his property in his schedules, he is not entitled to his exemption until after his last examination. (*In re Mastbaum*, 2 W. N. 479.)

A proper and reasonable construction of the rule requiring the assignee to make a report of the exempted property within twenty days after receiving the assignment, demands that, where the property to be exempted is in litigation, the time shall be computed from the date of the final decision of the court, so as to give twenty days after the property is adjudged to be within or under the control of the assignee. (*In re D. Shields*, 1 B. R. 344.)

In the list of exceptions the value of the articles set apart should be stated, so that it may be seen whether they come within the limitations of the act. (*In re Graham*, 2 Biss. 449.)

The provisions of Rule XIX, requiring the assignee to report to the court the "articles set off to the bankrupt under the fourteenth section of the act, with the estimated value of each article," evidently refers to the "necessary household and kitchen furniture, and other articles and necessities not exceeding \$500 in value," which the assignee is by that section required to designate and set apart, and not to real estate held as a homestead. A homestead is not a necessary article to be set off by the assignee. (*In re C. Hunt*, 5 B. R. 493; s. c. 2 L. T. B. 197; s. c. 4 C. L. N. 5; s. c. 2 Pac. L. R. 146.)

The auxiliary "may," in Rule XIX, allowing creditors to file exceptions, is not to be taken in an imperative sense. The supreme court intended to leave a discretion with the circuit and district courts, to permit them to repair accidents, correct mistakes, and prevent frauds. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.)

Where an attempt is made to exempt a species of property that can not be exempted, it is not necessary in order to defeat the exemption, to file exceptions within the required time. No exceptions need be taken. The title to property so attempted to be exempted, passes to the assignee, and remains in him until it is divested in some one of the ways provided by the law. The attempt to exempt is ineffectual. The creditors may except to the account of the assignee, if he omits to account for or charge himself with the value of such property. (*In re Gainey*, 2 B. R. 525; *in re Jackson & Pearce*, 2 B. R. 508; *in re Farish*, 2 B. R. 168.)

Where the exceptions are as to articles comprehended by the terms "household or kitchen furniture, or other articles or necessities," they must be made in the way, and also in the time, prescribed. (*In re Gainey*, 2 B. R. 525.)

Where the exceptions go to the title to the exempted property, they need not be filed within the required time. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.)

*Quære.* Should the assignee give notice to the creditors that he has filed his report of articles set apart for the bankrupt? (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.)

The assignee is not obliged to designate articles on which there is no lien. If he were, the bankrupt might have nothing exempted. The assignee, moreover, is not a judicial officer to determine the question of lien or no lien. If the assignee should make such a designation of exempted articles as would by reason of the incumbrances on those articles, be worthless or insufficient to fulfil the beneficent design of the law in making exemptions, the bankrupt could obtain redress by excepting to the determination of the assignee. His appeal from the assignee to the court would bring before the court the whole question of the existence and amount of the liens. (*In re C. H. Preston*, 6 B. R. 545.)

Where the exemption under the State law is absolute, it is not necessary in order to preserve the exemption that the bankrupt shall apply to the assignee to have the property selected and set apart as a homestead. (*Rix v. Capitol Bank*, 2 Dillon, 367.)

The decision of the assignee can only be reversed on an exception to it. This need not be done in the shape of a formal bill of exceptions. (*In re Richard Prior*, 4 Biss. 262; *in re W. H. Thiell*, 4 Biss. 241.)

The court will deem the allowance made by the assignee to be reasonable and suitable until the contrary is shown by some appropriate facts and proofs. (*In re Ziba Williams*, 5 Law Rep. 155.)

The court will not reverse the decision of the assignee, unless it plainly appears that he has abused the discretionary power confided to him. (*In re W. H. Thiell*, 4 Biss. 241.)

SEC. 5046.—All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made,

shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes—April 4, 1800, ch. 19, §§ 13, 17, 20, 44, 2 Stat. 25, 26, 27, 33; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

### Choses in Action.

The phrase "*choses in action*" is qualified and limited by the rest of the section. The choses in action for tort which pass to the assignee are rights of action for real or personal property, or for the unlawful taking or detention of property, or for injuries thereto, and not causes of action for merely personal injuries. (*Noonan v. Orton*, 12 B. R. 405; s. c. 84 Wis. 259.)

The words "*choses in action*" mean nothing more than the words "rights of action," and it has been uniformly held that these latter words only include rights of action founded on contracts or for injuries to property, and not rights of action for torts which are purely personal, and die with the party. (*Dillard v. Collins*, 25 Gratt. 343.)

The rights of action which pass to the assignee are those that are founded upon beneficial contracts made with the bankrupt where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages. (*Dillard v. Collins*, 25 Gratt. 343.)

An action for an abuse of an attachment or garnishee process is an action for a personal injury, and does not pass to the assignee, although the wrong injured the bankrupt's business. (*Noonan v. Orton*, 12 B. R. 405; s. c. 84 Wis. 259.)

A plea that the plaintiff has been adjudicated bankrupt is not a good plea to an action of slander. (*Dillard v. Collins*, 25 Gratt. 343.)

A right of action for damages arising from a fraudulent and deceitful recommendation of a person as worthy of trust and confidence, does not pass to the assignee. (*Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.)

### Fraudulent Conveyances.

The provisions of this clause relate to the State statutes against fraudulent conveyances, and to those only; and the right of action is not affected by section 5128. Section 5128 has no reference to those statutes, but is only intended to reach frauds on the bankrupt act. (*Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *Knowlton v. Moseley*, 105 Mass. 136; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Hyde v. Sontag*, 8 B. R. 225; s. c. 1 Saw. 249.)

Property received by a creditor in fraud of a compromise agreement vests in the assignee of the debtor under this clause. (*Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

The assignee represents the rights of creditors, as well as the rights of the bankrupt, and any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed, or assignee appointed, will be equally void as against the general creditors represented by the assignee. He may contest the validity of a conveyance, even though the bankrupt could not. That is what the act means when it vests in the assignee all property conveyed in fraud of creditors. It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such convey-



ance or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Bradshaw v. Klein et al.* 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *in re Metzger*, 2 B. R. 355; *in re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424; *Boone v. Hall*, 7 Bush, 66; *Pratt v. Curtis*, 6 B. R. 139; *Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330; *Carr v. Hilton*, 1 Curt. 230; *Ashley v. Robinson*, 29 Ala. 112; *vide Reavis v. Garner*, 12 Ala. 661; *Porter v. Douglass*, 27 Miss. 379)

Conveyances made with a specific intent to defraud creditors, and conveyances in fraud of creditors, in the technical and legal sense of the term, are both within the letter and spirit of the bankrupt act. All conveyances made void as against creditors by the statute of frauds, in legal contemplation, are made in fraud of such creditors, whether they are fraudulent in fact by specific intent or only fraudulent in law. (*Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; *Allen v. Massey*, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 17 Wall. 351; s. c. 2 Abb. C. C. 60; s. c. 1 Dillon, 40; s. c. 1 L. T. B. 218; *in re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.)

The declaration of a homestead is in no sense a conveyance. He who declares land which he already owns to be a homestead, does not convey it. He merely avails himself of a legal right to place it in a condition where it will not be liable to a forced sale. The right of property remains unchanged, except that the law, mindful of the object for which homesteads are allowed to be declared, provides that after the declaration the homestead can not be alienated except with the concurrence of the wife, and that on the death of the husband it survives to her for the benefit of herself and the family. It is evident that to call the declaration of a homestead a conveyance of the property would be doing extreme violence to the language of the act, and in view of the provisions allowing exemptions, such construction is inadmissible. (*In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305.)

An assignee may maintain an action to set aside fraudulent conveyances made by the debtor before he was adjudged a bankrupt, and even before the bankrupt act was passed. (*Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72.)

After the commencement of proceedings in bankruptcy, no one but the assignee can bring or maintain an action to set aside a fraudulent conveyance made by the bankrupt. (*In re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424; *Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. [N. S.] 68; *Goodwin v. Sharkey*, 3 B. R. 558; s. c. 5 Abb. Pr. [N. S.] 64; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Edwards v. Coleman*, 2 Bibb, 204; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400.)

The assignee may avoid a fraudulent conveyance, although he has no lien on the property. (*Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519; *in re Wm. B. Duncan*, 14 B. R. 18.)

If the fraud was merely constructive, and not actual, the assignee can not recover in an action at law. (*Badger v. Story*, 16 N. H. 168.)

If the assignee refuses to institute proceedings to set aside a fraudulent conveyance, any creditor who has proved his debt has a right to apply to the court for an order directing proceedings for that purpose to be instituted, upon such terms as appear to be right. (*Freeland v. Holloman*, 9 B. R. 331.)

A creditor may file a bill in equity to vacate a fraudulent conveyance, and make the assignee a party defendant. (*Freeland v. Holloman*, 9 B. R. 331; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Sands v. Codwise*, 4 Johns. 536.)

A creditor can not file a bill in a State court to set aside a fraudulent conveyance without making the assignee a party. (*Alsbrook v. Cates*, 5 Tenn. 271.)

If a creditor, who does not prove his debt, holds a judgment which is a lien on property fraudulently transferred by the bankrupt, he may issue a *fi. fa.* and levy thereon even after the commencement of the proceedings in bankruptcy, if the assignee has taken no steps to reach the property. (*Barber v. Terrell*, 54 Geo. 146.)

The right of creditors to institute a suit to set aside a fraudulent conveyance is perfect upon the refusal of the assignee to permit the use of his name, and can not be divested after the institution of the suit by any change of the assignee, for the latter merely comes into the place of the former and acquires no greater rights than he had. If the case has been carried to an appellate court, the proceedings will not be stayed until such assignee is made a party. (*Sands v. Codwise*, 2 Johns. 485.)

The creditors, as beneficiaries, are proper, though not necessary, parties. (*Boone v. Hall*, 7 Bush, 66.)

When a creditor has acquired a lien by virtue of proceedings instituted prior to the commencement of proceedings in bankruptcy to set aside a fraudulent conveyance of a bankrupt, he may continue the suit so as to enforce his lien. (*Sedgwick v. Minck*, 1 B. R. 675; s. c. 6 Blatch. 156; *Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. [N. S.] 68; *Carr v. Fearington*, 63 N. C. 560; *Wooten v. Clark*, 23 Miss. 75; *Fetter v. Oirade*, 4 B. Mon. 482; *Storm v. Waddell*, 2 Sandf. Ch. 494; *contra*, *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 318.)

A petition to set aside a deed of trust not contrary to other provisions of the bankrupt act should allege that the property was conveyed by the bankrupt in fraud of his creditors, and show that the same passed to the assignee, under this section, as property conveyed by the bankrupt in fraud of his creditors. (*In re Broome*, 3 B. R. 343; s. c. 3 Ben. 488.)

Equity looks at substance and not form. It penetrates beyond externals to the substance of things, and it accounts as nothing and delights to brush away barricades of written articles and formal documents, when satisfied that they have been devised to conceal or protect fraud. If the fraud does not consist in a particular sale, but in the mode of conducting the business, it is a continuous fraud. (*Martin v. Smith*, 4 B. R. 275; s. c. 1 Dillon, 85; s. c. 3 L. T. B. [C. R.] 199)

The statute of limitations of Missouri contemplates fraud which is secret or concealed, as distinguished from fraud which is open and known. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know the facts which make that transfer fraudulent. If those facts are such that any creditor must, if ordinarily vigilant, have discovered the fraud within five years, the action will be barred. (*Martin v. Smith*, 4 B. R. 275; s. c. 1 Dillon, 85; s. c. 3 L. T. B. [C. R.] 199.)

A mortgage upon a stock of goods which authorizes the mortgagor to sell them and replace them with others, at such time and in such manner as he may determine, and use the proceeds generally as he sees fit, is fraudulent and void. A mortgage accompanied by such an agreement, consent, or understanding is no protection to the mortgagee. Such an arrangement defeats its essential nature and qualities as a mortgage, so that it can not, in a legal sense, be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgagor. If such an agreement is inserted in the mortgage, it is proven by the production of the mortgage, but if it is not, it may be proven by evidence *aliunde*. It is not necessary that it should be in writing or in the mortgage. It may be proven by *parol*, or inferred from circumstances and the conduct of the parties. (*In re Kahley et al.*, 4 B. R. 378; s. c. 2 Biss. 383; *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; *in re Perrin & Hance*, 7 B. R. 283; *in re Samuel Cantrell*, 6 Ben. 482; *Smith v. McLean*, 10 B. R. 260; *Smith v. Ely*, 10 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 22 Wall. 513; *in re Manly*, 3 B. R. 291; s. c. 2 Bond, 261; s. c.

2 L. T. B. 89; *contra*, *Brett v. Carter*, 14 B. R. 301; *Barron v. Morris*,\*14 B. R. 371; s. c. 2 Woods, 354; *Johnson v. Patterson*, 2 Woods, 443.)

If the power to sell is not contained in the mortgage, its existence must be found by the jury before the mortgage can be declared fraudulent. (*Miller v. Jones*, 15 B. R. 150.)

A provision that a certain person shall take possession of the property as trustee under the mortgage and retain possession until the mortgage debt is paid will not render the mortgage valid, if the trusteeship is a mere pretense and the trustee merely sees that the business is regularly conducted. (*Smith v. Ely*, 10 B. R. 553.)

The taking of possession under a claim of title will not render the mortgage good, for the title still remains fraudulent. (*Smith v. Ely*, 10 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 22 Wall. 513; *in re William D. Forbes*, 5 Biss. 510.)

A mortgage may be in operation as to a portion of the property, and fraudulent as to the residue. (*In re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383; *in re Perrin & Hance*, 7 B. R. 283; *in re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.)

A mortgage containing a stipulation that the mortgagor shall remain in possession, and sell the mortgaged property as agent of the mortgagee, and account for the proceeds, until the mortgage debt is paid, is not necessarily void. If carried out in good faith, it does not hinder, delay, or defraud creditors. The object is to subject the mortgaged property to the payment of the loan. The mortgagor can only rightfully dispose of it for the purpose of liquidating the secured debt. He can not sell for his own use; this would be a fraud upon creditors, and if such permission was given by the terms of the instrument, or agreed and consented to by parol, the mortgage would be void. (*Hawkins v. First National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462; *contra*, *in re Wm. D. Forbes*, 5 Biss. 510.)

A mere power of sale will not vitiate a mortgage of personal property if it is provided that the proceeds shall be applied to purchase other goods as a substitute for those sold. (*Mitchell v. Winslow*, 2 Story, 630.)

When the State laws make all sales of chattels void unless accompanied by delivery within a reasonable time, and followed by an actual and continued change of possession, and there was no delivery or change of possession because the vendor and vendee lived together in the same house, the sale is void, and the assignee may recover the property so sold. (*Allen v. Massey*, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 1 Dillon, 40; s. c. 2 Abb. C. C. 69; s. c. 17 Wall. 351; s. c. 1 L. T. B. 218; *Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380.)

If the change of possession does not accompany the transfer, it is not sufficient that a change is made before a creditor acquires a lien on the goods. (*In re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.)

From *Twyne's*, down to the very latest case, no sale has ever been upheld by any court where the vendor has remained in possession, performing all the offices of an absolute owner, and continuing so for many months in every beneficial use and enjoyment which ordinarily appertain to the ownership of property. No state of facts can be made out of sufficient force to repel the inference of fraud. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *in re Manly*, 3 B. R. 291; s. c. 2 Bond, 261; s. c. 2 L. T. B. 89; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137.)

The publicity attributed to an involuntary transfer of personal property under an execution fairly levied, prevents the application of the general rule, that continuance of possession by a debtor after a transfer of his property is a badge of such fraud as renders the transfer avoidable by his creditors, though it

was a transfer for a valuable consideration. But the exception ceases as soon as the demands of the judgment creditors are paid. When these demands are paid the general rule becomes applicable. (*In re Wm. H. Long*, 3 B. R. quarto, 66.)

If such change of possession is made as the nature of the subject admits of; nothing more is in general required. (*Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.)

The retention of the possession of fixtures after the execution of a mortgage is merely *prima facie* evidence of fraud. (*Howard v. Prince*, 11 B. R. 322.)

In Kentucky, an actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale, as to creditors and subsequent purchaser, whenever the vendor at the time of the sale is in possession of the property. And this transmutation of possession, to be effectual, must not be merely nominal or momentary, but must be real, actual and open, and such as may be publicly known. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.)

An absolute deed intended as a mortgage is not conclusive evidence of fraud. (*Gaffney v. Signal*, 1 Dillon, 158.)

Where the State laws make the purchase of property in the name of another presumptively fraudulent as to existing creditors, and raise a trust in favor of such creditors when the presumption of fraud is not disproved, property so purchased passes to the assignee of the party whose money was so invested, and he can sue for and recover the same. (*In re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424.)

By the laws of Mississippi, the income of a wife's separate estate, so far as necessary, should be used jointly with that of her husband in support of the family. If she permits the husband to receive the income of her estate without accounting for the same for a longer period than one year, she loses the right to call him to an account for such income. The accounting for such income after the title has thus become vested in the husband, is a gift by the husband to the wife, and this can not be done to the prejudice of creditors. The relationship of the parties and the conveyance of all property that is subject to execution are evidence of fraud. The rights of all parties must be governed by the law in force when they accrue. The act of 1867, entitled "An act to amend the law heretofore in force respecting the rights of married women," has no application to this case, having been passed subsequent to the conveyance. (*Gillespie v. McKnight et al.* 3 B. R. 468.)

A condonation after a deed of separation renders the deed a voluntary conveyance instead of a conveyance for a valuable consideration. (*Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.)

The relinquishment of a contingent right of dower, without any agreement for compensation therefor, is not a valuable consideration for a subsequent conveyance. (*Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.)

A promise which is not founded upon a valuable consideration is voluntary, and not a sufficient consideration for a transfer. (*Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.)

A voluntary settlement by a debtor who is insolvent is fraudulent. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; *Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.)

In determining whether the donor retains enough to meet his liabilities, attention should be given to the business in which he is engaged, the society in which he lives, and his necessary expenses. The economy of country life does not furnish a standard or measure for city transactions. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 5 B. R. 168; s. c. 5 Ben. 184; s. c. 12 Blatch. 163.)

If the subsequent expenditures in improving the property are in pursuance of a plan formed at the time of the gift thereof, the whole will be taken as one transaction. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 5 B. R. 168; s. c. 5 Ben. 184; s. c. 12 Blatch. 163.)

A voluntary conveyance made by a person who is indebted is *prima facie* fraudulent, and the burden is on the grantee to show that the debtor had abundant means, besides the property conveyed, to pay all his debts. (*Pratt v. Curtis*, 6 B. R. 139.)

The assignee alone can impeach a voluntary conveyance, and work out the equity of antecedent creditors. (*Pratt v. Curtis*, 6 B. R. 139.)

When a deed is void as to existing creditors, and is therefore set aside, all creditors, both prior and subsequent, participate in the fund *pro rata*. A man who is indebted and unable to pay can not, as against his creditors, part with his property under the name of a sale at an undervalue, so as to give away the surplus value to a father, son, friend, or favored creditor. (*Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.)

A voluntary settlement by a man who is indebted, is fraudulent and void if the debts existing at the time of the conveyance are only paid by contracting other obligations which finally result in insolvency. (*Antrim v. Kelly*, 4 B. R. 587.)

The earnings of a *feme covert* are by the common law the property of the husband and liable for his debts, and do not constitute a good consideration for a conveyance. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.)

The payment by a *feme covert* of her money towards a purchase of property, without insisting upon any agreement for a reconveyance or conveyance of any interest to her, is conclusive evidence of a gift of the money to the husband, without any right on her part to reclaim any interest in the land or in its proceeds as against him or his creditors. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.)

A purchase in the name of a *feme covert* by the husband constitutes a gift to the same extent, and with the same effect, as if the property were first conveyed to him, and then by him to her. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.)

If a party furnished the money with which a house was purchased in the name of the bankrupt, and then subsequently took a note therefor which he proved against the estate, a conveyance of the house to him, after the giving of the note, will be claimed to be void, and not an execution of the resulting trust. (*Napier v. Server*, 2 W. N. 400.)

When the deed is kept from record, and the debtor appears as the owner and obtains credit upon the faith of the property, a voluntary conveyance is void as to subsequent creditors. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; *in re Rainsford*, 5 B. R. 381.)

A voluntary conveyance made with the intent to cast on creditors the hazards of future speculations, and to provide a home in case of disaster, is fraudulent. (*In re Rainsford*, 5 B. R. 381.)

The assignee claims not under but adversely to a fraudulent deed. He claims that the deed is void as to creditors, and on this ground alone attacks it, and upon this ground alone has he any right to the property. He can not claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance, he can not set it up to defeat the right of the debtor's wife to dower. He can not ask that the same instrument be held void as to creditors, and then in their favor held valid as to the wife. The debtor's wife is not, under such circumstances, barred of her dower. (*Cox v. Wilder*, 7 B. R. 241; s. c. 5 B. R. 443; s. c. 2 Dillon, 132; s. c. 5 L. T. B. 500.)

The exemption from execution is a right or privilege given to the debtor. He may waive it by not claiming the exemption. If he does not choose to assert any claim to have the property exempted, the fraudulent grantee is in no position to claim it as against the assignee. (*Edmonson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; *contra*, *Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.)

Where by the State laws a *feme covert* may own property in her own right and carry on business in her own name, she may employ her husband and pay him. She has a right to all the advantages that flow to her from her own or her husband's tact and foresight, so long as his means, services, and earnings do not enter into her business. Property thus obtained *bona fide* can not be taken from her and turned over to the creditors of her husband. On the question of the ownership of such property, the presumptions are all in her favor. (*Driggs v. Russell*, 3 B. R. 161; s. c. 1 L. T. B. 161; s. c. 1 C. L. N. 353; *in re Eldred*, 3 B. R. 256; s. c. 1 C. L. N. 389.)

If the personal labor and capacity of the husband have contributed largely to the accumulation of property held as his wife's separate estate, or if a successful business conducted in her name has been wholly managed by her, and its profits resulted alone from her industry, skill, and economy, then, as by the settled principles of law which govern the relative rights of husband and wife, even the proceeds of her labor and industry ordinarily belong to him, the property so acquired is subject to the debts of the husband, whatever equitable rights the wife may have as between herself and him; with this exception, however, that the skill, care, or labor of either husband or wife bestowed on her estate, so far as may be reasonably necessary, inures to the benefit of such estate, and does not render it liable to the husband's debts. (*Shackleford v. Collier*, 6 Bush, 149.)

Where a husband receives money from his wife and engages in transactions in real estate in her name until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee. (*Muirhead v. Aldridge*, 14 B. R. 249.)

According to the laws of New York, as interpreted by the courts, a married woman may own property of every description in the same manner as if she were a *feme sole*. She may engage in trade, and her labor and her time are not the property of her husband. She may even employ the time and labor of her husband in the business of using her capital in trade, and she may support her husband out of the profits of her business; and neither the fact that she employs her husband, nor the fact that the labor and skill of the husband contribute to the success of the business, nor the fact that the husband and his family are supported out of the profits of the business, will make the business or its profits the property of the husband. (*Voorhies v. Bonesteel*, 7 Blatch. 495; s. c. 16 Wall. 16.)

Under the laws of Georgia, a *feme covert*, with the consent of her husband, may have a separate estate in her earnings, and the purchase of property in her name with such earnings is not fraudulent. (*Glenn v. Johnson*, 18 Wall. 476.)

A mere intent to prefer does not render a transfer fraudulent which is otherwise valid. (*Cookingham v. Ferguson*, 4 B. R. 636; s. c. 8 Blatch. 488.)

Parties who have taken transfers from the fraudulent vendee are necessary parties. (*Cookingham v. Ferguson*, 4 B. R. 636; s. c. 8 Blatch. 488)

By the laws of Florida, an assignment appropriating the property to such creditors as shall sign a compromise agreement, and none others, with a direction that the surplus shall then revert to the assignor, is not an assignment of the whole of the assignor's property, and is fraudulent and void. (*In re Broome*, 3 B. R. 444; s. c. 3 Ben. 488.)

If a fraudulent assignment has not been expressly assented to by the credi-

tors, it is merely a power which is revoked by the commencement of the proceedings in bankruptcy. (*Ashley v. Robinson*, 29 Ala. 112')

The assignee may recover property fraudulently purchased in the name of another, after the commencement of the proceedings in bankruptcy, with the funds of the bankrupt. (*Hyde v. Cohen*, 11 B. R. 461.)

A lien is not a property in the thing itself, nor does it constitute a mere right of action for the thing. It more properly constitutes a charge upon the thing. In some general sense creditors have an equitable lien upon property purchased with the debtor's funds in the name of another. So they would have if a general liability instead of a resulting trust had been declared. So debts are an equitable lien upon property fraudulently transferred by the debtor, and it may be said that every debtor is a trustee for his creditors, and bound to use his property for their benefit, and that creditors have an equitable lien upon the property of the debtor. But in all these cases the usual remedies are to be pursued to create and force the lien before a specific charge creating an incumbrance is created. A creditor can not enforce the liability of a resulting trust under the statute without a preliminary judgment and execution. Before the equitable interests of a debtor can be reached in equity, all available legal remedies must be exhausted. Neither a judgment nor execution constitutes a lien upon equitable interests. The commencement of the equitable action and the filing of the *lis pendens* is necessary for that purpose. (*Ocean Nat'l Bank v. Olcott*, 46 N. Y. 12.)

It is an easy matter for parties to go through the form of paying and receiving money in the presence of witnesses. This is the common device of parties contriving a fraud, but endeavoring to fortify themselves with the evidence of good faith. So, too, the placing of the device "agt." on the sign is so generally the cover of fraud, that so far from freeing the transaction from suspicion, it only serves to awaken it. When the parties are competent witnesses in the cause, but do not testify or offer any explanation of the transaction, it is a sound rule, sustained by reason as well as by authority, that the presumption is, that the evidence in their possession, if given, would be in corroboration of that which has already been given against them. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.)

A conveyance which is made by an insolvent to a relative of nearly all his property for an inadequate price, for the purpose of putting it out of the reach of his creditors, and which is absolute in form, but in fact on secret trust for the benefit of the grantor and such creditors as he may see fit to select, and which is kept from record for nearly a year, has nearly every badge of fraud. (*In re J. H. C. Lutgens*, 7 Pac. L. R. 89.)

Evidence of prior transactions between the same parties which tends to show the consideration of the conveyance and the inducements which led the debtor to make it, bears directly upon the question whether it was made in good faith or in fraud of creditors, and is admissible. (*Knowlton v. Moseley*, 105 Mass. 136.)

When goods covered by a bill of sale are left upon the premises of the original owner in charge of a person partially employed by him, the transfer is valid when there is no evidence that a creditor or a purchaser has been misled or deceived thereby. (*Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.)

A judgment confessed upon a defective statement is not absolutely void, but only so as to creditors who have a lien upon the property sought to be affected by the judgment. It has, indeed, been ruled that even as against lien creditors, the insufficiency of statement is only *prima facie* evidence of fraud, and that it is admissible to support the judgment by proof that the transaction was in good faith and the judgment confessed upon an actual existing debt. The bankrupt act must be construed as giving the creditors who prove their debts, from and after the filing of the petition, such a direct interest in the property or assets of the bankrupt as to enable them, or the assignees for them, to attack

such a judgment as fraudulent in law or fact, even though their claims do not consist of judgments. (*In re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 248.)

The statutes requiring chattel mortgages to be filed in the office of the county recorder, do not make a mortgage valid which would otherwise be void as to creditors. It would be a serious drawback to all trading operations, if a dealer were obliged to search the files of the recorder's office to ascertain whether there is a mortgage on property held out to the world by a party as his own. (*In re Manly*, 3 B. R. 291; s. c. 2 Bond, 261; s. c. 2 L. T. B. 89; *Robinson v. Elliott*, 11 B. R. 553; s. c. 22 Wall. 513.)

No acts of the assignor, after the assignment, can invalidate it, or afford any evidence from which fraud in fact can be legitimately inferred. When a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter *ex post facto*. (*Beck v. Parker*, 65 Penn. 262.)

The title of a fraudulent grantee is good against all parties except the assignee and creditors. A tenant can not defeat the title of the grantee by showing fraud in a transfer by his landlord, at least until he has been notified by the landlord's assignee of a claim for the property. Until such notice the tenant can not be held liable to the assignee for rent. (*Steadman v. Jones*, 65 N. C. 388.)

Although an indorsement on a mortgage to the effect that it shall cover property acquired after its execution is made for the purpose of defrauding creditors, yet it will not affect the validity of the original mortgage. (*Whithed v. Pillsbury*, 13 B. R. 241.)

The assignee has no greater rights than the judgment creditor, and a *bona fide* purchaser from a fraudulent grantee will be protected, although his purchase was made after the appointment of the assignee. (*Beall v. Harrell*, 7 B. R. 400; s. c. 1 Woods, 476; *Murray v. Jones*, 50 Geo. 109.)

If the purchaser has notice of facts sufficient to put him on the inquiry, he is not a *bona fide* purchaser. (*Harrell v. Beal*, 7 B. R. 400; s. c. 9 B. R. 49; s. c. 17 Wall. 590.)

Although a gift is void, a mortgagee who makes a loan in good faith gets a good title. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 12 Blatch. 163.)

A mortgagee who takes his mortgage to secure a desperate debt due by the donor, is not a purchaser for value if he is aware of the defects of the title. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 12 Blatch. 163.)

A party who, after the commencement of proceedings in bankruptcy, purchases at a sale under a fraudulent execution, does not obtain a valid title as against the assignee. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 12 Blatch. 163.)

If the donee has sold the property, the assignee may recover the value from him. (*Sedgwick v. Place*, 10 B. R. 28; s. c. 12 Blatch. 163.)

To constitute a *bona fide* purchaser, he must be without notice of the fraud, not only at the time of the purchase, but also at the time of the actual payment of the consideration. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.)

The lien of a judgment rendered after the making of a fraudulent conveyance, and before the commencement of the proceedings in bankruptcy, is preserved, and is entitled to priority when the conveyance is set aside. (*Codwise v. Gelston*, 10 Johns. 507.)

When a fraudulent deed is set aside, the property should be turned over to the assignee. (*Sands v. Codwise*, 4 Johns. 536.)

When a fraudulent conveyance of land is set aside, all the stock and grain, except such as the law exempts, will be considered assets. (*Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.)

The account for rents and profits should only be taken from the time of filing the petition in bankruptcy. (*Sands v. Codwise*, 4 Johns. 536.)



Expenditures may be set off against rents and profits. (*Sands v. Codwise*, 4 Johns. 586.)

A person who takes a mortgage from a fraudulent grantee has no right to sell the property after notice of the claim of the grantor's assignee. (*Brooks v. D'Orville*, 7 Ben. 485.)

If a party in good faith takes a mortgage for a valuable consideration from a fraudulent grantee, it will be valid against the assignee. (*Brooks v. D'Orville*, 7 Ben. 485.)

SEC. 5047.—The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

Statute Revised—March 2, 1867, ch. 176, §§ 14, 16, 14 Stat. 523, 524. Prior Statutes—April 4, 1800, ch. 19, § 13, 2 Stat. 25; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

### Original Suits.

This provision is limited by the preceding section. The assignee can only sue for the property or rights of action which pass to him as assignee, and can only prosecute actions of a like character in his own name. (*Noonan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.)

The statement in a complaint that the plaintiff is assignee may be treated as surplusage, or at most as *descriptio personæ*, and may be disregarded. (*Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439.)

It is not necessary to allege in detail the adjudication, the appointment of assignee, and the assignment and record thereof. As in the case of an executor or administrator, it is only necessary to state —, assignee of the estate of —, duly adjudged a bankrupt according to the statute in such case made and provided. (*Ethridge v. Jackson*, 19 I. R. R. 134; s. c. 7 Pac. L. R. 132; *Wheelock v. Lee*, 10 B. R. 363; s. c. 64 N. Y. 242; *Hustings v. Fowler*, 2 Ind. 216.)

The assignee's title to the bankrupt's estate, and right to sue therefor, is derived from the assignment, and hence a copy of the assignment need not be procured before the institution of a suit. (*Rogers v. Stevenson*, 16 Minn. 68.)

After the execution of a deed of assignment the bankrupt is entirely divested of his property, and the same is vested in his assignee. The whole estate is conveyed by the assignment, and there is no residuary interest in the bankrupt. It results as a necessary legal consequence that the assignee may and alone can maintain ejectment. His is the title: to him the real estate of the bankrupt exclusively belongs, and in the event of an ejectment he is the person dispossessed

and injured. (*Barstow v. Adams*, 2 Day, 70; *vide Fales v. Thompson*, 1 Mass. 34.)

In proceedings in bankruptcy, the legal title vests in the assignee under the assignment. Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, possessed, as of his own property, of the estate assigned to him. It is true, he holds the title of the property when recovered, in trust for certain purposes specified in the statute; but as between him and a stranger, he holds the title, and may assert it in the same form of action as though he owned the fee. (*Dambmann v. White*, 12 B. R. 488; s. c. 48 Cal. 489.)

So far as a removed executor has claims against the estate of a decedent, they may be asserted in the probate court by his assignee. (*Appling v. Bailey*, 44 Ala. 838.)

A party who takes an assignment of a *chose in action* from the bankrupt after the commencement of the proceedings in bankruptcy, has a good title if the proceedings are discontinued without the appointment of an assignee before the trial of a suit on such *chose in action*. (*Kline v. Bavendahl*, 12 B. R. 375; s. c. 6 N. Y. Supr. 546; s. c. 11 N. Y. Supr. [Hun], 265.)

A bankrupt can not have relief in respect to lands where the title to the land or interest in it is vested in his assignee. The effect of his bankruptcy can not be avoided by an averment that he is a trustee for his wife, she not being made a party. (*Muller v. Erich*, 5 Pac. L. R. 223.)

The assignee is clothed with the legal title as well as the beneficial interest in a judgment rendered in favor of the bankrupt, and must proceed in his own name against a sheriff for neglecting to return an execution issued thereon, although the execution was issued in the name of the bankrupt after the commencement of the proceedings in bankruptcy. (*Gary v. Bates*, 12 Ala. 544.)

The bankrupt cannot institute an action of trover for the conversion of property belonging to the estate after the commencement of the proceedings in bankruptcy, for, in order to maintain such a suit, the plaintiff must have a right of property in the goods converted, as well as the right of possession at the time of the conversion. (*Redman v. Gould*, 7 Blackf. 361.)

In the absence of all proof, the presumption is that the equitable interest is united with and follows the legal title, and, under such circumstances, a suit can not be instituted in the name of the bankrupt on a note made payable to him prior to the commencement of the proceedings in bankruptcy, although the suit is entered to the use of a third party. (*Griswold v. McMillan*, 15 Ill. 590.)

The assignment extends to all claims founded in property. In all cases where the cause of action would survive to the executor of a bankrupt, it passes to his assignee. (*Sullivan v. Bridge*, 1 Mass. 511; *vide Bird v. Hempstead*, 2 Day, 272; s. c. 2 Day, 293.)

A right of action against a sheriff for negligence in the levy of an execution, whereby the claim was lost, vests in the assignee of the judgment creditor. (*Sullivan v. Bridge*, 1 Mass. 511.)

A suit on a judgment in the name of the bankrupt can not be maintained, for all suits instituted after the appointment of the assignee should be brought in his name, or at least prosecuted for the benefit of the creditors whom he represents. (*Cook v. Lansing*, 3 McLean, 571.)

If no plea in abatement is interposed, the assignee may recover a moiety of a debt due to a firm of which the bankrupt and another were members. (*Barclay v. Carson*, 2 Hay [N. C.], 243.)

The bankrupt can not institute a suit in the name of a third person for his benefit, where his interest in the cause of action accrued prior to the commencement of the proceedings in bankruptcy. (*Berry v. Gillis*, 17 N. H. 9.)

The bankrupt has the exclusive right to sue for a trespass committed upon the exempt property prior to the commencement of proceedings in bankruptcy. It is not necessary for him to produce a certificate of exemption, for what the law requires to be done it presumes has been done, until the contrary is shown. (*Seiling v. Gunderman*, 35 Tex. 345.)

The bankrupt may institute an action for a levy on property which was exempt from execution, although the property was sold after the commencement of the proceedings in bankruptcy and before the allowance of the exemption by the assignee. (*Williams v. Miller*, 16 Conn. 144.)

If a note is allowed to the bankrupt as a part of his exemption, he may institute a suit thereon in his own name. (*Henly v. Lanier*, 15 B. R. 280; s. c. 75 N. C. 172.)

A creditor may file a bill in equity to reach certain assets of the bankrupt, without a previous refusal of the assignee to institute a suit where the whole conduct of the assignee shows that he has abandoned all claim to it. (*Rugely v. Robinson*, 19 Ala. 404.)

When a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues it is no ground of defense that the beneficial interest is in another, or that the agent, when he recovers, will be bound to account to another. If the agent becomes bankrupt, he may still sue in his own name. If a party pledges his business for a debt, with an agreement that it shall be carried on with the capital of the pledgee, he has no beneficial interest in contracts subsequently made, and in case of bankruptcy may nevertheless sue upon them in his own name. (*Rhoades v. Blackisson*, 106 Mass. 334.)

The assignee is a necessary party to a bill filed by a creditor to reach the equitable assets of the bankrupt. (*Rugely v. Robinson*, 19 Ala. 404.)

The bankrupt may institute an action at law in his own name on a claim which was not placed on his schedules. (*Steele v. Towne*, 28 Vt. 771.)

If the judgment was assigned prior to the commencement of the proceedings in bankruptcy, a *sci. fa.* may be maintained in the name of the bankrupt for the benefit of the owner of the judgment. (*Boone v. Stone*, 8 Ill. 537.)

If the payee of a note obtains possession of the note after a sale thereof by his assignee, he is remitted to his original legal title, and may transfer it by his indorsement. (*Birch v. Tillotson*, 16 Ala. 387.)

If a note passes to the assignee by delivery without indorsement, and he sells and transfers it to the bankrupt by delivery, the bankrupt may be considered as reinstated in his original right, and may sue thereon in his own name. (*Drury v. Vanneaver*, 59 Mass. 442.)

If a note passes to the assignee by delivery without indorsement, and he sells and transfers it by delivery to one of the bankrupts, the latter may sue thereon in the name of the bankrupts. (*Drury v. Vanneaver*, 59 Mass. 442.)

If the bankrupt purchases a *chose in action* from the assignee, he may bring an action thereon in his own name. (*Udall v. District*, 48 Vt. 588.)

If the bankrupt made an equitable assignment of a *chose in action* before the commencement of the proceedings in bankruptcy, he may maintain an action in his own name if he subsequently purchases the claim. (*Blin v. Pierce*, 20 Vt. 25.)

A party who took an assignment of a *chose in action* as a collateral security prior to the commencement of the proceedings in bankruptcy, can not institute a suit in equity where the bankrupt had no beneficial interest therein, although the assignee refuses to allow the use of his name, for the creditor may sue at law in the name of the bankrupt. (*Ontario Bank v. Mumford*, 2 Barb. Ch. 596.)

The purchaser of a *chose in action* from the assignee takes merely an equitable title, and must sue in the name of the assignee for his use. (*Cumack v. Bisquay*, 18 Ala. 286.)

The purchaser of a *chose in action* from the assignee can not maintain an action thereon in his own name. (*Leach v. Greene*, 12 B. R. 376; s. c. 116 Mass. 534.)

If a *chose in action* is sold by the assignee, an action may be brought in the name of the bankrupt for the benefit of the purchaser. The authority given an assignee in bankruptcy to sue for and recover, in his own name, the debts due the bankrupt, is not for the benefit of the debtors nor of the purchasers, but for the benefit of the estate, and when the estate is not to be benefited by such suit, no reason is perceived why it should be brought in his name. (*Foster v. Wylie*, 60 Me. 109; s. c. 6 L. T. B. 576; *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.)

The purchaser may also sue in his own name. (*Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.)

The act of the assignee in selling a *chose in action* can not be collaterally impeached in a State court. (*Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.)

If a suit is instituted in the name of the assignee without his authority, and afterward ratified by him, its prosecution in his name is lawful. (*Curr v. Lord*, 29 Me. 51.)

A plea that the plaintiff is not the assignee of the bankrupt is a plea in bar, for it denies that the plaintiff has any cause of action. (*Peel v. Ringgold*, 6 Ark. 546.)

A confession of judgment admits the assignment and the right of action to be in the assignee agreeably to the declaration. Suffering judgment to go by default admits the contract to be as declared on. (*Kelly v. Holdship*, 1 Browne, 36.)

A plea that a note was indorsed by one of two payees after he became a bankrupt, is defective unless it shows that the indorsement was made by a party who was not duly authorized to make it, and that the note was so held as to vest in the assignee, and also gives the name of the assignee. (*Fulhoeller v. Singer*, 2 Greene [Iowa], 372.)

A plea of the bankruptcy of the plaintiff is bad when the obligation was given after the filing of the petition although it alleges that the consideration was an indebtedness that accrued before the bankruptcy. (*Beacon v. Howard*, 11 B. R. 486; s. c. 44 Ind. 413.)

A plea that after the rendition of the judgment, and before the issuing of a *sci. fa.*, the plaintiff became a bankrupt, is a good plea, for a *sci. fa.* to revive a judgment, can only be maintained in the name of the assignee. (*Boone v. Stone*, 8 Ill. 537.)

The assignee stands in the place of the bankrupt, and must establish his title to real estate in the same way. (*Talcott v. Goodwin*, 3 Day, 264.)

The plaintiff must prove himself to be duly appointed assignee by producing a certified copy of the record or of the assignment. (*In re McIver & Moore*, 1 Cranch C. C. 90.)

If it is proved that proceedings in bankruptcy were duly commenced, it involves upon the party who asserts that they were interrupted or superseded to prove it. In the absence of proof to the contrary, it will be presumed that the proceedings which follow as of course after those that are proved did take place, including the appointment of an assignee. (*Janes v. Beach*, 1 Mich. N. P. 94.)

If the adjudication of bankruptcy is established, the appointment of an assignee may be presumed. (*Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17; *Janes v. Beach*, 1 Mich. N. P. 94.)

As an assignment is required to be made in all cases as a matter of course, the maxim that in courts of general jurisdiction, *omnia præsumuntur rite esse acta* applies, and in the absence of any allegation or proof to the contrary, the courts in a collateral action, will generally assume that an assignment has been made. (*Sweepson v. Rouse*, 65 N. C. 34.)

If the bankruptcy is expressly admitted, and the right of the assignee to sue is not put in issue by any of the pleas, it is not incumbent on the assignee to prove the assignment. (*Zantlinger v. Ribble*, 4 B. R. 724; s. c. 36 Md. 32.)

If a party permits the transcript from the records of the bankrupt court to establish the presumption of the execution of an assignment, without an objection as to the non-production of the deed, he can not raise that question for the first time in the appellate court. (*Crayton v. Hamilton*, 37 Tex. 269.)

An assignee stands in a representative capacity, and may sue and be sued in that relation. He may, therefore, under the laws of Pennsylvania, appeal from an award without paying the costs or entering in recognizance. (*Morse v. Gritman*, 10 B. R. 132; s. c. 31 Leg. Int. 246.)

The bankruptcy of the plaintiff may be proved under the general issue, where the action has been instituted since the commencement of the proceedings in bankruptcy. (*Sims v. Ross*, 16 Miss. 557; *Berry v. Gillis*, 17 N. H. 9; *Lefter v. Hunt*, 8 Blackf. 195; *Pike v. Crehore*, 40 Me. 503.)

The objection that the indorsement of a note was made by the payee after the commencement of proceedings in bankruptcy may be taken under the general issue, for the plaintiff must show that he has a legal title to the note. (*Birch v. Tillotson*, 16 Ala. 387.)

### Continuance of Pending Suits.

The provisions of this section include suits and actions pending in the State courts, and are addressed to the courts in which suits or actions are pending, quite as much as to the Federal courts. The power of State courts to proceed with pending suits in cases where creditors have provable debts, but which they do not prove under the bankrupt proceedings, under certain prescribed limitations, is recognized by the bankrupt act itself. The jurisdiction of the State courts is not extinguished, except in those cases where the creditor proves his debt or claim. The bankrupt court has no control over the State courts, and can not determine questions of law that may arise upon cases pending therein. The State courts having jurisdiction of the parties and subject-matter, must determine the questions as they arise according to law, subject to the final judgment of the proper appellate tribunal. (*In re Clark et al.* 3 B. R. 491; s. c. 4 Ben. 88; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Clark v. Binninger*, 5 B. R. 254; s. c. 39 How. Pr. 363; *Peck v. Jenness*, 7 How. 612; *Heroett v. Norton*, 13 B. R. 276; s. c. 1 Woods, 68; *Linthicum v. Fenley*, 11 Bush, 131.)

The provision that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy to which the bankrupt is a party does not oblige him to seek a remedy in that way. (*Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

The words "he may prosecute" are permissive. It only becomes a duty for an assignee to prosecute a suit when the interest of the estate demands it, of which the assignee is, in the first instance, the judge. (*Reade v. Waterhouse*, 10 B. R. 277; s. c. 12 Abb. Pr. [N. S.] 255; s. c. 52 N. Y. 587; s. c. 35 N. Y. Sup. 78.)

The bankrupt may continue to prosecute an action of replevin in his own name for an article which has been set apart to him as exempt by the assignee. (*Scott v. Wilkie*, 65 N. C. 376.)

Until an assignee is appointed and qualified, and the conveyance or assignment made to him, the title to the property remains in the bankrupt. Until that time the bankrupt may prosecute pending actions, for there is no one to take his place. (*Sutherland v. Davis*, 10 B. R. 424; s. c. 42 Ind. 26.)

A bankrupt may continue to prosecute a pending action till some one appears with a better right. (*Gilmore v. Bangs*, 55 Geo. 403.)

The bankrupt can not prosecute an action in chancery to obtain satisfaction of a judgment, although he did not place it on the schedules. (*Planters' Bank v. Conger*, 20 Miss. 527.)

A motion for leave to prosecute the suit in the name of the bankrupt, for the benefit of the assignee, should be denied, because the bankrupt, by his bankruptcy, becomes *civiliter mortuus*, and can no longer sue either for himself or another. All his rights of property pass by the assignment to the assignee, in whose name alone can the suit be prosecuted. (*Cannon v. Welford*, 22 Gratt. 195; *Lacy v. Rockett*, 11 Ala. 1002; *contra*, *Neenan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.)

An assignee upon filing a duly certified copy of the assignment, may on notice to the plaintiff have a pending action entered to his use. (*Cottrell v. Mann*, 1 W. N. 157.)

If the plaintiff is declared a bankrupt after the commencement of a suit, the court may instruct the jury, if they find for the plaintiff, to find their verdict in the name of the plaintiff for the use of his assignee in bankruptcy. The verdict and judgment will be a sufficient protection to the defendant, and it is not a matter of concern to him who gets the money. (*Woodall v. Holliday*, 10 B. R. 545; s. c. 44 Geo. 18.)

A decree entered after the bankruptcy of the complainant is void, and can not be enforced by an attachment, for the suit thereby became defective. (*Springer v. Vanderpool*, 4 Edw. Ch. 362.)

The assignee may be admitted to prosecute the suit in his name, although third persons have an interest in the claim. (*Hammond v. Rice*, 18 Vt. 353.)

The assignee may prosecute a pending action in his own name, although it is pending in a State court. (*Ames v. Gilman*, 51 Mass. 239.)

If the suit is continued without exception in the name of the bankrupt, the defendant can not ask the court to instruct the jury, that if they render a verdict against him it must be for the use of the assignee. (*Southern Express Co. v. Connor*, 12 B. R. 53; s. c. 49 Geo. 415.)

The suit is not abated by the substitution of the plaintiff's assignee. (*Wise v. Decker*, 1 Cranch C. C. 190; *Hammond v. Rice*, 18 Vt. 353.)

The substitution of the assignee, when actually made, relates back to the commencement of the proceedings in bankruptcy. (*Browne v. Ins. Co.* 4 Yeates, 119.)

The State court can not proceed to hear and decide a case for the specific performance of a contract to convey land, if the vendor becomes bankrupt after the commencement of the suit, unless the assignee is made a party. (*Sweeps v. Rouse*, 65 N. C. 34.)

The assignee is the only person who can move to set aside an execution after the judgment debtor is declared bankrupt. (*Maris v. Duren*, 1 Brews. 428; s. c. 6 Phila. 327.)

When the assignee seeks to be made a party defendant to an action brought to recover the possession of property alleged to have been wrongfully taken and converted by the bankrupt, he should show that he has some right to the property in controversy. A motion which does not set forth such a right will be dismissed. (*Gunther et al. v. Greenfield et al.* 3 B. R. 730; s. c. 8 Abb. Pr. [N. S.] 191.)

Where property of the bankrupt has been sold, and the proceeds paid to the complainant under a decree which is subsequently reversed, the complainant can not defeat a motion for an order directing a repayment of the money by dismissing the bill before the assignee becomes a party. (*Kane v. Pilcher*, 7 B. Mon. 651.)

The commencement of proceedings in bankruptcy does not affect the jurisdiction of a State court over an action then pending to foreclose a mortgage, and a sale under a decree entered after the appointment of an assignee will pass a valid title to the purchaser. (*Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28; *in re Mary Irving et al.* 14 B. R. 289; *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313; *Cleveland v. Boerum*, 24 N. Y. 613; s. c. 23 Barb. 201; s. c. 27 Barb. 252; *Lenihan v. Hamann*, 8 B. R. 557; s. c. 11 B. R. 471; s. c. 14 Abb. Pr. [N. S.] 274; s. c. 55 N. Y. 652; *Jerome v. McCarter*, 15 B. R. 546; *contra*, Anon. 10 Paige, 20; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Fellows v. Hall*, 3 McLean, 487; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; *Storm v. Davenport*, 1 Sandf. Ch. 135; *Penniman v. Norton*, 1 Barb. Ch. 246.)

It is the duty of a State court to proceed with an action to foreclose a mortgage until it is informed by some proper pleading of the bankruptcy of the mortgagor. It is not sufficient for the assignee merely to file a certificate of his appointment without any motion or plea to be made a party or to take part in the case. (*Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28.)

Where a sale is made after the commencement of proceedings in bankruptcy under a decree entered before the adjudication in an action to foreclose a mortgage in a State court, and a decree for the deficiency is entered against the bankrupt, the decree is a bar to the right of the assignee to raise the question of usury in regard to the mortgage. (*Cutter v. Dingee*, 14 B. R. 294.)

An assignee appointed after a completed foreclosure by judgment and sale will be bound by the judgment, and especially in a case where the court of bankruptcy has authorized the continuance of the suit before judgment and sale. (*Lenihan v. Hamann*, 8 B. R. 557; s. c. 11 B. R. 471; s. c. 14 Abb. Pr. [N. S.] 274; s. c. 55 N. Y. 652.)

The mere filing of a petition in bankruptcy does not of itself constitute a sufficient reason for the dismissal of an action pending in a State court. (*Hobart v. Haskell*, 14 N. H. 127.)

Until the plea of bankruptcy is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant. (*Fellows v. Hall*, 3 McLean, 281.)

Bankruptcy is a fact, and when set up as a defense to a bill in equity by one or all of the defendants, should be pleaded in some regular way. Unless admitted as a fact by the opposite party, with a concession of its effect as barring all relief, it is not of itself cause for dismissing the bill in advance of the hearing. (*Ballin v. Ferst*, 55 Geo. 516.)

If a fund is in the hand of a receiver appointed by a State court for distribution, the assignee may intervene as a representative of the bankrupt and the general creditors, and contest any claim against the fund. (*Loudon v. Blanford*, 56 Geo. 150.)

If the assignee, with knowledge of the pendency of a bill brought by a creditor prior to the commencement of the proceedings in bankruptcy to vacate a deed alleged to be fraudulent, fails to be made a party to the suit until after a decree is made declaring the deed fraudulent, the creditor is entitled to payment in full out of the proceeds. (*Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.)

If a suit is pending against the bankrupt at the time of the commencement of the proceedings in bankruptcy, the plaintiff by due process may cause the

assignee to be made a party thereto. (*Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.)

If the assignee is made a party to a pending action in his representative capacity, a judgment against him in his individual character is void. (*Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.)

If the assignee is made a party to a pending action, the judgment is effectual and operative only to establish the amount and validity of the claim, and may be filed with him as a basis of dividends. (*Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25; *contra*, *Minot v. Brickett*, 49 Mass. 560.)

If a pending action is allowed to proceed to judgment for the mere purpose of establishing the validity of the claim and the amount due, any provision in such judgment awarding a lien to the plaintiff is entirely unavailing. (*Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25; *vide Switzer v. Zeller*, 27 La. An. 468.)

A party to whom a claim has been assigned prior to the bankruptcy of the plaintiff may afterwards intervene. The question of the bankruptcy of the plaintiff is not properly before the court upon a motion to intervene. The assignee in bankruptcy may contest the transfer of the claim, but not the defendant. (*Smalley v. Taylor*, 33 Tex. 668.)

When a *chose in action* upon which a suit has been brought is assigned for a full and valuable consideration before the commencement of proceedings in bankruptcy, the plaintiff becomes a trustee for the purchaser, and may continue the suit in his own name. His subsequent bankruptcy does not affect the right of his *cestui que trust*. The assignee in bankruptcy has no interest in the suit, and no right to be substituted as plaintiff. (*Valentine v. Holloman*, 63 N. C. 475; *King v. Morrison*, 5 Ark. 519; *Hynson v. Burton*, 5 Ark. 492.)

If a judgment was transferred to another, the suit thereon may be continued in the name of the bankrupt. (*Penn v. Edwards*, 56 Ala. 63.)

If the assignee declines to intervene, an action of replevin may be prosecuted in the name of the bankrupt by the surety on the replevin bond to whom the goods were delivered as security for his liability on the bond. (*Sawtelle v. Rollins*, 23 Me. 196.)

A party who has taken a transfer of the note may intervene and prosecute the suit in the name of the bankrupt. (*Converse v. Sorley*, 39 Tex. 515.)

If the assignee sells his interest in property which is in litigation in a court of equity, the purchaser should be made a party instead of the assignee. (*Penniman v. Norton*, 1 Barb. Ch. 246.)

The court will not permit an action to be prosecuted in the name of the assignee on the motion of a purchaser who has bought the claim from the assignee. (*Gale v. Vernon*, 1 Sandf. Ch. 679.)

If the assignee sells the claim, the purchaser will not be permitted to prosecute the action in his own name. (*Gale v. Vernon*, 1 Sandf. Ch. 679.)

If a suit in the name of the bankrupt is settled and dismissed after the commencement of the proceedings in bankruptcy, the assignee may move to have the case reinstated at the first regular term after his appointment. (*Home Ins. Co. v. Hollis*, 14 B. R. 337; s. c. 53 Geo. 659.)

Neither the bankrupt nor his attorney has the authority to settle a suit in the name of the bankrupt after the commencement of the proceedings in bankruptcy. (*Home Ins. Co. v. Hollis*, 14 B. R. 337; s. c. 53 Geo. 659.)

When a suit is settled after the commencement of the proceedings in bankruptcy, it is not incumbent on the assignee to show that the settlement was wrong in order to have the case reinstated. (*Home Ins. Co. v. Hollis*, 14 B. R. 337; s. c. 53 Geo. 659.)



If the complainant becomes bankrupt while a suit in equity is pending, the bill, may, on motion of the defendant, be dismissed, unless the assignee intervenes within a certain time. (*Bailey v. Smith*, 10 R. I. 29.)

If the assignee declines to intervene and prosecute a bill filed against a conventional trustee alleging a mismanagement of the trust fund, the bankrupt can not make him a party by a supplemental bill. (*Bailey v. Smith*, 10 R. I. 29.)

The assignee may intervene in an action commenced by the bankrupt by an original bill in the nature of a supplemental bill. (*Northman v. Ins. Co.* 1 Tenn. Ch. 312, 319.)

If a demurrer is entered to a plea setting up the bankruptcy of the plaintiff properly, it should be overruled, for no one can be or remain a party to a suit after his bankruptcy. (*Collier v. Hunter*, 27 Ark. 74.)

A plea of the bankruptcy of the plaintiff should conclude with a verification. (*Brown v. Patrick*, 7 Phila. 143.)

A plea of the bankruptcy of the plaintiff *pendente lite* need make no allegation in respect to the jurisdiction of the bankrupt court, for it will be intended that the petition was filed in the proper court. (*Lacy v. Rockett*, 11 Ala. 1002.)

If the assignee takes issue upon the plea of the bankruptcy of the plaintiff, and it is found against him, judgment must be entered for the defendant. (*Lacy v. Rockett*, 11 Ala. 1002.)

The assignee may avoid a plea of bankruptcy of the plaintiff *pendente lite* by submitting to make himself plaintiff. (*Lacy v. Rockett*, 11 Ala. 1002; *Brooks v. Harris*, 12 Ala. 555.)

The defendant may plead that the plaintiff has been declared a bankrupt by the proper district court subsequent to the institution of the suit. Such a plea is a plea in bar. (*Lacy v. Rockett*, 11 Ala. 1002; *Hynson v. Burton*, 5 Ark. 492; *King v. Morrison*, 5 Ark. 519.)

A plea that the defendant became a bankrupt before the suing out of a writ of error, need not set forth the name of the assignee. (*Vairin v. Edmonson*, 9 Ill. 120.)

The question whether the person who claims to be assignee of the plaintiff is such, can not be raised by a general demurrer, but only by a plea in abatement. (*Manning v. Hunt*, 36 Tex. 118.)

The State court is not a mere auxiliary tribunal of the Federal court to entertain the claim of the assignee to property, and to order it to be surrendered up to him unconditionally, right or wrong, to be administered and disposed of by the bankrupt court. If the aid of the State court is sought and demanded by an assignee to recover property, he must submit to the terms prescribed, and recover or not recover as the principles of law and equity bearing on the rights of the contesting parties demand. He is estopped in such a case to deny the jurisdiction of the State court to decide the merits of the controversy. (*Pindell v. Vimont*, 14 B. Mon. 400.)

When the assignee appears to defend a pending action, he may adopt the answer already filed. (*Fritsch v. Van Mittedorfer*, 2 Cinn. 261.)

A plea that a part only of the plaintiffs have become bankrupts *pendente lite* is a good plea. (*Lacy v. Rockett*, 11 Ala. 1002; *Sims v. Ross*, 15 Miss. 557.)

The bankruptcy of the plaintiff can not be proved by parol evidence. (*Moore v. Voss*, 1 Cranch C. C. 179.)

If the assignee is permitted to appear and defend a suit in the name of a bankrupt defendant, he can not be directed to pay costs after the rendition of a judgment. The proper practice in such a case is to move for security for costs at the time of his appearance, or prior to the termination of the proceedings. (*Holland v. Seaver*, 21 N. H. 386.)

Under the laws of New York the assignee is not liable for costs, except in case of mismanagement or bad faith. (*Ronde v. Waterhouse*, 10 B. R. 277; s. c. 12 Abb. Pr. [N. S.] 255; s. c. 52 N. Y. 587; s. c. 35 N. Y. Sup. 78.)

Costs can not properly be taxed to the assignee before he became a party to the suit. (*Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.)

If a party who has recovered a judgment takes the benefit of the bankrupt act and afterwards dies, the suit in the appellate court should be revived against the assignee in bankruptcy, and not against the administrator. (*Moffit v. Cruise*, 7 Cold. 137.)

If the judgment debtor is declared a bankrupt after the rendition of a judgment affecting a right of property which would pass to his assignee, the latter is the proper party to bring a writ of error, and he alone can do it. (*Knox v. Exchange Bank*, 12 Wall. 379; *Day v. Laflin*, 47 Mass. 280; *Vairin v. Edmondson*, 9 Ill. 120; *Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.)

When the bankrupt is seeking to prevent the establishment of a claim against himself, he has an interest sufficient to entitle him to maintain an appeal. (*Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.)

Where the judgment of a justice in a summary proceeding against the bankrupt under the landlord and tenant act is reversed on appeal, the assignee who has been appointed since the commencement of the proceeding is entitled to a writ of restitution, although he never was in possession, for he is entitled to all the rights of the bankrupt in respect to his property. (*McMillan v. Love*, 72 N. C. 18.)

Where an action is brought on an appeal bond to recover costs, an objection that one of the appellees became bankrupt after the taking of the appeal and before the dismissal thereof, will be deemed to be waived unless it is pleaded, and can only be pleaded in abatement. (*McSpedon v. Bouton*, 5 Daly, 30.)

The bankrupt may sue out a writ of error in his own name to remove a judgment rendered against him after the commencement of the proceedings in bankruptcy. (*Dormire v. Cogly*, 8 Blackf. 177.)

If the defendant is declared a bankrupt before the taking of an appeal, the appeal may be prosecuted in his name or in that of his assignee. (*O'Neil v. Dougherty*, 10 B. R. 294; s. c. 46 Cal. 575.)

A bankrupt may appeal from a judgment rendered against him as guardian after the commencement of the proceedings in bankruptcy. (*Collins v. Marshall*, 10 Rob. [La.] 112.)

The time of the adjudication of bankruptcy is the time of filing the petition. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

SEC. 5048.—No suit pending in the name of the assignee shall be abated by his death or removal; but, upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

Statute Revised—March 2, 1867, ch. 176, § 16, 14 Stat. 524. Prior Statutes—April 4, 1800, ch. 19, § 9, 2 Stat. 24; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

SEC. 5049.—A copy, duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evi-

dence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes—April 4, 1800, ch. 19, § 56, 2 Stat. 35; Aug. 19, 1841, ch. 9, § 15, 5 Stat. 448.

When an appellant becomes bankrupt after an appeal taken, his assignee, upon producing a copy of the assignment, duly attested by the clerk of the proper district court, may, on motion, be admitted as a party to the suit in the appellate court in the place of the bankrupt. (*Herndon v. Howard*, 4 B. R. 212; s. c. 40 How. Pr. 288; s. c. 9 Wall. 664; *Knox v. Exchange Bank*, 12 Wall. 379.)

An uncertified copy of the petition to be declared bankrupt and a certificate of discharge are no evidence of the appointment of an assignee. (*Alexander v. McCullough*, 32 Leg. Int. 336.)

Oral testimony to prove an assignment is not admissible until evidence is given to show that the original or a certified copy thereof can not be produced. (*Burk v. Winters*, 15 B. R. 140; s. c. 28 Ark. 6; *Files v. Harbison*, 29 Ark. 307.)

The right of the assignee to maintain a suit does not depend on the instrument of assignment. A copy of an assignment, under the seal of the court, if duly certified, is sufficient to show the assignee's right to sue, although the original assignment is not signed either by the judge or the register. (*Zantzing v. Ribble*, 4 B. R. 724; 36 Md. 32.)

It is not necessary to produce proof of an acceptance of the appointment or of a publication of the appointment or of the recording of the assignment, for a duly certified copy of the assignment is made conclusive evidence of the right to sue. (*Rogers v. Stevenson*, 16 Minn. 68; *Faires v. Metoyer*, 6 Rob. [La.] 75.)

In a suit instituted by the assignee, it is not necessary to prove all the steps in the proceedings in bankruptcy, for a copy of the assignment is conclusive evidence of the assignee's title. (*Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439; *Shawhan v. Wheritt*, 7 How. 627; *Carr v. Gale*, 2 Ware, 330; s. c. 3 W. & M. 38.)

If the assignee produces a duly certified copy of the assignment, it is not necessary for him to show the jurisdiction of the district court over the proceedings or the person of the bankrupt. (*Cone v. Purcell*, 11 B. R. 490; s. c. 56 N. Y. 649.)

Neither the validity of the adjudication of bankruptcy, nor the existence, sufficiency, or validity of the debt of the petitioning creditor can be collaterally drawn in question. In all suits brought by the assignee, the assignment is conclusive evidence of his right to sue. (*Barstow v. Adams*, 2 Day, 70; *Rugan v. West*, 1 Binn. 263; *Barclay v. Carson*, 2 Hay [N. C.] 243; *Lovett v. Cutter*, 1 Mass. 67; *Libermore v. Swazey*, 7 Mass. 213; *Den v. Wright*, Pet. C. C. 64.)

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SEC. 5050.—No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522.

Until a conveyance is declared to be void by due course of law, the grantee's right to books and papers conveyed to him is as perfect, to all intents, as against the assignee, as his right to any other property. (*Rogers v. Winsor*, 6 B. R. 246.)

A receiver appointed by a State court, is entitled to refuse to deliver up the

bankrupt's books to the assignee, or to give him possession thereof, until they are properly taken from him by adverse proceedings, but he must produce them to be used on the examination as evidence. (*In re William W. Hulst*, 7 Ben. 40.)

SEC. 5051.—The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522.

The bankrupt court will order the bankrupt to execute and deliver to the assignee the proper papers to enable him to be admitted to prosecute suits pending in the State courts in his own name, in the same manner and with the like effect as they might have been prosecuted by the bankrupt; and direct the bankrupt himself to refrain from prosecuting the actions, or applying for any order or decree therein. (*In re Clark et al.* 3 B. R. 491; s. c. 4 Ben. 88; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Clark v. Binninger*, 5 B. R. 255; s. c. 39 How. Pr. 363.)

SEC. 5052.—No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522.

This provision can not enlarge the rights or title of the assignee, or make a mortgage invalid against him, which, but for the provision, would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding record; and so, if the mortgage be one that requires no record, as if it be executed in a State having no statute upon the subject, or if the record is not required between the parties, the provision will not defeat it. (*In re Chas. W. Griffiths*, 3 B. R. 731; s. c. Lowell, 431; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75.)

It would be going too far to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds of trust or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116)

Mortgages which are not otherwise valid or duly recorded are not enumerated as protected in favor of the mortgagee, but, on the contrary, are carefully excluded. The attention of Congress was specially called to chattel mortgages, and the language of the act is carefully framed, so as to recognize and protect such liens as were already valid by the laws of the land, the statutes of the United States, or of the State where the transaction occurred. The maxim *expressio unius est exclusio alterius*, applies to other cases. (*Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; *in re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356; *Moore v. Young*, 4 Biss. 128.)

SEC. 5053.—No property held by the bankrupt in trust shall pass by the assignment.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522.

The trustee meant by this clause can only be a mere naked trustee who holds the legal title but has no beneficial interest in the subject of the trust. A vendor is not such a trustee for the vendee, if all the purchase money has not been paid. (*Swoepson v. Rouse*, 65 N. C. 34.)

A purchase by the bankrupt at a sale of property in which his wife is interested, under a patrol promise to hold it for her benefit, does not vest a resulting trust in her so that she can hold it against his assignee. (*O'Hara v. Dilworth*, 72 Penn. 397.)

To create a resulting trust in case of a purchase of property with the wife's money, it must clearly appear that the money was hers, and that it was paid at the time of the purchase. If it was paid at a subsequent time the trust can not be maintained. (*Fisher v. Henderson*, 8 B. R. 175.)

When a husband, without any instructions from his wife, uses her money in the purchase of property, and takes the title in his own name, she may, if she so elect, set up a resulting trust to it, or she may treat the transaction as a loan, which she will be presumed to have done unless she takes steps within a reasonable time to set up her trust after she shall have been informed of the disposition of the money. (*Fisher v. Henderson*, 8 B. R. 175.)

The statute applies to all estates where the trusts can be legally established, and is effectual against one claiming under the assignee who is not in the position of a purchaser without notice. Information of a fact coming from a source which ought to be heeded, is sufficient notice. (*Faxon v. Folvey*, 110 Mass. 392.)

Land held by the bankrupt under an agreement to reconvey upon the payment of a certain note, is held in trust and does not pass to the assignee. (*Faxon v. Folvey*, 110 Mass. 392.)

If a bankrupt insurance company reinsures in another company, and in case of a loss receives the amount of the reinsurance from the latter, under an express trust to pay it over to the assured, the amount is held in trust and does not pass to the assignee. (*Hosmer v. Jewett*, 6 Ben. 208.)

Where the identical money collected by a corresponding banker on notes sent to him for collection is not kept separate and distinct from his other money, there is no trust attached to this money in favor of the banker who so remitted the notes for collection. (*Bank of Commerce v. Russell*, 2 Dillon, 215.)

If a party placed a certain sum of money in the hands of the bankrupt, to be applied to redeem a note and mortgage, and the bankrupt credited the amount on his books and then used it in his business, he can not claim the return of an equal amount from the assignee, but must prove his claim the same as other creditors. (*In re Robert Hosie*, 7 B. R. 601; s. c. 6 L. T. B. 89; s. c. 5 Pac. L. R. 193.)

A claim for money placed in the hands of the bankrupt to be invested, but which he failed to invest, is not entitled to priority. (*In re Janeway*, 4 B. R. 100; s. c. 4 Brews. 250; s. c. 2 L. T. B. 124.)

If the debtor, acting as a factor, sells goods of his principal, and in violation of his instructions takes notes therefor in his own name, and has them discounted, turning over the proceeds to an accommodation indorser to pay the notes upon which he is liable, and such indorser receives the money without notice of any violation of any trust, the fund which may be recovered by the assignees from such indorser solely on the ground that he received a preference

by such payment, will not be liable to any trust. The principal's lien was destroyed when the proceeds were received by such indorser, and the assignee's recovery was simply as a representative of the creditors, and not of the debtor or his principal, and the trust is discharged. (*White v. Jones*, 6 B. R. 175.) }

The trust property must be property that can be followed or distinguished. There must be some ear-mark by which it can be recognized. As, for instance, where goods are sent to a factor to be disposed of, and the factor becomes a bankrupt, and the goods yet in his possession can be distinguished from the general mass of his property, the principal may recover them *in specie*, and is not obliged to prove his debt under the commission. And even where the bankrupt has sold the goods, if he has kept the money received from the sale in separate bags, the principal has been permitted to claim and hold the money against the assignee. Where, however, the trust property does not remain *in specie*, but has been made way with by the trustee, the *cestuis que trust* have no longer any specific remedy against any part of his estate in his bankruptcy or insolvency; but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them. (*In re Janeway*, 4 B. R. 100; s. c. 4 Brews. 250; s. c. 2 L. T. B. 124; *Wood M. & R. Co. v. Brooke*, 9 B. R. 395; *in re Coan & Ten Broeke Mfg. Co.* 12 B. R. 203; s. c. 6 Biss. 315.)

If the bankrupt, acting as banker and broker, kept the money arising from the brokerage business in a separate bank, a party who gave him bonds to sell may claim payment in full if the money in the bank is more than sufficient to meet all demands against the brokerage department. (*Voight v. Lewis*, 14 B. R. 543; s. c. 33 Leg. Int. 402; s. c. 9 C. L. N. 65.)

It is not essential to the effective assertion of a beneficial title to a trust fund that the fund shall be susceptible of separate identification. No more is required than proof of substantial identity. Money has no ear-marks by means of which it can be specifically identified. Into whatever form it may be changed, if it can be clearly traced, equity will rescue it from a wrongful appropriation, and give effect to the right of its real owner. An ear-mark is only a means of identification, but is not evidence of ownership. (*Voight v. Lewis*, 14 B. R. 543; s. c. 33 Leg. Int. 404; s. c. 9 C. L. N. 65.)

If the consignment is a consignment on sale, as distinguished from a consignment on *del credere* guaranty, the consignor can not reserve a special property in the proceeds of the goods as against the assignee of the consignee. (*In re Chamberlaines*, 12 B. R. 230.)

It is not necessary in order to enable an owner or *cestui que trust* to claim newly acquired property that it shall be purchased with the proceeds of the original property. It is sufficient if the newly acquired property is acquired by direct exchange with it. The real question is, What has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner or *cestui que trust*. (*Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332.)

If the bankrupt deposited the trust funds in bank with his own in his own name, the mode of ascertaining how much belongs to the trust estate, is to take the deposits and withdrawals in the order of their dates, find out how much of the balance belongs to the trust and how much to the general fund, and divide accordingly. (*In re Hapgood*, 14 B. R. 495.)

A depositor is not entitled to priority of payment, although the bank having previously suspended payment agreed, at the time of receiving the deposit, to receive special separate deposits from its customers for the purpose of continuing business, unless the deposit was kept separate so as to be identified. (*In re Mutual Savings Bank*, 15 B. R. 44.)

SEC. 5054.—The assignee shall immediately give notice of his appointment, by publication at least once a week for three suc-

cessive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded,\* and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statute—April 4, 1800, ch. 19, § 11, 2 Stat. 24.

### Publication.

A requirement that a notice shall be published once a week for three successive weeks, is a requirement that it shall be published in every seven days for three successive periods of seven days each; that the interval between any two publications shall not be less than seven days; that the interval between the last publication and any proceeding dependent upon the publication shall be not less than seven days; and that the publications shall be three in number. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.)

The publication by the assignee of his appointment is not essential to the regularity of the proceedings. This provision of the act is merely directory to the assignee, and not intended so much for creditors as for persons owing debts to, or otherwise having business with, the estate. (*In re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.)

### Record.

The purpose in requiring the assignee to cause the assignment to be recorded is that every purchaser of land at an assignee's sale may have recourse to a certified copy of such registry, as a link in his claim of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary to the safety of such purchaser; for there is but one original assignment, and that is filed in the office of the clerk of the district court. When this law is observed, the loss of the original would work no loss or inconvenience to the purchaser or others claiming under him; for they could have recourse to a certified copy from the registry, which the act declares shall be evidence thereof in all courts. The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title though the assignment may never be recorded. The assignee may use it as evidence of his title in the courts, though the same may not have been recorded. (*In re Neale*, 3 B. R. 177; s. c. 1 L. T. B. 295; *Holbrook v. Coney*, 25 Ill. 543.)

As the county records should contain a complete registry of all instruments on which transfers of title depend, it was eminently proper for the protection of all concerned, that the assignment in bankruptcy should be there recorded; an instrument in writing, which though not conforming in the usual particulars with conveyances from one party to another, or even with sheriff's deeds, yet by the paramount law is a complete transfer and conveyance of all the bankrupt's real and equitable interest, with the exceptions named in the act. That instrument is not signed by the bankrupt, or acknowledged by him, but is signed by the register or judge. When the assignment is recorded, the record, or a duly

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\* So amended by act of Feb. 18, ch. 80, 1875, 18 Stat. 320.

certified copy thereof, is made evidence of the assignment in all courts, notwithstanding very different rules as to instruments affecting realty may obtain under State laws. It is to be remarked, that the clause directing the assignment to be recorded, gives no further effect thereto than that just stated. The assignment itself passes the property with relation back to the commencement of the proceedings, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made or afterwards, and consequently the recording of the assignment is not essential to the validity of the transfer, and is not designed to operate as under State registry acts. A purchaser from the bankrupt, after the commencement of proceedings, although he has no notice thereof, will take no title. The question of notice can not arise. The purchase being of what the bankrupt debtor had at the time, and all his interest having passed to the assignee previously, the purchaser acquires no title as against the assignee. (*Davis v. Anderson*, 6 B. R. 145; *Phillips v. Helmbold*, 26 N. J. Eq. 202.)

A copy from the record of the assignee's deed is admissible in evidence to prove registration. (*Oakey v. Corry*, 10 La. An. 502.)

When the assignment has been recorded, and it is apparent of record at the time of a sale on execution, that the judgment debtor has no title to or interest in the property sold, the purchaser at the sheriff's sale acquires no title. (*Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.)

The purchaser at a sale of real estate by the assignee of a bankrupt, will hold the title against a prior unrecorded deed of the bankrupt. (*Holbrook v. Dickinson*, 56 Ill. 489.)

A copy from the State records of an assignment not acknowledged according to the State laws, is not admissible in evidence. (*Zeigler v. Shomo*, 78 Penn. 357.)

The title of a party who claims under the assignee will prevail against a party who obtained a conveyance from the bankrupt after the commencement of the proceedings in bankruptcy with notice of such title, although the assignment to the assignee was not acknowledged and recorded according to the laws of the State where the land was situated. (*Brady v. Otis*, 14 B. R. 345; s. c. 40 Iowa, 97.)

SEC. 5055.—The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

Statute Revised—March 2, 1867, ch. 176, § 15, 14 Stat. 524.

If the assignee is satisfied that property taken by him does not belong to the bankrupt, he should surrender it without delay to the owners. (*In re Noakes*, 1 B. R. 592.)

SEC. 5056.—No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statute—April 4, 1800, ch. 19, § 49, 2 Stat. 34.

This section covers all the acts which the assignee honestly does in the discharge of the trust which the law casts upon him. The statute requires a spe-



cific notice. The mere presentation of a bill for services rendered is not sufficient. (*Hallam v. Maxwell*, 2 Cinn. 136.)

This section does not apply to an action of replevin to recover property which the assignee took from the possession of the plaintiff. (*Leighton v. Harwood*, 12 B. R. 360; s. c. 111 Mass. 67.)

No notice need be given to an assignee before bringing a bill to enjoin a judgment recovered by the bankrupt by his fraudulent contract. (*Weakley v. Miller*, 1 Tenn. Ch. 523.)

The omission to give notice to an assignee can only be taken advantage of by a plea in abatement. (*Weakley v. Miller*, 1 Tenn. Ch. 523.)

By appearing and filing a plea the assignee waives the want of notice before bringing the suit. (*Rove v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.)

SEC. 5057.—No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

Statute Revised—March 2, 1867, ch. 176, § 2, 14 Stat. 518. Prior Statute—Aug. 19, 1841, ch. 9, § 8, 5 Stat. 446.

A suit is a prosecution of some demand in a court of justice. (*Wilt v. Stickney*, 15 B. R. 23; s. c. 13 Pac. L. R. 61.)

The cause of action accrues to the assignee on the execution of the assignment, and the limitation begins to run from that time. (*Lathrop v. Drake*, 30 Leg. Int. 141.)

On all matured claims and demands the cause of action accrues to the assignee at the date of the assignment; on all others from their maturity, or at the time when an action will lie, and he must sue from these dates respectively. (*Norton v. De la Villebeuve*, 13 B. R. 304; s. c. 1 Woods, 163.)

This section applies equally to courts of equity and courts of law. (*Bailey v. Wier*, 12 B. R. 24; s. c. 21 Wall. 342.)

The limitation applies when the suit is brought in a State court as well as when it is brought in a Federal court. (*Comegys v. McCord*, 11 Ala. 932; *Archer v. Duval*, 1 Fla. 219.)

A suit is the lawful demand of a right at law or in equity, and it matters not what form is given to it by the legislative power, it still remains a suit in the sense of the definition, although it retains none of the features by which proceedings at law or in equity have been distinguished. (*Union Canal Co. v. Woodside*, 11 Penn. 176.)

The limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt, which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt and before assignment. These disputes of claims affect the assets of the bankrupt, and an adjustment of them, either by compromise or suit, is indispensable to a settlement and distribution of the estate among the creditors. A short bar by limitation to suits brought either by the assignee or the adverse claimant, furnishes a fit and appropriate remedy against delay where compro-

mise is impracticable. (*In re Frederick J. Conant*, 5 Blatch. 54; *Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50)

It is entirely within the power of Congress, in establishing a uniform system of bankruptcy, to provide a uniform rule on the subject of actions, whether by or against an assignee in bankruptcy; and such rule must of necessity supersede all State legislation on the subject. If the right of action asserted by the assignee is not actually barred at the time of his appointment—a case expressly saved by the proviso—he has two years, and only two years from the time the cause of action accrued for or against such assignee. This is to apply, by the express words of the section, to actions brought “in any court whatsoever;” therefore in any court, State or Federal. (*Peiper v. Harmer*, 5 B. R. 252; s. c. 8 Phila. 100.)

This is a separate and independent provision, and has no connection with any State statute on the subject. It may extend or it may contract the time provided in the State statute of limitations. Thus if at the time of the appointment of the assignee but a few days remain of the time necessary to complete the bar, the time will be extended; or, if the statute has just commenced running, and under the State law would have ten years to run, it would be complete within two years. (*Freeland v. Holloman*, 9 B. R. 331.)

A petition to a court, to order a distribution of a fund lodged in its registry, is not an action or suit within the meaning of this clause. (*In re Masterson*, 4 B. R. 553.)

The limitation does not extend to an application by an assignee for money brought into a State court in proceedings instituted before the commencement of the proceedings in bankruptcy. (*Phillips v. Helmbold*, 26 N. J. Eq. 202.)

When the defendant only disputes the amount, there is no controversy in regard to the interests and rights touching the property. A voluntary assignor, under a void assignment, can not have or claim any adverse interest as against the assignee in bankruptcy. A claim against the bankrupt's estate, for services rendered to the bankrupt, is not within the statute. (*In re Krogman*, 5 B. R. 116.)

A *venire* to assess damages for land taken by a corporation is a suit at law. (*Union Canal Co. v. Woodside*, 11 Penn. 176.)

A claim for damages for the taking of the land of the bankrupt by a corporation is not barred, for the corporation is not an adverse claimant. (*Union Canal Co. v. Woodside*, 11 Penn. 176.)

The omission to bring the suit for more than two years after the cause of action accrued may be a good defense, if properly pleaded, but does not go to the jurisdiction of the court. (*Chemung Canal Bank v. Judson*, 8 N. Y. 254.)

The title of a party who purchases at a sale under a proceeding to foreclose a mortgage which was instituted after the commencement of the proceedings in bankruptcy, without making the assignee a party thereto, will not be rendered valid by the lapse of two years, unless he takes actual possession of the premises and occupies them in such a manner that the assignee must be presumed to have had notice thereof, or gives some notice, actual or constructive, to the assignee that he claims an adverse interest. (*Price v. Philips*, 3 Robt. 448.)

A mortgage does not of itself constitute an adverse claim, for it is simply a lien or charge on the land, and does not confer on the mortgagee any estate in the land. (*Price v. Philips*, 3 Robt. 448; *vide* *Cleveland v. Boerum*, 24 N. Y. 613; s. c. 23 Barb. 201; s. c. 27 Barb. 252.)

An action on judgment is barred by the lapse of two years. (*Archer v. Duval*, 1 Fla. 219.)

The limitation applies, although the suit is brought in the name of the assignee for the use of a third person. (*Pike v. Lowell*, 32 Me. 245.)

If a party buys a judgment against the bankrupt, and purchases certain land at a sale, under an execution issued thereon, under a parol agreement that out of the proceeds he shall retain a debt due to him, and the money used to buy the judgment, and then pay the balance to the bankrupt, the statute begins to run from the time when he receives the proceeds. (*Hyde v. Ely*, 8 Pac. L. R. 147.)

If the assignee is not made a party to a pending action until more than two years after his appointment, his claim will be barred, for the amendment by which he is made a party will not relate back, and thereby make him a party *ab initio*, and thereby defeat the limitation. (*Cogdell v. Exum*, 10 B. R. 327; s. c. 69 N. C. 464.)

A bill to set aside a fraudulent conveyance will be defeated by a plea of the statute of limitations, if more than two years have elapsed since the appointment of the assignee. (*Freelander v. Holloman*, 9 B. R. 331; *Botts v. Patton*, 10 B. Mon. 452.)

If a mortgagee enforces his lien in a State court after the commencement of proceedings in bankruptcy, the assignee has two years from the time of the sale in which he can institute proceedings to set it aside. (*Phelps v. Sellick*, 8 B. R. 390.)

This clause does not apply to a proceeding to set aside a sale made under a levy upon land, after the filing of a petition to enforce a judgment lien. (*Davis v. Anderson*, 6 B. R. 145.)

A suit merely to collect a debt, or enforce the payment of money due on a contract, does not fall within the provisions of this clause. The plaintiff does not claim an interest adverse to the defendant in or touching any property, or right of property, of the bankrupt, transferable to or vested in the plaintiff as assignee; nor does the defendant claim any interest adverse to the plaintiff in or touching any such property, or right of property. The defendant claims no ownership of or title to the debt or contract which the plaintiff seeks to enforce against the defendant; nor does the plaintiff claim any ownership of or title to any specific property, or right of property, as having passed to him by virtue of his appointment, which the defendant also claims to own; nor does the defendant claim any ownership of or title to any specific property which belonged to the bankrupt. The limitation of two years applies only to such controversies. Moreover, it applies only to controversies of which the circuit court of the district has concurrent jurisdiction with the district court of the same district. (*Sedgwick v. Casey*, 4 B. R. 496; s. c. 3 C. L. N. 177; *Smith v. Crawford*, 9 B. R. 38; s. c. 6 Ben. 497; *Carr v. Lord*, 29 Me. 51; *contra*, *Harris v. Collins*, 13 Ala. 388; *Norton v. Barker*, 1 W. N. 29.)

The limitation does not relate to an action by a purchaser to recover a debt which was sold as a part of the bankrupt's assets. (*Judson v. Lathrop*, 6 La. An. 587.)

This section does not apply to sales or conveyances, and the assignee may convey any portion of the estate after even the lapse of two years. (*Warren v. Miller*, 38 Me. 108; *Hollbrook v. Brenner*, 31 Ill. 501.)

If the claim of the assignee is barred by the lapse of two years, he can not, by a transfer to another, confer a right of action which he has suffered to expire, and thus avoid the limitations. (*Cleveland v. Boerum*, 23 Barb. 201; s. c. 27 Barb. 252; s. c. 24 N. Y. 613.)

The limitation has no application to suits which are pending at the time of the commencement of the proceedings in bankruptcy. (*Kane v. Pilcher*, 7 B. Mon. 651.)

The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes into his hands. These are matters for which he may be made personally responsible, and no reason existed for chang-

ing the general period of limitations any more than in the case of any other trustee dealing with trust property. (*In re Frederick J. Conant*, 5 Blatch. 54.)

The limitation does not apply to a party who takes possession of the property after the commencement of the proceedings in bankruptcy. (*Stevens v. Hauser*, 39 N. Y. 802; s. c. 1 Robt. 50.)

If an assignee, after instituting a suit, dies, and the new assignee institutes another suit instead of continuing the prior suit, the statute runs to the time of the institution of the second suit. (*Richards v. Maryland Ins. Co.* 8 Cranch, 84.)

The limitation provided by this section does not apply to a proceeding to review a decision of the district court. (*Wilt v. Stickney*, 15 B. R. 23; s. c. 13 Pac. L. R. 61.)

An action by an assignee of a bank to recover money paid by persons pretending to act as commissioners of the bank to their attorney, before the appointment of the assignee, is barred, unless it is brought within two years after that time. (*Miltenberger v. Phillips*, 2 Woods, 115.)

The limitation can not affect any suit, the cause of which occurred from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession. (*Banks v. Ogden*, 2 Wall. 58.)

The failure of the assignee to sue and recover a distributive share of an estate of one of the bankrupt's children, to which the bankrupt was entitled, does not confer any right on the bankrupt to sue for it. (*Deadrick v. Armour*, 10 Humph. 588.)

If the claim of the assignee is barred by the limitation, the creditors may file a bill to set aside a fraudulent conveyance made by the bankrupt before the commencement of the proceedings in bankruptcy. (*Tichenor v. Allen*, 13 Grat. 15; *Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.)

A bill to set aside a judgment recovered by the assignee on the ground of fraud is barred unless it is brought within two years from the time of the discovery of the fraud. (*Clark v. Hackett*, 1 Cliff. 269.)

When there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him. (*Bailey v. Weir*, 12 B. R. 24; s. c. 21 Wall. 342; *Carr v. Hilton*, 1 Curt. 230; *Pritchard v. Chandler*, 2 Curt. 488.)

The limitation bars the action, although the assignee was ignorant of his rights, for the court can not engraft an exception on the statute. (*Norton v. De la Villebeuve*, 13 B. R. 304; s. c. 1 Woods, 163.)

This rule applies to suits at law as well as in equity. (*Bailey v. Weir*, 12 B. R. 24; s. c. 21 Wall. 342.)

The statute begins to run from the time when the assignee could have discovered the fraud by the use of due diligence. (*Andrews v. Dole*, 11 B. R. 352.)

As the adverse party is under no duty to make known the cause of action to the assignee, something more than silence on his part must be proved in order to sustain a charge of fraudulent concealment. (*Pritchard v. Chandler*, 2 Curt. 488.)

If the statute once begins to run, it must continue until the completion of the bar, and to prevent it from beginning to run, the fraudulent concealment must exist at the moment when the assignee's title accrued. (*Pritchard v. Chandler*, 2 Curt. 488.)

A bill which states a case of secret fraud does sufficiently aver that the cause of action was fraudulently concealed, for a secret or concealed fraud is a fraudulent concealment of the cause of action. (*Carr v. Hilton*, 1 Curt. 230.)

The interest adversely claimed, which the statute protects, is an interest in a claimant other than the bankrupt. (*Clark v. Clark*, 17 How. 315; *Pickett v. McGavick*, 14 B. R. 236.)

If the bankrupt, at an assignee's sale, fraudulently purchases a claim against a foreign government, the cause of action does not accrue until he gets possession of the money. (*Clark v. Clark*, 17 How. 315.)

A bill, which is in theory and in fact an original bill, can not, for the purpose of avoiding the limitation, be treated as an amendment of a prior bill which was dismissed. (*Clark v. Hackett*, 1 Cliff. 269.)

Where a court of equity allows a respondent to amend his answer so as to set up the statute of limitations, the amendment must afterwards be deemed to have been duly and properly allowed. (*Clark v. Hackett*, 1 Cliff. 269.)

A casual averment in an answer to a petition to the effect that the assignee has lain by for a period of over two years without notifying the respondent that he would have to account for certain rents, is not a sufficient plea of the statute. (*Hall v. Scovel*, 10 B. R. 295.)

If the declaration shows that the cause of action is barred by the statute of limitations, the defendant may demur. (*Harris v. Collins*, 13 Ala. 388.)

SEC. 5058.—[This section is superseded by act of 22 June, 1874, ch. 390, § 4, 18 Stat. 178.]

SEC. 5059.—The assignee shall, as soon as may be, after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

Statute Revised—March 2, 1867, ch. 176, § 17, 14 Stat. 524. Prior Statutes—April 4, 1800, ch. 19, § 54, 2 Stat. 34; Aug. 19, 1841, ch. 9, § 9, 5 Stat. 447.

If the assignee does not deposit the money in bank within the time fixed by the statute, he is chargeable with interest if he has not a reasonable excuse for not complying with the statute. (*In re Stillman Thorp*, 4 N. Y. Leg. Obs. 377.)

SEC. 5060.—When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

Statute Revised—March 2, 1867, ch. 176, § 17, 14 Stat. 524.

SEC. 5061.—The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and under such direction may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 524. Prior Statutes—April 4, 1800, ch. 19, § 43, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 11, 5 Stat. 447.

The assignee must apply to the court by petition, and not to the register. (*In re John Graves*, 1 B. R. 237; s. c. 2 Ben. 100.)

An order authorizing the assignee to compromise any and all debts due the bankrupt's estate with the consent of certain persons selected by the creditors, is not authorized in this section. (*In re Dibblee et al.* 3 B. R. 12; s. c. 3 Ben. 354.)

This provision does not apply where there is no suit or demand against the estate, or controversy as to a debt due to it. (*In re Franklin Fund Saving Society*, 31 Leg. Int. 173.)

When the assignee applies to the court under the provisions of this section, he should take unequivocally upon himself the direct responsibility of recommending the proposed arrangement as in his opinion a proper one. (*In re Franklin Fund Saving Society*, 31 Leg. Int. 173.)

If an assignee attempts to arbitrate or compromise without pursuing the course prescribed by the statute, the agreement will be binding on him in his individual and not his representative capacity. (*Blight v. Ashley*, Pet. C. C. 15.)

The act of one assignee will not bind a co-assignee without his previous authority or subsequent ratification, especially when the act is not within the scope of their authority, for they act under delegated authority. (*Blight v. Ashley*, Pet. C. C. 15.)

SEC. 5062.—The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but, upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place and manner of sale as will, in its opinion, prove to the interest of the creditors.

Statute Revised—March 2, 1867, ch. 176, § 15, 14 Stat. 524. Prior Statutes—April 4, 1800, ch. 19, §§ 44, 59, 2 Stat. 33, 35; Aug. 19, 1841, ch. 9, § 9, 5 Stat. 447.

The State laws in regard to the transfer of estates are subject to the plenary power of Congress over bankruptcy, and there can be no doubt of the complete force of the bankrupt law to dispose of the bankrupt's property for all the purposes designated or implied by it. The rights of the assignee are broad enough to dispose of all the property, if such disposition be needed. (*Stevens v. Earles*, 25 Mich. 40.)

The assignee has the authority to sell unincumbered assets without an order from court. (*In re White & May*, 1 B. R. 218; s. c. 2 Ben. 85; *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.)

A State law prohibiting sales of land in the possession of an adverse claimant does not apply to a sale by an assignee, for that is a judicial sale. (*Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50; *Stevens v. Palmer*, 10 Bosw. 6.)

An assignee in one State may sell real estate lying in another State. (*Oakey v. Corry*, 10 La. An. 502.)

The assignee may be vested with a discretion in regard to the time and manner of making a sale. (*Holbrook v. Coney*, 25 Ill. 543.)

When the authority of the assignee, under an order to sell, is limited to the property set forth in the schedule, he can not convey any other property. (*Warren v. Homestead*, 33 Me. 256.)

The assignee is limited in his transactions to the powers and authority conferred upon him by the bankrupt act, and by the orders of the court. Anything he may do outside, or in conflict with, or in violation of such powers and authority, is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed, without consideration, to sell to another person for a certain price, and to wait for an answer for a certain time, which period has not expired at the time of receiving a better bid. (*In re Ryan & Griffin*, 6 B. R. 235.)

If a lease made by the assignee is not authorized or sanctioned by the court, those who are in possession under it can claim no rights as against such order as the court may make concerning the property. (*In re Samuel Schapter*, 9 B. R. 324.)

The court may authorize a private sale of land so far as the authorization may be required to assure the title to the purchaser, but not so as to exempt the assignee from responsibility to creditors for negligence, if any, in obtaining the best price for the property. (*In re Knott, Rooney & Dibest*, 1 W. N. 52.)

If a sale is fairly made, and the bids are understood by the auctioneer and the bystanders, it will be valid, although the assignee is present and in consequence of his negligence and inattention fails to understand the terms thereof. (*Ives v. Tregent*, 14 B. R. 60; s. c. 29 Mich. 390)

If an assignee makes a sale of property, but refuses to deliver the possession thereof, he may be sued at law if the sale has never been brought to the attention of the bankrupt court nor in any manner acted on by it. (*Ives v. Tregent*, 14 B. R. 60; s. c. 29 Mich. 390.)

The solicitor of the assignee can not purchase at a sale made by the assignee, for he is not the personal counsel of the assignee, but of the assignee as the representative of the creditors. (*Citizens' Bank v. Ober*, 13 B. R. 328; s. c. 1 Woods, 80.)

An agreement by a party who expects to become a purchaser at an assignee's sale, to sell the property to the assignee's solicitor for a fixed price, without reference to the amount that may be bid therefor, does not render the sale void. (*Citizens' Bank v. Ober*, 13 B. R. 328; s. c. 1 Woods, 80.)

When the terms are cash on the day of sale, a party who expects to purchase may agree with another party, that in case he becomes purchaser, he will sell the property to him at a named price on terms of credit, especially when he has no notice or knowledge that the party proposing to buy, is prepared to pay cash, and is ready to bid and able to make his bid good. (*Citizens' Bank v. Ober*, 13 B. R. 328; s. c. 1 Woods, 80.)

The bankrupt may purchase property at an assignee's sale. (*Arnold v. Leonard*, 20 Miss. 258; *Phelps v. McDonald*, 2 McArthur, 375.)

The district court has the power to set aside a sale made by an assignee. When a portion of the creditors unite in a purchase for the joint benefit of themselves, it ought to appear that the sale has been so conducted that no prejudice has come to other creditors. It is not sufficient that the technical formal requisites to a regular sale have been complied with, when there has been an improper combination between the assignee and the purchaser, which has resulted in a sacrifice of the property. A creditor, whose claim is in dispute,

may file a petition to set aside a sale. (*In re Troy Woolen Co.* 4 B. R. 629; s. c. 8 Blatch. 465.)

A sale of real estate at public auction by the assignee is subject to the approval of the court, which has a discretion to refuse to confirm it for mere inadequacy of price. It is not necessary that there should be fraud or such gross inadequacy of price as to be evidence of fraud. (*In re O'Fallon*, 2 Dillon, 548.)

A sale of real estate is not confirmed by the court, but the purchaser is left to establish his title whenever the occasion may arise. (*In re H. O. Alden*, 16 B. R. 39; s. c. 9 C. L. N. 846.)

If the right to property and the evidence to establish it are concealed from the assignee and the creditors, so that the assets are sold for a nominal amount to the bankrupt himself, then the purchase is fraudulent and may be set aside. (*Clark v. Clark*, 17 How. 315; *Booth v. Clark*, 17 How. 322.)

The court will not direct the repayment of the consideration where the sale is void, unless it appears that the purchaser acted in good faith and under the belief that the assignee in making the sale was exercising the powers of his office in a right and fair manner. (*In re Jacob H. Mott*, 1 B. R. 9.)

A purchaser is not bound by a subsequent decree for a sale of the premises unless he is a party to the proceedings, although it purports to set aside the previous sale to him. (*Holbrook v. Brenner*, 31 Ill. 501.)

A knowledge of the bankruptcy does not necessarily imply any knowledge that the assignee is about to sell property belonging to another, and will not estop the owner from asserting his title against a purchaser from the assignee. (*Davis v. Fairclough*, 63 Mo. 61.)

If the vendor and the bankrupt, before the commencement of the proceedings in bankruptcy, agreed that the sale should be rescinded and the money paid thereon forfeited, the vendor will have a better title than the purchaser from the assignee. (*Davis v. Fairclough*, 63 Mo. 61.)

Where an individual partner is adjudged bankrupt, the statute of limitations runs from the date of the adjudication against any purchaser of a *chose in action* at a sale by the assignee. (*Blackwell v. Claywell*, 15 B. R. 300; s. c. 75 N. C. 213.)

The purchaser at an assignee's sale is entitled to the rents from the day of sale. (*Hall v. Scovil*, 10 B. R. 295.)

A purchaser from an assignee takes no higher right than the bankrupt himself had. (*Anderson v. Miller*, 15 Miss. 586; *Baker v. Vining*, 30 Me. 121.)

The statute does not enable the assignee to convey a legal title where, by the rules of law, the bankrupt himself could not. The sale gives to the purchaser no other title than a sale by the bankrupt himself before his bankruptcy would confer. If the bankrupt could not give a legal title by his sale, the assignee can not. (*Camack v. Bisquay*, 18 Ala. 286.)

Such a sale does not divest the dower of the wife of the party from whom the bankrupt bought the land. (*Speake v. Kinard*, 4 Rich. [N. S.] 54.)

Where the bankrupt, prior to the commencement of the proceedings in bankruptcy, executed a deed of trust to secure an indebtedness with a power to sell, the purchaser will not take the legal title, but merely the surplus that may remain after the debt is paid. (*Lyall v. Miller*, 6 McLean, 482.)

If a privilege without registry is good against the bankrupt, it is also good against the purchaser. (*McKiernan v. Fletcher*, 2 La. Ann. 438)

The purchaser of a *chose in action* from the assignee takes it subject to all the equities existing against it in the hands of the bankrupt. (*Strong v. Clawson*, 10 Ill. 346.)



A purchaser of a note at an assignee's sale takes it subject to a prior lawful transfer thereof by the bankrupt. (*Converse v. Sorley*, 39 Tex. 515.)

A person who purchases from the assignee can not impeach a prior conveyance for fraud and have it set aside. (*Reavis v. Gardner*, 12 Ala. 661.)

A purchaser who buys all the interest of the assignee in certain property may impeach a prior conveyance for fraud. (*Dwinel v. Perley*, 32 Me. 197; *Badger v. Story*, 16 N. H. 168.)

A sale of all the bankrupt's rights of property gives the purchaser all the rights of action which the assignee could exercise in respect of such property, and he may impeach a prior fraudulent conveyance. (*Williams v. Vermeule*, 4 Sandf. Ch. 388.)

A purchaser of the mere right which the bankrupt had in the premises at the commencement of the proceedings in bankruptcy, as distinguished from the right of the assignee, does not represent creditors. (*Baker v. Vining*, 30 Me. 121.)

If the property is sold subject to incumbrances, the purchaser takes it subject only to legal and valid incumbrances, and may impeach an incumbrance for fraud. (*Murray v. Jones*, 50 Geo. 109.)

A sale of a lease, good will, and fixtures will only pass such fixtures as are affixed in some way to the building, and their accessories. If any of these are subsequently sold, the first purchaser may claim the proceeds. (*In re Hitchings*, 4 B. R. 384.)

He who purchases property at the sale of an assignee acquires the possession legally, and the owner, if there is a better title, can not recover the property by a possessory warrant. He must bring trover, or other proper action, to try the title. (*Bryan v. Whitsett*, 39 Geo. 715.)

The statutory right to redeem property sold under a deed of trust passes to the assignee, and may be sold by him. But the purchaser at the sale under the deed of trust is not deprived of any of his rights, and may demand a repayment of the advance, as well as the original bid, as a condition precedent to the right of redemption. (*Toombs v. Palmer*, 4 Heisk. 381.)

If a purchaser who claims under a sale by the assignee fails to establish the regularity of the proceedings in bankruptcy, he may rely upon a subsequent mortgage made by the bankrupt. (*Den v. Wright*, Pet. C. C. 64.)

The sale and a compliance with its terms vest an equitable title in the purchaser, but the conveyance alone passes the legal title. Consequently the purchaser can not sustain an action of ejectment by proof of a deed made after the institution of the suit, although the sale was made before that time. (*Joy v. Berdell*, 25 Ill. 537.)

If the purchaser buys only the mortgage note, without taking an assignment of the mortgage, he can not maintain an action at law to recover the land. (*Warren v. Homestead*, 33 Me. 256.)

A debtor to the estate can not, in an action by a purchaser of the claim set off a debt obtained by him after the commencement of the proceedings in bankruptcy. (*Judson v. Lathrop*, 6 La. An. 587.)

A debtor to a bankrupt firm can not, in an action by a purchaser, set off a debt due to him by one of the bankrupts. (*Judson v. Lathrop*, 6 La. An. 587.)

A claim against the bankrupt before his bankruptcy can not be set off against an indebtedness for goods purchased from the assignee. (*Moran v. Bogert*, 14 B. R. 393; s. c. 16 Abb. Pr. [N. S.] 803; s. c. 10 N. Y. Supr. 603.)

A claim against the bankrupt's estate for a benefit conferred upon it, may be set off against a liability for goods purchased from the assignee. (*Moran v. Bogert*, 14 B. R. 393; s. c. 16 Abb. Pr. [N. S.] 803; s. c. 10 N. Y. Supr. 603.)

The defendant in an action brought by the purchaser to recover the property, can not impeach the proceedings in bankruptcy for defects or irregularities. (*Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50.)

The sale of the property by the assignee for a nominal consideration, is an objection that can not be raised in an action by the purchaser to recover the property. (*Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50.)

A purchaser is not liable for any injury caused by the negligence of the assignee in the management of the property, after the sale and before the ratification of the sale and conveyance of the property. (*Metz v. Buffalo, Corry & P. R. R. Co.* 12 B. R. 559; s. c. 58 N. Y. 61.)

A recital in a deed by an assignee that a person was declared bankrupt, that the grantor was appointed his assignee, and that he was directed to sell the property, is not evidence of the facts recited against a person claiming the property otherwise than through or under the grantor. (*Warren v. Syme*, 7 W. Va. 474.)

The appointment of the assignee may be established by proof that he acted as assignee, without producing the record of his appointment, in a controversy between the purchaser and third parties. (*Arnold v. Leonard*, 20 Miss. 258.)

Where the plaintiff, in an action of ejectment, claims title under an assignee, he may prove the proceedings in bankruptcy by parol evidence if the records are destroyed. (*Thomas v. Cruttenden*, 4 Cranch C. C. 71.)

SEC. 5062 A (22 June, 1874, ch. 390, § 1, 18 Stat. 178).—That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided*, that such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

The court may authorize the assignee to spend money to put property into a salable condition. The assignee should endeavor to settle and liquidate the estate as rapidly as possible, and to the best advantage. It is no part of his ordinary right or duty to carry on a trade. But if, in a reasonable time and at a reasonable expense, he can make property salable which is not so in the condition in which he finds it, he may do so. He will not be allowed to do so, however, unless it is clearly shown that he can make such a bargain for the necessary work as will almost to a moral certainty insure the creditors against loss, and insure them a large gain within a reasonable time. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.)

If a receiver institutes a suit to recover the value of property sold by the bankrupt in fraud of the bankrupt law prior to the commencement of proceedings in bankruptcy, the assignee will not be admitted to prosecute the suit. (*Lansing v. Manton*, 14 B. R. 127.)

A receiver can not maintain an action to recover the value of property sold by the bankrupt in fraud of the bankrupt law prior to the commencement of proceedings in bankruptcy. (*Lansing v. Manton*, 14 B. R. 127.)

SEC. 5062 B (22 June, 1874, ch. 390, § 4, 18 Stat. 178).—That,

unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit de-

claring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall willfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

The assignee's right to convey depends entirely upon the statute which gives him the power, and he is bound to convey in the manner prescribed by the statute, or else his conveyance is a nullity. (*Stevens v. Palmer*, 10 Bosw. 60; *Harrington v. Fish*, 10 Mich. 445; *Gray v. Heslep*, 33 Mo. 238; *Warren v. Homestead*, 33 Me. 256; *Dwinel v. Perley*, 32 Me. 197; *Osborn v. Baxter*, 58 Mass. 406; *Joy v. Berdell*, 25 Ill. 537; *Holbrook v. Brenner*, 31 Ill. 501; *vide Crowley v. Hyde*, 116 Mass. 589.)

The register may designate the newspapers in which a notice of sale by the assignee shall be published. (*In re Peter N. Burke*, 15 B. R. 40.)

SEC. 5063.—Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Statute Revised—March 2, 1867, ch. 176, § 25, 14 Stat. 528.

This section entrusts the court with a discretion which can only be exercised by the court itself, and cannot be delegated to any officer of the court. (*In re Wm. Major*, 14 B. R. 71; *in re John Graves*, 1 B. R. 237; s. c. 2 Ben. 100.)

An order of a register authorizing a private sale without notice is null and void. (*In re Wm. Major*, 14 B. R. 71.)

No confirmation by the court can give validity to an order of a register authorizing a private sale without notice. (*In re Wm. Major*, 14 B. R. 71.)

An approval by the court of a sale can not be regarded as a confirmation where it is private and does not become a part of the record until some time afterwards. (*In re Wm. Major*, 14 B. R. 71.)

A purchaser at a judicial sale made under a void decree, is bound by the rule *caveat emptor* to look to the jurisdiction of the court, and the legality of the decree and proceedings from which it arose. (*In re Wm. Major*, 14 B. R. 71.)

A sale can only be made after such notice to those claiming adversely as the court in its discretion may deem proper. (*In re Wm. Major*, 14 B. R. 71.)

If property in dispute is sold without notice to the claimant, the sale is a nullity so far as he is concerned. (*Stanley v. Sutherland*, 16 A. L. Reg. 298.)

The sale must be public after public notice. (*In re Wm. Major*, 14 B. R. 71.)

Before the appointment of an assignee, the bankrupt is the custodian of the estate, and must act in the interest of the creditors. He stands in a fiduciary relation to the estate, and can not be a purchaser. (*March v. Heaton*, 2 B. R. 180; s. c. *Lowell*, 278.)

*Quære.* Does this clause apply to mortgaged property? Its language is better adapted to claims made by title paramount. (*Poster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 318.)

The provision that the court may order a sale of property not in the possession of the assignee implies very clearly that the court may exercise such control as it deems proper, in regard to property which is in controversy, and which is not in the possession of the assignee. Of course it must be reduced to possession. Where a sale has been made, and the proceeds realized by that sale are in controversy, the court may order the proceeds to be delivered to the assignee, and held subject to the rights of the party who may prove himself entitled to it. (*Bill v. Beckwith*, 2 B. R. 241; *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 318; *in re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.)

Taken literally, the phrase "or which is claimed by him" appears to afford some support to the theory that the power of sale extends to any portion of an estate, the title to which is in dispute, where the same is claimed by the assignee; but it is impossible to adopt that view, as it would authorize the district judge, in the settlement of the estate of a bankrupt, however small, to order the sale of the estate, if claimed by the assignee, of every inhabitant of his judicial district, and to direct the assignee to hold the funds received from the sales in the place of the estate sold, and to compel the owners in possession of the same to appear in court and vindicate their titles, and to accept, if successful, the proceeds of the sales as the value of their property. Such a construction would annul the Constitution, for a man might under it be deprived of his property without due process of law, and could not claim a trial by jury unless he commenced his action before the court ordered a sale. The phrase can not, however, be rejected as surplusage. It was incorporated into the act for the purpose of giving an enlarged power of sale, and authorizes a sale though the estate may not have come to the possession of the assignee, if it is claimed by him, and the title is in dispute, as where personal estate is found in the hands of a mere depositary, carrier, or bailee for safe keeping or transportation, without claim of title or interest in the goods; or, what more frequently occurs, where personal property is subsequently discovered in the possession of the bankrupt which was not transferred to the assignee, and other cases of a like character. Other examples might be put, but these are sufficient to show that the power of sale even as enlarged by incorporating the phrase into the provision, does not extend to a case where the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same, whether the title and possession were derived from the debtor, or any other former owner. (*Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205.)

The notice required by this section to be given to a claimant is not in terms at least limited to claimants residing in the district. (*Markson v. Heaney*, 4 B. R. 510; s. c. 1 *Dillon*, 497.)

Under this provision the property may be recovered from the possession of the assignee by an action brought in a State court, before the commencement of proceedings in bankruptcy, and to which the assignee is made a party, or after

the commencement of proceedings in bankruptcy, by an action brought in the bankrupt court, or in the circuit court. But an action of replevin, brought in a State court, to recover specific property after such property has been taken into custody by the bankrupt court, is not, within this section, a "proper action." (*In re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *in re Noakes*, 1 B. R. 592.)

If the assignee is satisfied that property taken by him did not belong to the bankrupt, he should return it without delay to the owner. (*In re Noakes*, 1 B. R. 592.)

The statute does not exempt an assignee from an action in a State court, for a tortious taking of property not in possession of the bankrupt and belonging to a stranger. (*Leighton v. Harwood*, 12 B. R. 360; s. c. 111 Mass. 67.)

In an action against the marshal for an illegal seizure of property, the measure of damages is the true value of the property, not the amount for which it was sold. (*Doll v. Harlow*, 11 B. R. 350; s. c. 5 N. Y. Supr. 699; s. c. 9 N. Y. Supr. [Hun], 659.)

SEC. 5064.—The assignee may sell and assign under the direction of the court, and in such manner as the court shall order, any outstanding claims or other property, in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530.

SEC. 5065.—When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

Statute Revised—March 2, 1867, ch. 176, § 25, 14 Stat. 538.

The parties must apply to the court, and not to the register. (*In re John Graves*, 1 B. R. 237; s. c. 2 Ben. 100.)

The court can not order the sale of the property in an involuntary case until it comes into the hands of the marshal. (*In re Metzler et al.* 1 B. R. 38; s. c. 1 Ben. 356.)

It is the duty of the court, from the moment that the property is submitted to its custody, to take due order for its preservation, and to turn it to the best account for the creditors. The district court may, therefore, even before the appointment of an assignee, order the sale of the whole or any part of the property, if it will be beneficial to the creditors, and is assented to by the bankrupt. (*In re James Vila*, 5 Law Rep. 17.)

The filing of a petition for a stay of the sale of certain property as perishable does not make the petitioner a party to the proceedings. (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.)

If a sale is made before the appointment of an assignee, it should not be made by the bankrupt. (*In re James Vila*, 5 Law Rep. 17.)

The bankrupt can not sell any of his property without authority from the court. (*In re Richard Pryor*, 4 Biss. 262.)

If a sale is made before the appointment of an assignee, it is necessary that the creditors should have due notice of the application before the sale takes place, so that they may appear in the district court and show cause against any sale, or for a postponement thereof. The best mode of giving notice to the creditors is by advertisement in some public newspaper a sufficient time before the sale to enable them to act if they see fit. (*In re James Vila*, 5 Law Rep. 17.)

SEC. 5066.—The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

Statute Revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes—April 4, 1800, ch. 19, § 12, 2 Stat. 24; Aug. 19, 1841, ch. 9, § 11, 5 Stat. 447.

*Quere.* Can the assignee redeem before the debt is payable? (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.)

SEC. 5067.—All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statutes—April 4, 1800, ch. 19, § 39, 2 Stat. 32; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 441.

### What Claims are Valid.

When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff in a suit at law seeking to enforce such claim. (*In re Prescott*, 9 B. R. 385; s. c. 5 Biss. 523; *in re Robert Pittock*, 8 B. R. 78; s. c. 2 Saw. 416.)

The assignee may set up any defense to a claim which the debtor himself could set up. (*In re Prescott*, 9 B. R. 385; s. c. 5 Biss. 523.)

Any debt which may be proved by complying with the provisions of the bankrupt act is a provable debt. It is true that a secured creditor can be admitted as a creditor only for the balance of his debt after deducting the value of the property upon which he has a lien, unless he releases or conveys his security to the assignee, in which case he may be admitted as a creditor for his whole debt; yet his debt is, nevertheless, provable within the meaning of the act, before such balance is ascertained or such release or conveyance is made. It does not follow that, because he can not be admitted as a creditor, he there-

fore can not prove his debt. On the contrary, the proving of his debt is a necessary preliminary step to his eventually being admitted as a creditor. (*In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126; *Rankin & Pullan v. Florida, Atlantic & G. C. R. R. Co.* 1 B. R. 647; s. c. 1 L. T. B. 85; *contra*, *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.)

The time of the adjudication of bankruptcy is the time of filing the petition. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; *contra*, *in re Hennocksburch & Block*, 7 B. R. 37; s. c. 6 Ben. 150.)

The time of the adjudication in bankruptcy is taken by the statute as the decisive time. The debt must exist at the time, or it can not be proved. If it exists then, but is not payable until afterward, and is not a debt running with interest, there must be a rebate from its amount of the interest on that amount from the time of the adjudication of bankruptcy to the time when it would be payable. If it exists, but is payable before that time, and bears interest, the statute intends that the debt shall be proved for the amount of the principal, and of the interest thereon to the time of the adjudication of bankruptcy. (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361; *in re Crawford*, 3 B. R. 698; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *in re Port Huron Dry Dock Co.* 14 B. R. 253.)

The accrued interest constitutes part of a debt provable against the bankrupt's estate. (*Sloan v. Lewis*, 12 B. R. 173; s. c. 22 Wall. 150; s. c. 68 N. C. 557; *in re Hugo Broich*, 15 B. R. 11.)

If the contract is silent as to interest after maturity, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Interest can not be allowed on interest in such cases. (*In re Geo. A. Bartenbach*, 11 B. R. 61; s. c. 2 A. L. T. [N. S.] 33.)

No interest can be allowed on the bills of a bankrupt bank until payment has been demanded thereon and refused. (*In re Bank of North Carolina*, 10 B. R. 289.)

The proof of a bank bill against a bankrupt bank is equivalent to a demand of payment, and if the estate is sufficient to pay the face value of the claims as proved, interest may be allowed from the time of filing the proof. (*In re Bank of North Carolina*, 10 B. R. 289.)

Claims will draw interest from the time of the adjudication up to the payment at the agreed rate, when that is agreed upon, and when not at the legal rate. (*In re Strachan*, 3 Biss. 181.)

Interest on provable debts can not be computed as against the general assets beyond the date of the adjudication. The estate is a dead fund, and in such a shipwreck, if there is a salvage of a part to each person in the general loss, it is as much as can be expected. It is immaterial to the creditor at what time interest stops on his debt, provided interest on all the debts stops simultaneously with his own, for his proportionate share of the assets will be the same, whatever period be fixed for the stoppage on all the debts. (*In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231; *in re Oliver Bugbee*, 9 B. R. 258.)

If the value of a security held by a creditor is greater than the amount of the debt, interest may be computed up to the day of payment and allowed thereon. (*In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231; *in re Frank Newland*, 9 B. R. 62; s. c. 7 Ben. 63.)

Interest on a lien claim should be allowed up to the date of making up the report. (*In re Abraham A. Devore*, 24 Pitts. L. J. 185.)

The rate of interest and damages which the drawer of a bill of exchange is to pay *ex mora*, is governed by the law of the place where the bill is drawn. (*In re Chas. H. Glyn*, 15 B. R. 495; s. c. 9 O. L. N. 183.)

If judgment is recovered before the commencement of proceedings in bankruptcy, the costs are a part of the debt, and may be proved. Interest on the judgment is also provable. (*Ex parte O'Neil*, 1 B. R. 677; s. c. Lowell, 162.)



A judgment for costs is a provable debt. (*Graham v. Pierson*, 6 Hill, 247.)

A judgment for costs incurred after bankruptcy is not a provable debt. (*Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67)

If a draft falls due after the commencement of proceedings in bankruptcy, or is payable at the domicile of the debtor, damages for the non-payment thereof can not be allowed. (*In re Oliver Bugbee*, 9 B. R. 258.)

Drafts drawn and accepted after the commencement of proceedings in bankruptcy are not provable, although the acceptor paid the money to extinguish claims that existed prior to that time. He is not entitled to be subrogated to the rights of the creditors to whom the drafts were given, unless he has taken an assignment of their claims. (*In re Strachan*, 3 Biss. 181.)

A claim against the bankrupt for liability on stock held by him, can not be proved until an assessment is made by competent authority. (*Gibson v. Lewis*, 11 B. R. 247; s. c. 9 Pac. L. R. 75; s. c. 32 Leg. Int. 22.)

The liability of a stockholder for the debt of a corporation is not a provable debt. (*James v. Atlantic Delaine Co.* 11 B. R. 390.)

### Contracts.

The only legal effect of an indorsement of a Confederate bond was to transfer the title, and not to render the party liable as indorser or guarantor. (*Holleman v. Dewey*, 7 B. R. 269.)

If a policy of insurance contains a clause authorizing the assured to surrender the policy at any time, or the company to cancel the same on five days' notice, and provides for a return of a part of the premium in either event, the holder may cancel and surrender the policy after the company becomes insolvent, and before it becomes bankrupt, and the return premium will be a provable debt. (*In re Independent Ins. Co.* 7 A. L. Rev. 362.)

The right to maintain an action for money had and received, does not always depend on privity of contract, or upon contract at all. It is enough to prove that the defendant has money of the plaintiff which in equity and good conscience, he ought not to retain. Where the defendant is bound by a valid contract to pay the money to some one else, the plaintiff can not prevail. The law does not imply a contract to pay A. when the debtor is already bound by a valid contract to pay B. In cases not founded on a direct contract, the inquiry is not concerning priority of contract, but concerning identity of property. If a party fraudulently overdraws his bank account, the bank has a claim upon those who received the checks without giving value therefor. Their obligation to pay the drawer must yield as soon as the fraud is shown. The bank has a claim for the bank bills which were drawn out upon the fraudulent checks by the parties themselves. The same result will follow whenever the proceeds or fraudulent checks are traced to their possession, whether in the identical bills or not. When such checks are paid directly to the parties, it will be presumed that they drew them, or caused them to be drawn. In those instances in which such checks are paid directly to the creditors of such parties, it may be somewhat more difficult to say that the money of the bank comes to the hands of the parties themselves. (*In re Eureka Manuf. Co.* Lowell, 500.)

The debt of a wife contracted *dum sola* is a provable debt. (*Vanderheyden v. Mallory*, 1 N. Y. 452.)

A note given to compensate another for indorsing a note for the maker is valid. (*Providence Co. Savings Bank v. Frost*, 13 B. R. 356.)

A subscription for a religious or charitable institution given in consideration of a similar subscription by another party, and not revoked until the institution

has incurred new expenses on the faith of it, is a valid promise, and founded on good and sufficient consideration. (*Capelle v. Trinity Church*, 11 B. R. 536.)

If the bankrupt agrees to pay expenses of taking out a patent in consideration of an interest therein, an indorsement of a note given to pay for labor on the patent is for a valuable consideration, and the note is a provable debt. (*In re Cosmore G. Bruce*, 6 Ben. 515.)

If notes are given to an accommodation indorser to indemnify him for his liability, and are subsequently indorsed by him, and passed to a third party, with the fraudulent design of charging the estate of the maker with a larger amount than is justly chargeable, the holder can not prove the claim against the indorser, even for the amount paid for the notes. (*In re Leonard L. Hook*, 11 B. R. 283.)

A person can not claim to be a *bona fide* holder of a note, if the circumstances are of such a strong and pointed character as necessarily to cast a shade on the transaction, and to put him on the inquiry. (*In re Leonard L. Hook*, 11 B. R. 283.)

An overdue note under seal, given as a collateral security to indemnify the payee against liabilities as indorser for the bankrupt, is a provable debt, although the payee has not actually advanced the money for which he is bound as surety. (*Roosevelt v. Mark*, 6 Johns. Ch. 266.)

A promissory note to deliver specific articles is a provable debt. (*Chandler v. Windship*, 6 Mass. 310; *McMullen v. Bank*, 2 Penn. 343.)

If a creditor signs a negotiable paper after the commencement of the proceedings in bankruptcy, the purchaser takes it subject to all just offsets existing at the time of the commencement of the proceedings, for the creditor can assign, and the assignee can purchase, no more than the balance due from the bankrupt after all credits are admitted. (*Humphreys v. Blight*, 1 Wash. 44; s. c. 4 Dall. 370.)

If one of several joint makers of a promissory note takes it up by giving his individual note therefor, and thus satisfies the holder, it is immaterial how he satisfies him, and he has a demand for contribution, whether he has, in point of fact, paid his own note or not. (*Fox v. Eckstein*, 4 B. R. 373.)

Debts created by fraud, and debts created by defalcation in a fiduciary character are provable. (*In re Rundle & Jones*, 2 B. R. 113.)

A person who has advanced money to the bankrupt for the purchase of stock, which, however, was purchased in the name of the bankrupt, and by him hypothecated for money loaned to him, has, as against the other creditors, merely a provable debt to the amount of the value of the stock so directed to be purchased for him. (*Ungewitter v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195.)

A claim for services rendered by counsel for the bankrupt in opposing the petition in involuntary proceedings, is a provable debt. (*In re N. Y. Mail Steamship Co.* 2 B. R. 74, 554; s. c. 3 B. R. 280, 627; s. c. 7 Blatch. 178.)

A claim for services rendered by counsel for the bankrupt in the preparation of papers in voluntary bankruptcy is provable. (*In re Thos. C. Evans*, 3 B. R. 261.)

A person who has taken charge of the bankrupt's property under a deed of trust, which was subsequently declared void under the provisions of the bankrupt act, has a claim against the bankrupt for services so rendered, and such claim is a provable debt, although he had notice that the deed was fraudulent at the time when he rendered the services. (*Cutlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

A party dealing with an agent has a right to resort to his principal to compel the performance of an ordinary or verbal contract made by the agent for the benefit, and by the authority, of his principal, unless the credit was knowingly given exclusively to the agent. This principle also applies, although the agent contracts in his own name without disclosing his principal, and the other party supposes the agent to be acting for himself only, and it makes no difference that the contract is in such form that the agent is also personally liable. (*In re Troy Woolen Co.* 8 B. R. 412.)

Some law under which a corporation with the powers assumed may be lawfully created must be shown in addition to mere user before an association can be said to exist *de facto*. An association must be shown to be a corporation *de facto* within this rule before a party dealing with it will be deemed to be estopped from showing that it had no legal corporate existence. In such case a creditor may treat the association as a partnership, and his claim will constitute a debt provable against the members. (*In re Richard J. Mendenhall*, 9 B. R. 497.)

If a note on its face purports to make the promise that of the bankrupt corporation, and bears the impression of the seal of the corporation, it is provable against the estate, although the signature is merely that of the president as president. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the presumption is that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

Parol evidence is admissible to prove that a note executed by an officer of a corporation was intended as the promise of the corporation. (*In re Southern Minn. R. R. Co.* 10 B. R. 86.)

A party who elects to prove his claims as for goods sold and delivered to the bankrupt, can not without withdrawing the proof institute an action of replevin on the ground that the bankrupt was merely his agent. (*Ormsby v. Dearborn*, 116 Mass. 886.)

### Partnership.

Where a member of a firm files a separate petition, a partnership creditor may prove his claim. (*In re Frear*, 1 B. R. 660; s. c. 35 How. Pr. 249; s. c. 2 Ben. 467.)

Where one partner, in fraud of the firm, issues firm notes for the purpose of obtaining his share of the capital, an accommodation indorser who subsequently pays them has no claim against the firm, if by prudent inquiry at the time of their indorsement he could have ascertained that they were unconnected with the current business of the firm. (*In re Dunkle & Driesbach*, 7 B. R. 107.)

If a note is drawn by one partner in the firm name, apparently in the course of the firm dealing, the title of the holder will not be affected by his mere knowledge of facts that were admonitory to greater caution and further inquiry. There must be knowledge of facts impeaching the validity of the note. The fault of the partner's meditated fraud must be implanted in the holder's title, so that his assertion of a claim against the firm would necessarily subject him to the imputation of bad faith. (*Bush v. Crawford*, 7 B. R. 299; s. c. 2 L. T. B. 239.)

An agreement made by a member of a firm who are the payees of an accommodation note not to call on the maker for payment, binds the other partner who was personally ignorant of the transaction, and he can not prove the note against the maker, although he took it up with his own individual funds. (*Cupelle v. Hall*, 12 B. R. 1.)

In favor of third persons acting in good faith, the presumption is that notes indorsed in the name of the firm were indorsed on partnership account, and the indorsement will bind the firm, unless it appears that the holder had notice that the indorsement was outside of partnership affairs. (*Lemoins v. Bank*, 3 Dillon, 44.)

If the holder has notice that the indorsement is an accommodation indorsement, the burden of proof is upon him to show the assent of the partners, either express or implied, from the firm's course of dealing. (*Lemoins v. Bank*, 3 Dillon, 44.)

The possession of a note by the maker before its maturity raises a presumption that an indorsement thereon is an accommodation indorsement. (*Lemoins v. Bank*, 3 Dillon, 44.)

A check drawn in the firm name for the proceeds of a note bearing the accommodation indorsement of the firm, does not operate as a ratification, so as to bind a partner who had no knowledge of the indorsement or of the drawing of the check. (*Lemoins v. Bank*, 3 Dillon, 44.)

If a party advances money to one partner for a purpose entirely outside of the partnership business, and takes a firm note therefor, the burden is on him to prove the consent of the other partner; and if he fails to do so, the claim is not provable against the joint estate. (*In re Forsyth & Murtha*, 7 B. R. 174.)

An indebtedness growing out of partnership transactions, of which no settlement has been made between the parties, in a case where the partnership debts have not all been paid nor all the partnership property disposed of, and being in part for assets that have never been disposed of, is not a provable debt. But a claim arising from a fraudulent misappropriation of the partnership funds by one partner may be proved against the separate estate of the wrong-doer. The partner thus wronged by such dishonest and fraudulent acts of his copartner, is entitled to treat the misappropriation as entirely foreign to the partnership business, and prove the debt for his share of such funds precisely the same as though the partnership had never existed. (*Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.)

When the articles of partnership stipulated that the share contributed by each partner to the capital stock should be left in the concern until the expiration of the partnership, and the partnership gave a firm note, payable four days after date, to each member, for the share contributed by him, the wife of a partner who has indorsed his note to her before maturity, for money loaned by her to him, and by him contributed to the capital stock of the firm, can not prove the note against the firm until the partnership debts are paid. She may prove it against her husband, and is entitled to participate in any dividend of the proceeds of his individual estate. The knowledge of the husband of facts affecting the wife's property, which he is managing by her consent, must be regarded as the knowledge of the wife, and she must be charged with notice of all facts known to him which may affect his transactions on her behalf. (*In re Frost et al.* 3 B. R. 786.)

In order to dissolve a limited partnership under the laws of New York there must be one publication of the dissolution, and then a repetition three times after the first publication, at an interval of seven days between each of the four times. (*In re King et al.* 7 B. R. 279.)

The general partners in a limited partnership can not bind the firm by a contract beyond the purpose and scope of the partnership, and a claim arising from such a contract can not be allowed as an offset to a debt due to the firm. (*Taylor v. Rasch*, 11 B. R. 91.)

No departure by the general partners from the scope of the business, no matter how common or long continued, if not consented to or known and acqui-

esced in by the special partner, can have the effect to change or enlarge the scope of the business. (*Taylor v. Rasch*, 11 B. R. 91.)

Until a partner pays the partnership debt, he has no claim, contingent or otherwise, against his copartner. (*Hester v. Baldwin*, 2 Woods, 438.)

If one partner advances more than his proportion to the capital of the firm, the assignee of the firm may prove for such advance against the estate of the copartner. (*In re John McLean & Son*, 15 B. R. 333.)

### Equitable Debts.

Equitable debts are within the scope of the bankrupt act. It is the intent of the statute to give all creditors an equal share of the assets, without regard to the mode in which their rights might have been enforced if there had been no bankruptcy, and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors, the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. This section makes provable all debts and liabilities, in language broad enough to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner, and so of demands which but for bankruptcy would be properly cognizable in a court of admiralty. If this were not so, the law could not be uniform, for proof of debts would depend on the remedies given in the several States, in one of which the very same debt might be sued at law, which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity. (*In re Blandin*, 5 B. R. 39; s. c. Lowell, 543; s. c. 2 L. T. B. 198; *Roosevelt v. Mark*, 6 Johns. Ch. 266.)

When the bankrupt has carried on business in the name of another, demands arising from such business may be considered as equitable debts of the bankrupt, and proved against his estate. (*In re Wm. H. Long*, 3 B. R. quarto, 66.)

### Claims by Bankrupt's Wife.

Money loaned by the wife of the bankrupt to him out of her separate estate is a claim that may be proved. While the law regards claims of this character with great distrust, equity will protect the rights of the wife even against the creditors of the husband. The court being satisfied that the money was the separate property of the wife, and was placed in the husband's hands as a loan or trust for the benefit and use of the wife, and not as a gift, will adjudge him to be her debtor to that amount, and will award payment to her as to any other creditor. (*In re Bigelow et al.* 2 B. R. 556; s. c. 3 Ben. 198; *in re Blandin*, 5 B. R. 39; s. c. Lowell, 543; s. c. 2 L. T. B. 198; *in re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.)

Gifts from the husband to the wife can not be offset against such a loan. If the gifts were disproportioned to the circumstances of the parties, or there were reasons to suspect the motives with which they were made, the court might marshal the gifts and offset them against the loan. (*In re Bigelow et al.* 2 B. R. 556; s. c. 3 Ben. 198.)

A mortgage taken in the name of the wife merely for the sake of convenience will not be deemed a settlement or advancement, and a subsequent use of the notes by the husband will not give the wife a valid claim against his estate. (*In re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.)

Where the husband, by the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, the law presumes that she intended to thus dispose of them for the benefit of the family, and does not therefore imply a promise to repay them. (*In re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.)

A note given by the bankrupt to his wife for a legacy previously reduced to possession, is without consideration and can not be enforced. (*Canby v. McLearn*, 13 B. R. 22.)

### Defenses.

Where a foreign creditor has obtained a judgment and levied an execution upon the personal property of the bankrupt in such foreign country after the commencement of proceedings in bankruptcy, if he seeks to prove his claim he must first refund what he has so acquired, and come in equally with the rest of the creditors, or not at all. (*In re Oliver Bugbee*, 9 B. R. 258.)

If the debt of such foreign creditor consists of two claims, on one of which alone was such judgment obtained and execution issued, he can not prove either claim, for the whole debt of the creditor is considered the debt upon which the principle of equality operates. (*In re Oliver Bugbee*, 9 B. R. 258.)

If a foreign corporation transacts business within the limits of a State before the appointment of an agent upon whom process may be served, where such appointment is required by the laws of the State as a condition precedent to the right to transact such business, all contracts so made are void. (*In re Comstock & Co.* 12 B. R. 110; s. c. 3 Saw. 320.)

A debt contracted by a *feme covert* in a case where she was not authorized to incur it by the law of her domicile, is not provable. (*In re Schlichter*, 2 B. R. 336; *in re Rachel Goodman*, 8 B. R. 380; s. c. 5 Biss. 401.)

The taking of the note of a third party for a debt, and the obtaining of a judgment thereon, extinguish the original debt, and make it the debt of the third party. (*In re Hinds et al.* 3 B. R. 351.)

A receipt given by the bankrupt to the sheriff for certain property taken under an attachment is a provable demand. (*Fowles v. Treadwell*, 24 Me. 377.)

A surety fixed at law, and having as a security an absolute note for a sum certain, due and payable, or a judgment in the name of his trustee, but for his use, for a sum certain, due and payable, may be admitted to prove his debt, although the notes upon which he is fixed as indorser, or the forfeited bonds on which he stands as security have not been actually paid. He has his legal, absolute debt, liable only to be defeated in equity by the very remote and possible contingency that he may never be called upon to pay the notes and bonds. (*Roosevelt v. Mark*, 6 Johns. Ch. 266.)

An absolute judgment in the name of another to indemnify a surety for liabilities incurred by him for the bankrupt, is a legal subsisting debt of which the surety is the beneficial owner, and which he may prove. (*Roosevelt v. Mark*, 6 Johns. Ch. 266.)

A gift made voluntarily and freely by the donor, and accepted by the donee, is not a sufficient consideration to support the promise contained in a note which was not executed on consideration, nor as a condition of the gift. At most it is only a moral consideration, and is not sufficient to support a promise. There is no legal obligation or duty which a promise can reach and rest on. A note, which is a mere renewal or repetition of a lost voluntary note, is like that without consideration and void. (*In re Cornwall*, 4 B. R. 400; s. c. 6 B. R. 305; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.)

In order to entitle a third party to prove a note which was given without any valuable consideration, there must be some present consideration at the time of the transfer. He must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper. (*In re Howard, Cole & Co.* 6 B. R. 372; s. c. 2 Md. L. R. 448.)

If a party has broken the essential part of a contract, his claim thereon will

be disallowed, for he must fulfill the essential part of his contract, or show that he has been released therefrom by the bankrupt, or prove that the bankrupt, and not himself, was the cause of his failure to comply therewith. If he fails to do this, he is without legal remedy or equitable redress. (*In re Nounnan & Co.* 7 B. R. 15.)

A debt incurred by the loan of Confederate notes is not provable. (*In re Milner*, 1 B. R. quarto, 19; s. c. 1 B. R. 419; s. c. 35 Geo. 330; s. c. 1 Abb. C. C. 261; s. c. 1 L. T. B. 15.)

The acceptance of Confederate notes or bonds as payment was a sufficient consideration to liquidate or discharge a contract debt. (*Holleman v. Dewey*, 7 B. R. 269.)

A claim for money loaned to a debtor to enable him to depart from the State with intent to defraud his creditors is not provable. (*In re Hatje*, 12 B. R. 548; s. c. 6 Biss. 436.)

A savings bank which is prohibited from making a loan on personal security, can not prove a note taken for such loan. (*In re Jaycox & Green*, 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 7 B. R. 578; s. c. 13 Blatch. 70.)

A savings bank which is prohibited from making loans on personal security can not prove claim for money so loaned. (*In re Jaycox & Green*, 13 B. R. 122; s. c. 12 Blatch. 209.)

A contract for the services of convicts is valid, although the contractor did not make the deposit with the comptroller required by law. (*In re Edward Burt et al.* 13 B. R. 187; s. c. 12 Blatch. 252.)

A note given for negroes before the emancipation proclamation took effect is valid and constitutes a provable debt. (*Miller v. Keyes*, 3 B. R. 224; *contra*, *Buckner v. Street*, 7 B. R. 255.)

If a compromise failed because all the creditors refused to sign it, a creditor who received a secret preference may prove his original debt, although the assignee by suit compelled the refunding of the fraudulent preference. (*Brookshire v. Bean*, 12 B. R. 217; s. c. 3 Dillon, 136.)

The purchase of the right to deliver grain at a certain price before some future day is void as a wagering contract, if the parties do not intend to deliver the grain, but only at the utmost to settle the differences, and the holder can only prove for the purchase money where the State laws on the subject of gaming allow the money paid to be recovered. (*In re P. K. Chandler*, 9 B. R. 514; s. c. 6 Biss. 53; *in re John Green*, 15 B. R. 198.)

A broker who advances the margin for his principal on a gaming contract, for a future delivery of grain, can not prove for such advance under the laws of Wisconsin. (*In re John Green*, 15 B. R. 198.)

A factor may prove a note against his principal given for money advanced by him on a contract for a future delivery of cotton, where there was to be no delivery but the difference only was to be paid, and for services in relation to that contract. (*Lehman v. Strassberger*, 2 Woods, 554.)

If a party reserves the option to receive or deliver cotton on a contract for a future delivery, the contract is not a wagering contract if he did not communicate his purpose not to receive or deliver to the other party. (*Lehman v. Strassberger*, 2 Woods, 554.)

If the goods were selected by the bankrupt and at his request set apart and marked with his name, this is a sufficient delivery and acceptance, and the vendor may prove the claim although the goods were destroyed by fire in his store. (*In re Downing*, 15 B. R. 564; s. c. 13 Pac. L. R. 167.)

When a contract is within the statute of frauds it is not completed until there is an actual acceptance and receipt of the goods. In such cases the con-

tract is to be governed by the law of the place where the goods are accepted, and when it is illegal there, on account of a law prohibiting the sale of liquor, it is not provable. In Michigan payments can not be applied to the older items in point of time, so as to extinguish the items for spirituous liquors. A note given for the balance of an account of which items for liquor constitute a part, being founded in part on an illegal consideration, is totally void. (*In re Pad-dock*, 6 B. R. 132; s. c. 2 L. T. B. 214; *in re Town et al.* 8 B. R. 38.)

A verbal contract is not within the statute of frauds, unless it expressly shows that it was not to be performed within a year from the making thereof. (*Capelle v. Trinity Church*, 11 B. R. 536.)

If a note is made in the State and sent by mail to another State where the sale was made, the validity of the note must be determined according to the laws of the latter State. (*In re Town et al.* 8 B. R. 38.)

A claim for goods sold to the bankrupt under a contract made in another State, by a citizen of that State, and valid in the place where it was made, is a provable debt, even though no suit could be maintained thereon in the courts of the State where the bankrupt resides and files his petition. If an action can be sustained on the claim before the circuit court, on appeal, and if the discharge would relieve the debtor from his liability therefor, then the district court should recognize and allow the same as a debt provable against the bankrupt's estate. The proceedings in bankruptcy being by virtue and authority of the act of Congress, which authorizes the proof of all legal demands against the bankrupt's estate, a law of the State denying all remedy for the recovery of the account, can not in any way control the proceedings in bankruptcy of the district court. (*In re Murray*, 3 B. R. 765.)

A valid debt is provable, even though prosecuted by an attorney who has taken it for collection under an agreement to pay all expenses and retain a certain per cent. of all that may be recovered as a compensation for his services. The claim against the bankrupt exists independently of such an agreement. The agreement is a collateral matter. Under such circumstances it has never been held that an agreement made by a creditor with a third party in reference to the prosecution of a claim, although it would be held to be champertous if either party to it were setting it up as the foundation of a suit, or a defense in a court of justice, can be used to defeat the creditor in establishing a claim otherwise valid. (*In re Lathrop et al.* 3 B. R. 413; s. c. 3 Ben. 490.)

A debt is provable, although it may be barred by the statute of limitations of the State where the petitioner resides. (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 58; *in re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484; *contra*, *in re Danl. P. Kingsley*, 1 B. R. 329; s. c. Lowell, 216; *in re Harden*, 1 B. R. 395; s. c. 1 L. T. B. 48; *in re Cornwall*, 6 B. R. 305; s. c. 4 B. R. 400; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220; *in re C. W. Reed*, 11 B. R. 91; s. c. 6 Biss. 250.)

Where a debt is already barred by the statute of limitations, a promise by the debtor to pay it when he is able is regarded as conditional, and not to create an obligation as a revival of the debt until ability to pay appears; but where there is a present debt, a promise to pay when able does not destroy the right of the creditor to sue, nor postpone such rights, and in no wise hinders or prevents the running of the statute. (*In re Cornwall*, 6 B. R. 305; s. c. 4 B. R. 400; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.)

The filing of the petition in bankruptcy creates a trust, and the statute of limitations which ran against the debt ceases to run against the trust, and the debt is not barred if the time of limitation had not expired at the commencement of the proceedings in bankruptcy. (*In re Eldridge & Co.* 12 B. R. 540; *vide in re Robert Morris*, Crabbe, 70; *in re John S. Wright*, 6 Biss. 317; *in re J. W. Maybin*, 15 B. R. 468.)

The statute of limitations does not run against one who was a non-resident at



the time of the accruing of the cause of action until he comes into the State. (*Capelle v. Trinity Church*, 11 B. R. 536.)

### Usury.

The assignee may set up the defense of usury against any claim presented for proof. The principles adopted in a court of equity where a debtor seeks relief from a usurious contract do not apply, for the creditor is seeking to enforce his contract. (*In re Prescott*, 9 B. R. 385; s. c. 5 Biss. 523.)

The district court has jurisdiction to pass upon the legality of a claim, and to reject it if it is void under the usury laws, although it may not have jurisdiction to enforce a penalty imposed by a State law on account of an act making any such claim illegal. (*In re Robert Pittock*, 8 B. R. 78; s. c. 2 Saw. 416.)

The defense of usury may be pleaded so long as any part of the debt for which the usury was paid or agreed to be paid remains unpaid. (*In re Prescott*, 9 B. R. 385; s. c. 5 Biss. 523.)

Where a creditor seeks to prove his claim, a forfeiture of all interest for usury may be enforced. (*In re Prescott*, 9 B. R. 385; s. c. 5 Biss. 523.)

If a loan is made at the rate of thirty per cent., and eighteen per cent. of such interest is put in a separate note, which is not due at the time of the filing of the petition, the rebate must be at the rate of eighteen per cent. (*In re Riggs, Lechtenberg & Co.* 8 B. R. 90.)

Notes drawn, dated, signed, and indorsed in one State, where the makers and indorsers reside, but sent to another State to be discounted, are to be governed by the laws of the latter State if they are accommodation paper, for they are not complete contracts until they are transferred for a valuable consideration. The fact that the consideration was remitted by check to the former State does not affect the question. If the notes are void for usury by the laws of the latter State, they are not provable. (*In re Conrad*, 4 L. T. B. 189; s. c. 28 Leg. Int. 324; *Providence Co. Savings Bank v. Frost*, 13 B. R. 356.)

The principal of money loaned by a national bank upon usurious interest is a provable debt. (*Moore v. National Exchange Bank of Columbus*, 1 B. R. 470; s. c. 2 Bond, 170; s. c. 1 L. T. B. 74.)

If the usury laws of the State do not apply to loans made to corporations, then as to such loans there is no law of the State, and the whole interest is forfeited for usury under the laws of the United States. (*In re Wild*, 10 B. R. 568; s. c. 8 A. L. J. 235.)

A mere accommodation indorser is entitled to all the protection which his principal may obtain, and can set up the defense of usury. (*In re Wild*, 10 B. R. 568; s. c. 8 A. L. J. 235.)

### The Amount that may be Proved.

When a party holds, as collaterals, notes of the bankrupt which are invalid as between the bankrupt and the payee, and is a *bona fide* holder, he may prove the full amount of the notes, or as much thereof as may be necessary to entitle him to a dividend equal to the full sum of his claim. (*Bailey v. Nichols*, 2 B. R. 478; s. c. 2 L. T. B. 60; s. c. 1 C. L. N. 185; *in re Storms & Co. Lowell*, 394.)

There is no law for restricting the proof on a note to the amount paid for it. The right of a party who holds a note of the bankrupt as a collateral can not be enlarged after bankruptcy, nor will a good title as pledgee be merged in a defective title as purchaser. The rule of equity is that the party may hold by his best title. If the pledgee releases the pledgor, and retains the note at a certain per cent., he will be considered a pledgee who has in good faith recovered what

he could from the pledgor, and may prove for the full amount of the note, but can receive dividends only to the extent of the per cent. at which he took it. (*In re Storms & Co. Lowell*, 394.)

A party who has compromised his claim with the bankrupt after the commencement of proceedings in bankruptcy, can not, in the absence of fraud on the part of the bankrupt, hold his claim against the estate of the bankrupt for the balance beyond the amount so received on the compromise. As to fraud, if the contract for compromise is void for fraud, it must be void in the whole and not in the part. The creditor can not retain the amount received under the compromise and prove a claim for the balance. He can not affirm one-half of the contract and disaffirm the other. (*In re Lathrop et al.* 3 B. R. 413; s. c. 3 Ben. 490.)

If the bankrupt as a commission merchant sells grain in violation of the order of his principal, no reference in estimating the damages can be had to the market at any later time than the date of the bankruptcy. (*Lehmer v. Smith*, 1 C. L. B. 45.)

Payments made by the maker of a promissory note after the proof thereof against the indorser do not affect the amount upon which a dividend can be demanded unless the result would be to overpay the note. (*In re George S. Weeks*, 13 B. R. 263.)

Where payments have been made by the maker of a promissory note prior to the proof against the indorser, the balance is the only amount that can be proved against the estate of the latter. (*In re George S. Weeks*, 13 B. R. 263.)

### Effects of Acts Done after Bankruptcy.

A note made prior to the commencement of proceedings in bankruptcy, which was taken up after such proceedings were commenced by the bankrupt's giving a new note, does not constitute a debt which may be proved by an indorser. If a creditor of the bankrupt, after the adjudication, accepts a new obligation from the bankrupt in substitution for the debt existing at the time of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for the payment of his debt. (*In re Henry B. Montgomery*, 3 B. R. 429.)

A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy, may be proved. The debt is not extinguished. The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation upon which it is built. The debt was founded upon contract; it is now founded on judgment, but it is, nevertheless, the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. It operates as a change of remedy merely. It is a security of a higher nature. It is still but a security for the original cause of action. The theory that the debt is so merged in the judgment as to be extinguished, has no applicability under the bankrupt act. (*In re Crawford*, 3 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *in re Vickery*, 3 B. R. 696; *in re S. Brown*, 3 B. R. 584; s. c. 5 Ben. 1; *Barnes v. U. S.* 12 B. R. 526; s. c. 21 I. R. 212.)

*Contra.* Neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy. (*In re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Reg. 374; *Bradford v. Rice*, 102 Mass. 472; *in re Gallison et al.* 5 B. R. 363; s. c. 2 L. T. B. 195; *in re A. S. Mansfield*, 6 B. R. 388.)

It is not the judgment but the debt, as it existed on the day of the filing of the petition, that is provable. (*In re Vickery*, 3 B. R. 696; *in re S. Brown*, 3

B. R. 584; s. c. 5 Ben. 1; *in re* Louis H. Rosey, 8 B. R. 509; s. c. 6 Ben. 507; *in re* Theodore Vetterlein, 13 Blatch. 44; *in re* J. W. Maybin, 15 B. R. 468.)

*Contra.* The debt or claim as it stood at the time of the filing of the petition, is merged in the judgment, and, therefore, the judgment must be proved. The judgment must be proved, not because it existed at a proper time, but because the debt constituting the foundation did exist at that time. The costs, however, which accrued subsequent to the time of the filing of the petition, can not be said to constitute a claim or debt which existed at that time, and should be excluded in making up the amount upon which dividends are to be declared. (*In re* Crawford, 8 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *Monroe v. Upton*, 50 N. Y. 593; s. c. 6 Lans. 255.)

It is not necessary for a creditor who recovered judgment after the adjudication of bankruptcy to strike out his judgment before he can prove the claim on which the judgment was recovered. (*In re* Ezra M. Stevens, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.)

A decree for more than five hundred dollars obtained in a State court in an action instituted after the commencement of the proceedings in bankruptcy, is not a provable debt. (*In re* J. W. Maybin, 15 B. R. 468.)

### Torts and Damages.

A claim for damages for a purely personal injury is not provable, unless liquidated and transmitted into a legal debt by a judgment obtained before the adjudication of bankruptcy. (*In re* Hennocksburgh & Block, 7 B. R. 37; s. c. 6 Ben. 150.)

A mere verdict in an action for a personal tort is not a provable debt. (*Black v. McClelland*, 12 B. R. 481; s. c. 7 C. L. N. 420.)

A judgment entered after the commencement of the proceedings in bankruptcy upon a verdict rendered before that time in an action for a personal tort, is not a provable debt. (*Black v. McClelland*, 12 B. R. 481; s. c. 7 C. L. N. 420.)

A judgment for a fine imposed by law for the commission of a crime is not provable. A judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime. (*In re* Sutherland, 3 B. R. 314; s. c. 1 Deady, 416.)

A penalty incurred by the bankrupt in selling matches without stamps is a provable debt. (*In re* Louis H. Rosey, 8 B. R. 509; s. c. 6 Ben. 507.)

A claim of the United States for the value of goods imported contrary to the revenue laws is a provable debt. (*Barnes v. U. S.*, 12 B. R. 526; s. c. 21 I. R. R. 212; *in re* Theodore Vetterlein, 13 Blatch. 44.)

If the bankrupt wrongfully converted the property of another while he was legally in possession thereof, a claim for damages for the conversion constitutes a provable debt. (*Cole v. Roach*, 10 B. R. 288; s. c. 37 Tex. 413.)

If the bankrupt converts an acceptance to his own use and has it discounted, the owner may prove for the full value of the acceptance, although the bankrupt is also liable as indorser to the holder. (*In re* Morse & Co. 11 B. R. 482.)

If the original ground of action is founded on contract, but the immediate cause of the action arises *ex delicto*, and is a claim for damages unliquidated by an express agreement, it is not a provable claim. (*Dusar v. Murgatroyd*, 1 Wash. 13.)

A decree for damages in a suit for the specific performance of a contract is a present debt, and therefore provable, although the amount remains to be liquidated by the master. (*Boyd v. Vanderkemp*, 1 Barb. Ch. 273.)

If there has been a trial in an action for damages arising from a breach of a contract and a report of the judge fixing the amount of the damages and a taxation of the costs, so that the whole amount due has been ascertained, the demand is provable. (*Monroe v. Upton*, 50 N. Y. 593; s. c. 6 Lans. 255.)

Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it constitutes a provable debt, although the fraud must be proved in order to recover. (*In re Henry Schwarz*, 15 B. R. 330; s. c. 52 How. Pr. 513.)

A liability to an action for deceit on account of a misrepresentation of the condition of the bankrupt's firm is not a provable debt. (*In re Frederick Schuchardt*, 15 B. R. 161.)

A representation made by one member of a firm to a person who subsequently purchases commercial paper of the firm from a third person, without any intimation that the latter intends to make such purchase, does not render the partner liable individually although it is false. (*In re Frederick Schuchardt*, 15 B. R. 161.)

A judgment obtained for a breach of a promise to marry is provable. (*In re Sidle*, 2 B. R. 220; *in re Daniel Sheehan*, 8 B. R. 345.)

At the common law, except in the case of judgments in certain inferior courts, the record and judgment remain in the court in which the judgment is entered after, as well as before, writ of error, a transcript merely being sent up. The judgment is in no manner superseded, invalidated or affected by the pendency of the writ of error. The execution only is stayed or superseded by giving bond. The judgment is a provable debt. (*In re Daniel Sheehan*, 8 B. R. 345.)

Where the claim is for unliquidated damages, there must be an assessment of the damages by the court before the claim can be proved. The court is not called upon to order an assessment unless the creditor applies for the same. (*In re Clough*, 2 B. R. 151; s. c. 2 Ben. 508.)

A claim for losses arising from the failure of the bankrupt to accept goods purchased by a broker in his own name for the bankrupt is a claim for unliquidated damages, and can not be proved without an assessment. (*In re W. Fleming Smith*, 6 Ben. 137.)

SEC. 5068.—In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statutes—April 4, 1800, ch. 19, § 39, 2 Stat. 32; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

The only contingent debts and contingent liabilities allowed to be proved are those contracted by the bankrupt. (*Zimmer v. Schleeauf*, 11 B. R. 313; s. c. 115 Mass. 52.)

A bankrupt law may be so framed as to avoid and annul all contracts existing at the time of the bankruptcy, whether the liability of the bankrupt upon such contracts was fixed at the time of the bankruptcy or depended entirely upon contingencies which might afterwards arise. (*Shelton v. Pease*, 10 Mo. 473)

The phrase "contingent debt" means not demands whose existence depends on a contingency, but existing demands upon which the cause of action depends on a contingency. (*French v. Morse*, 68 Mass. 111.)

The term contingent demand is inapplicable where a present claim exists or where it is certain to arise in future, and is only appropriate when there is no claim *in præsenti*, and when it is uncertain whether any in fact will arise. (*Jemison v. Blowers*, 5 Barb. 686.)

It is necessary to distinguish between a contingent demand and a contingency whether there ever will be a demand. (*Woodard v. Herbert*, 24 Me. 358.)

The contingent demands provided for by the statute are those contingent demands which are in existence as such, and in such a condition that their value can be estimated. (*Woodard v. Herbert*, 24 Me. 358.)

Every joint debtor has a demand against his codebtor contingent upon his being compelled to pay more than his share of the debt, and such demand is provable. (*Dean v. Speakman*, 7 Blackf. 317; *Frentress v. Markle*, 2 Greene, 553; *Clarke v. Porter*, 25 Penn. 141.)

As long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable. A covenant for an indefeasible title in fee can not be proved when the claim consists merely of a contingent right of dower in the wife of one of the former owners of the property. (*Riggin v. Maguire*, 8 B. R. 484; s. c. 15 Wall. 549.)

If a party placed property in the hands of the bankrupt at the time of signing a bond to obtain a release thereof from an attachment under an agreement that it should be held until the liability on the bond was terminated, the claim is not provable if the attachment is not dismissed until after the granting of a discharge. (*Jacobson v. Horne*, 52 Miss. 185.)

This provision has no application to a claim for storage which arose after the commencement of proceedings in bankruptcy, under a contract which was terminable at pleasure. There must be a debt or liability either as principal or surety, which, if the contingency has happened, or the term of credit has expired, will be ascertainable. (*Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.)

Where the payment of a debt can not be enforced until the happening of some contingency, such debt being readily estimated, may be proved; or, if the extent of a liability depends on the happening of a contingency, and such contingency is reasonably certain to happen before final dividend, the court may by some method determine the value to be placed by the claimant on such value and admit him to prove it. (*U. S. v. Throckmorton*, 8 B. R. 309; s. c. 5 C. L. N. 520; s. c. 6 Pac. L. R. 102; s. c. 18 I. R. R. 54.)

A bond given by the bankrupt to obtain the delivery of property is not a provable debt, unless the decision on which the liability depends was rendered before the final dividend. (*U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.)

The liability of the sureties of a guardian attaches whenever the guardian receives property of his ward, and becomes a debt on and to the extent of the guardian's default, and is a contingent liability. (*Jones v. Knox*, 8 B. R. 559; s. c. 46 Ala. 53.)

Although a ground rent deed contains a stipulation that the rent shall cease on payment of a certain sum within a certain period, yet it is not a contingent demand. The payment of the principal sum depends wholly upon the election of the covenantor. A ground rent is an incorporeal hereditament, and can not be styled a contingent demand or a debt. (*Large v. Bosler*, 3 Penn. L. J. 246.)

A covenant in a deed to warrant the title against all liens or incumbrances is a provable demand. (*Shelton v. Pease*, 10 Mo. 473.)

A covenant against incumbrances is not a provable debt, unless the breach occurs before the discharge of the bankrupt. (*French v. Morse*, 68 Mass. 111.)

The grantee of land which at the time of the grant is subject to incumbrances which may defeat it, has, before eviction, a contingent demand against his grantor upon the covenant for quiet enjoyment in his deed, and the claim is provable, although the breach occurs after the commencement of the proceedings in bankruptcy. (*Jemison v. Blowers*, 5 Barb. 686.)

The levy of a *fi. fa.* on the land without more is not sufficient evidence of a breach of a warranty of title. (*Williams v. Harkins*, 15 B. R. 34; s. c. 55 Geo. 172.)

A note which is deposited in the hands of a third party, for the sole purpose of enabling the creditor to determine whether he will elect to abide by a certain contract and receive the note, is a contingent claim. (*Spalding v. Dixon*, 21 Vt. 45.)

A promise to pay when the debtor becomes able, is a contingent demand. (*Kingston v. Wharton*, 2 S. & R. 208.)

A policy of insurance is provable, although the loss does not occur until after the commencement of the proceedings in bankruptcy, for it is a contingent liability. (*In re American Glass Ins. Co.* 12 B. R. 56.)

If a policy of insurance contains a stipulation that the insured may surrender it any time, and that thereupon the company shall retain the customary short time rates of premium for each month entered upon before the surrender, the provable debt is the difference between the premium originally paid in advance, and such sum as would have been payable according to the tariff of short time rates for the time that elapsed before the surrender, counting a month which has been begun as a whole month. (*Ex parte Derry Mills*, 7 A. L. Rev. 573.)

The proof of the debt is deemed equivalent to the commencement of a suit, within the spirit and meaning of the "year clause," and a failure or neglect to make such proof, or bring a suit within twelve months from the time when the loss accrued, bars the claim as effectually as would the failure to sue if the company were not in bankruptcy. (*In re Fireman's Ins. Co.* 8 B. R. 123; s. c. 3 Biss. 462.)

If a loss upon a policy has been duly and regularly adjusted in good faith before the company is adjudicated a bankrupt, the claim can be proven like any other debt, without regard to the "year clause" of the policy. (*In re Fireman's Ins. Co.* 8 B. R. 123; s. c. 3 Biss. 462.)

If the preliminary proofs are not submitted or acted upon until after the petition is filed in bankruptcy, the assured, in order to preserve his claim, must not only present his preliminary proofs, but must also make his proof in bankruptcy as the equivalent or substitute for the commencement of a suit within twelve months. The assignee has no right to make an express promise to pay the loss as adjudged, and the law will not imply one against him from what he may do. If the assured fails to follow up the preliminary proof by proving his debt in bankruptcy, his claim will be barred by the "year clause." (*In re Fireman's Ins. Co.* 8 B. R. 123; s. c. 3 Biss. 462.)

It is the duty of the assured to furnish such preliminary proof as the terms of his policy require, and bring himself within the terms of his contract. The assignee can make no waiver of such proof. His duty requires him to allow and pay no claim for losses, unless the assured first furnishes all the proofs, and submits, on request, to the examination provided for. As an officer of the court, he can allow no claim or debt upon his own information or knowledge, and can waive the performance of no condition which the assured is bound to perform in

order to vitalize his demand. Even where proofs have been furnished, and losses adjusted before adjudication, especially if such adjustment was made after the intervention of actual insolvency, it would undoubtedly be the right and duty of the assignee to examine and revise such proofs and adjustment, and call for further proof if the claim was not clearly made out, or there was any evidence of the lack of entire good faith in the adjustment. (*In re Fireman's Ins. Co.* 8 B. R. 123; s. c. 3 Biss. 462.)

Where there is clear evidence of the waiver of the preliminary proof by the company prior to the filing of the petition, shown in the proof of debt, the claim should be allowed, subject to the right of the assignee to have inquiry made into all the facts touching such alleged waiver. (*In re Fireman's Ins. Co.* 8 B. R. 123; s. c. 3 Biss. 462.)

The clause, "loss, if any, payable at the same time and *pro rata* with the insured" in a policy of reinsurance, means that the reinsuring company shall not pay any more loss than the original company is liable for—that is, the reinsuring company is to have the benefit of any deductions, by reason of other insurance or salvage, that the original company would have, and also to have the benefit of any time for delay which the original company might claim, so that the liability of the reinsuring company shall be coextensive only with the liability of the original company. The claim of the company primarily liable against the reinsuring company is not limited by its ability to meet its obligations to its original policy holders. It may therefore prove for the full loss, although it has only paid a certain per cent. to the original policy holders. (*In re Republic Ins. Co.* 8 B. R. 197; s. c. 3 Biss. 504.)

If a policy is to be void unless the premium note is paid, and the vessel is stranded after the maturity of the note and before its payment, the holder has no claim, although the vessel could have been saved if a storm had not arisen after the payment of the note. (*Cardwell v. Republic Fire Ins. Co.* 12 B. R. 253; s. c. 7 C. L. N. 282.)

If the company that granted a reinsurance receives copies of the preliminary proofs from the company that granted the original policy without objection, this is a waiver of any right to demand original proof. (*In re Republic Ins. Co.* 8 B. R. 197; s. c. 3 Biss. 504.)

SEC. 5069.—When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed and before final dividend is declared.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

A claim against a bankrupt as drawer, indorser, surety, bail, or guarantor, can not be proved before the liability has become fixed. Until that time, it is not regarded as a debt due and payable, or even as a debt existing but not payable until a future day, so as to be provable. (*In re Loder*, 4 B. R. 190; s. c. 4 Ben. 305.)

To charge the bankrupt as indorser upon a note payable upon demand, the note must be presented for payment within a reasonable time. A demand after the lapse of more than four years is not sufficient. (*In re Crawford*, 5 B. R. 301.)

If a note is passed to the holder for a loan made by him to the bankrupt who indorses it, the claim is provable, whether the note is negotiable or not. (*In re Granger & Sabin*, 8 B. R. 30.)

If a party intending to take the property of a corporation and pay its debts, buys one of its notes, this does not release the indorser. (*In re Elliott Felting Mills*, 13 B. R. 160.)

A representation that a note has been paid does not operate as an estoppel in favor of an indorser unless there has been some actual loss. (*In re Elliott Felting Mills*, 13 B. R. 160.)

The giving of time to a maker does not release an indorser, unless there was a valid contract which could be enforced. (*In re Elliott Felting Mills*, 13 B. R. 160.)

A valid agreement for extension of time between the holder of a note and the maker, without reservation, discharges the indorser. If a valid extension is shown, the burden is upon the holder to prove a reservation of all rights and remedies against the indorser. Such agreement must be express, and made at the time and as a part of the transaction. (*In re Granger & Sabin*, 8 B. R. 30.)

Whenever an indorser's liability has become fixed, such liability constitutes a debt due and payable from him, and may be proved against his estate. (*In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; *in re Cram*, 1 B. R. 504; s. c. 1 L. T. B. 65.)

But when a payment has been made, the unpaid balance is all that can be proved. When the payment consists of property, the title to which has become absolute in the creditor by foreclosure, the debt can not be proved until an assignee has been elected and has fixed the value of the property. (*In re Cram*, 1 B. R. 504; s. c. 1 L. T. B. 65.)

Indorsers who are liable in the second instance are included in the statute, and such a claim is provable. (*McNeil v. Knott*, 11 Geo. 142.)

If the holder of a note indorses it to be liable in the second instance, the right of action accrues immediately upon the indorsement if the maker has paid the note while in the hands of a prior holder. (*McNeil v. Knott*, 11 Geo. 142.)

A party who takes an accommodation note indorsed for the benefit of the maker as collateral security for an antecedent debt, without any notice of any want of consideration, is a *bona fide* holder for a valuable consideration, and may prove the claim against the indorser. (*Fogg v. Stickney*, 11 B. R. 167.)

A jail bond is not a provable debt or claim, either against the debtor or his bail, unless there has been a breach of the condition prior to the commencement of the proceedings in bankruptcy. (*Dyer v. Cleveland*, 18 Vt. 241.)

A guaranty that if a claim can not be recovered from the debtor, the guarantor will pay it, is a provable debt. (*Stone v. Miller*, 16 Penn. 450.)

A bond given to release a debtor from arrest, and conditioned that he will, within fifteen days after the term at which judgment may be rendered, notify the creditor for the purpose of disclosure and examination, is not a demand provable against the surety where the judgment is rendered after the commencement of the proceedings in bankruptcy. (*Woodard v. Herbert*, 24 Me. 358.)

The omission to file an account is a mere formal breach of a probate bond, and furnishes a claim for nominal damages only, and so is not a claim provable against the surety. (*Loring v. Kendall*, 67 Mass. 305.)

A sheriff who holds a bond of indemnity against liability for executing a *fi. fa.* has a provable debt if judgment was rendered against him in an action by the owner of the goods prior to the commencement of the proceedings in bankruptcy. (*Wartmough v. Gilliams*, 1 Phila. 572.)



A bond conditioned for the faithful performance of the duty of a public officer, is not, prior to breach, a debt either *in presenti* or *in futuro*, and is not provable against the surety. (*Loring v. Kendall*, 67 Mass. 305; *Turner v. Esselman*, 15 Ala. 690.)

As between cosureties no claim exists until payment has been made upon the debt by one of them. There is no existing liability from one surety to the other, until that event. If the payment is not made until after the final dividend, there is no claim contingent or otherwise that can be proved. (*Swain v. Barber*, 29 Vt. 292; *Dunn v. Sparks*, 1 Ind. 397; *contra*, *Tobias v. Rogers*, 13 N. Y. 59.)

The claim of a surety against his cosurety, on an official bond for money which the former was compelled to pay after the final dividend, is not a provable debt, although the breach occurred before that time. (*Goss v. Gibson*, 8 Humph. 197; *Dole v. Warren*, 32 Me. 94.)

If the bankrupt puts another in possession of premises leased by him, but agrees to be accountable for the rent until they are relet, the claim for rent is provable. (*In re Cosmore G. Bruce*, 6 Ben. 515.)

A covenant to pay the debt due to another, is for a debt certain or capable of being reduced to a certainty, and is provable. (*Murray v. De Rottenham*, 6 Johns. Ch. 52.)

SEC. 5070.—Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This provision contemplates two cases, 1st. Where the whole debt has been paid, and the creditor satisfied by the surety, the latter may prove the debt, or, if it has already been proved by the creditor, the surety may stand in the place of the latter. 2d. Where the surety has not paid the whole debt, but is still liable for the same or any part thereof, he may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise. It is evident that the debt to be proved by the surety in the latter case is not the indebtedness of the bankrupt to him for the amount which may have been paid by him, but the whole indebtedness of the bankrupt to the creditor. This provision is the necessary consequence of the preceding clause, and indispensable for the protection of the surety, for if he has not satisfied the whole debt, he can not prove under the first clause, and if the creditor who has been in part satisfied, should choose not to prove, the surety who has paid part, and is liable for the balance, would be deprived of all share in the bankrupt's estate. The two clauses together secure the attainment of justice in all cases. By the first the surety who has discharged the debt, is subrogated to the right of the creditor whom he has paid. By the second the creditor may prove the whole

debt. The surety can not in such case prove, for that would be to allow the same debt to be proved, in part, twice. But if the surety has paid part, the creditor, after receiving in dividends, satisfaction of the balance due him, will hold as trustee for the surety, any dividends received by him in excess. If the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor. The estate will thus pay dividends only on the true amount of the indebtedness, the creditor, who has the double security of the bankrupt's liability, and that of the surety, will be satisfied, while the surety will be reimbursed, either through the creditor, if he proves, or directly by himself, proving the debt in the creditor's name, that portion of the debt he has paid, or is liable for, to which as a creditor of the bankrupt he is entitled. This result, however, can only be attained by allowing the creditor who has been partly paid by the surety to prove and receive dividends on the whole debt, or the surety, who in case of omission by the creditor proves in his name, to make like proof and receive like dividends. (*In re Ellerhorst & Co.* 5 B. R. 144.)

A surety has a provable claim against the principal, although he has not paid the debt for which he is liable. (*Mace v. Wells*, 7 How. 272; s. c. 17 Vt. 503; *Kyle v. Bostick*, 10 Ala. 589; *Fulwood v. Bushfield*, 14 Penn. 90; *Tubbs v. Williams*, 9 Ired. 1; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 464; *contra*, *McMullin v. Bank*, 2 Penn. 343; *Cake v. Lewis*, 8 Penn. 493.)

A surety has a provable debt against the principal, although the debt does not fall due until after the commencement of the proceedings in bankruptcy. (*Crafts v. Mott*, 4 N. Y. 603; s. c. 5 Barb. 305.)

The claim of an indorser against the principal is provable, although the indorser does not pay the note until after the commencement of the proceedings in bankruptcy. (*Hardy v. Carter*, 8 Humph. 153; *Tunno v. Bethune*, 2 Des-sau. 285.)

If the drawer is not a cosurety with the payee of a bill of exchange drawn for the accommodation of the acceptor, the claim of the payee is a provable debt. (*Dunn v. Sparks*, 7 Ind. 490.)

An accommodation maker who has not paid the note can not prove his claim if the holder has proved the note, for the demand can not be twice proved. (*In re Morse & Co.* 11 B. R. 482.)

The solvent partner stands in the relation of a surety to the bankrupt for the firm debt, and may prove for the latter's share of the indebtedness upon showing simply that he stands liable for payment. (*Butcher v. Forman*, 6 Hill, 583.)

If a party who is liable with the bankrupt as a maker of a joint and several note, is merely surety for the bankrupt, and takes up the note by giving the holder his own individual note, he is entitled to prove his debt. (*In re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.)

A second indorser upon a note of the bankrupt is entitled to prove the claim by way of security against the possible responsibility of any of the parties personally liable, and then his right to share in the dividends will depend upon his having paid any or all of the note. (*In re Henry B. Montgomery*, 3 B. R. 426; s. c. 3 Ben. 565.)

If the creditor has proved the claim, the surety may apply to the court for an order that the proof shall stand for his benefit to the extent of the payments made by him thereon. (*Downing v. Traders' Bank*, 11 B. R. 371; s. c. 2 Dillon, 136.)

This clause does not authorize proof by the party so liable, only in a case where the real creditor could prove his claim. (*Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.)

A surety upon an official bond has no claim against the officer until he has suffered an injury in consequence of becoming surety. (*Ellis v. Ham*, 28 Me. 385.)

The claim of a surety on an official bond, arising from the neglect of the officer, is not a provable demand against the principal when there is no proof that he has not faithfully discharged all his official duties, although he at the time has actually been guilty of official neglect. (*Ellis v. Ham*, 28 Me. 385.)

A bond to indemnify a party against a mortgage signed by the creditor jointly with the bankrupt is a provable debt, although the installments which the holder is compelled to pay fall due after the commencement of the proceedings in bankruptcy. (*Crafts v. Mott*, 4 N. Y. 603; s. c. 5 Barb. 305.)

A creditor who holds a note made for the accommodation of the bankrupt, and indorsed by him, and upon which, under the authority of the court, he has effected a settlement with the maker at forty cents on the dollar, without prejudice to his rights against the bankrupt, can only prove for the balance against the bankrupt's estate. (*In re Howard, Cole & Co.* 4 B. R. 571; s. c. 2 L. T. B. 161.)

If a creditor holding a draft drawn by the bankrupt and accepted for his accommodation, receives a part payment from the acceptor without prejudice, after the commencement of proceedings in bankruptcy, he may prove the whole amount of the draft against the estate, and at most will only be liable to be treated as proving in part for the benefit of the acceptor. (*Downing v. Traders' Bank*, 11 B. R. 371; s. c. 2 Dillon, 136.)

Where an indorser pays a certain sum in discharge of his liability on a note, the holder may prove the full amount against the estate of the maker without giving credit for what he receives from the indorser. The legal effect of the transaction is an agreement not to sue the indorser, and the holder remains the owner of the whole debt in trust to collect it from the principal debtor and to pay the remainder of his own demand first, and to then turn the balance over to the indorser, who has a right to be indemnified subject only to the holder's better title. (*Ex parte Talcott*, 9 B. R. 502.)

SEC. 5071.—Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

The words "the time of bankruptcy" mean the time when the petition was filed, to which time the adjudication relates. Rent for the time after the commencement of proceedings in bankruptcy is not a provable debt. Where an article is purchased, the consideration is, or is assumed to be executed, while in the case of rent the consideration is assumed to be not executed, but executory, the use and occupation being *in futuro*. (*May v. Merwin*, 9 B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238; *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578; *in re Lynch & Bernstein*, 7 Ben. 26; *in re Peter Hufnagel*, 12 B. R. 554.)

Rent accruing after bankruptcy can not be brought in question in the bankruptcy court. (*Wyllie v. Breck*, 2 Woods, 673.)

Rent should be allowed only up to the time of the commencement of the proceedings in bankruptcy, and not to the time of the adjudication. (*Wyllie v. Breck*, 2 Woods, 673.)

Rent should be allowed from the commencement of the term, although the term begins before the date of the lease. (*Wylie v. Breck*, 2 Woods, 678.)

Where the property has been condemned for public uses, and a certain sum allowed to the bankrupt, upon the theory that he would remain liable for the rent till the termination of the lease, the landlord may prove a claim for the full rent, with a proper rebate of interest. (*In re John Clancy*, 10 B. R. 215.)

Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. Rent is a lien under the statutes of Maryland, Virginia, Kentucky, New Jersey, South Carolina, Mississippi, Georgia, and Louisiana. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *in re Dunham & Hawkes*, 7 Phila. 611; *in re Trim et al.* 5 B. R. 23; *in re Webb & Co.* 6 B. R. 302; *Walker v. Barton*, 3 B. R. 265; s. c. 1 B. L. T. 625; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Austin v. O'Riley*, 12 B. R. 329; s. c. 8 B. R. 129; s. c. 2 Woods, 670; *contra*, *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578; *Loudon v. Blanford*, 56 Geo. 150.)

The lien is not waived by a mere agreement to forbear to distrain upon the condition that the property shall be kept upon the premises. (*Walker v. Barton*, 3 B. R. 265; s. c. 1 B. L. T. 625.)

Where the statute of 8 Anne, ch. xiv, or similar statutory provisions prevail, the landlord, by making a demand upon the assignee, before the removal of the goods, for an amount not exceeding a year's rent, is entitled to priority of payment, whether the right of distraining exists or not. (*In re Appold*, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; s. c. 1 B. L. T. 625; *in re Trim et al.* 5 B. R. 23; *Longstreth v. Pennock*, 20 Wall. 575; s. c. 7 B. R. 449; s. c. 12 B. R. 95; s. c. 9 Phila. 394; *contra*, *in re H. L. Butler*, 6 B. R. 501; s. c. 19 Pitts. L. J. 146.)

If a trustee under an assignment for the benefit of creditors sells the goods after the commencement of the proceedings in bankruptcy, and delivers the proceeds to the assignee, the landlord is entitled to priority of payment out of the same. (*In re Bowne & Ten Eyck*, 12 B. R. 529.)

If an execution is issued before the commencement of the proceedings in bankruptcy, the landlord is entitled to a priority for the rent in arrear, although the levy was not made nor notice of the rent given to the sheriff until after that time. (*Barnes' Appeal*, 13 B. R. 543; s. c. 76 Penn. 50.)

If the lease contains a provision that the whole rent for the term shall become due and payable whenever the lessee attempts to remove the property without paying the same, and that distraint may issue therefor, a distress for the rent on the happening of the contingency is valid. (*Goodwin v. Sharkey*, 15 B. R. 526; s. c. 80 Penn. 149.)

The landlord's right to rent against the bankrupt's estate expires on the day of adjudication. (*In re Webb & Co.* 6 B. R. 302.)

Under the statutes of Illinois, a distress for rent is in the nature of an attachment upon *mesne* process. Hence, the assignee of a bankrupt tenant is vested with all the property of the tenant upon which a distress warrant has been issued and levied, prior to the granting of the certificate of the court to the officer of the amount due from the tenant, and assessed and entered of record. But where the right of the landlord has been exercised by the issuing and levy of the warrant, and filing a copy of that and of the inventory of the goods before the magistrate, or in the proper court, and the obtaining of the certificate of the amount found due, the landlord has a priority over the general creditors. Where no distress warrant has been issued prior to the filing of the petition in bankruptcy, the landlord can have no priority or preference over the general creditors. (*In re Joslyn et al.* 3 B. R. 473; s. c. 2 Biss. 235; *Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.)

A mortgage to secure the rent under a lease which provides for its termination, if the assignee, in case of the bankruptcy of the lessee, shall not accept the lease within ten days after his appointment, is a security for the payment of the rent up to the time when the assignee elects not to take the lease, although more than ten days have elapsed. (*In re R. F. Yeaton*, Lowell, 420.)

If a chattel mortgage executed in pursuance of the terms of a lease is void under the recording laws of the State, the lessor has neither a legal nor an equitable lien. (*Platt v. Stewart*, 13 Blatch. 481.)

Where a lease stipulates that all unpaid rent shall be a mortgage lien upon the property on the premises, it creates an equitable lien that is valid against the assignee. (*McLean v. Klein*, 3 Dillon, 113.)

A lease containing a covenant that the lease shall operate as a mortgage upon all property placed on the premises to secure the rent accruing thereunder, is void as against the creditors of an assignee of the lease, although it is properly recorded as a chattel mortgage, unless it is accompanied by some evidence or notice that he holds the premises subject thereto. (*In re Dyke & Marr*, 9 B. R. 480.)

All right to priority under a lease which stipulates that the rent shall be a lien on the property placed on the premises, and gives the landlord the power to take possession thereof, is terminated if the assignee takes possession before the landlord does. (*In re Dyke & Marr*, 9 B. R. 480.)

A lease which contains a covenant that the lease shall constitute a mortgage on the property placed on the premises to secure the rent accruing thereunder, is void unless it is properly recorded as a chattel mortgage. (*In re Dyke & Marr*, 9 B. R. 480.)

If the assignee elects not to accept the lease, the landlord can not prove for the damages suffered by him in reletting the premises. Future rent is not a contingent debt or liability. There is no right of action at the time of the bankruptcy, except for the arrears. (*Ex parte Houghton et al.* Lowell, 554.)

If the landlord re-enters, under a power contained in the lease, such entry puts an end to the term, and to all claim for future rent. (*Ex parte Houghton et al.* Lowell, 554.)

Damages for alterations, made in violation of a covenant contained in a lease, constitute a provable demand. (*Ex parte Houghton et al.* Lowell, 554.)

A covenant to pay taxes assessed during the term, where they are assessed as of the first day of May in each year, includes only those taxes which were assessed in the months of May during the continuance of the term. (*Ex parte Houghton et al.* Lowell, 554.)

If the bankrupt, as sub-lessee, covenants to pay the taxes, and they are assessed to the owner of the estate, the claim of the mesne landlord, if he pays them, is not entitled to preference, because, as between the parties, it rested in contract merely, and was, to all intents and purposes, a part of the rent. As the taxes were not assessed to the bankrupt, the State had no right to prove them in bankruptcy. (*Ex parte Houghton et al.* Lowell, 554.)

If the landlord takes a note for the rent which is not paid at maturity, he is entitled to all his remedies for the security or collection of the debt in the same manner as if the note had never been given. (*In re Bowne & Ten Eyck*, 12 B. R. 529.)

A distress warrant can not be issued against the property of the bankrupt after the commencement of proceedings in bankruptcy. No lien can be acquired or enforced by any proceedings in a State court after the petition has been filed. (*In re Wynne*, 4 B. R. 23; s. c. *Chase*, 227; s. c. 2 L. T. B. 116; *Brock v. Terrell*, 2 B. R. 643; *Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.)

Until an assignee in bankruptcy elects to accept a lease as assignee he does

not become liable for rent accruing after the adjudication and assignment in bankruptcy. (*In re Ten Eyck & Choate*, 7 B. R. 26.)

Occupation of the premises, independently of the lease, is not evidence of an election to accept it. (*In re Ten Eyck & Choate*, 7 B. R. 26.)

Merely allowing the bankrupt's goods to remain on the premises does not alone prove an acceptance of the lease, especially when the key is sent back to the lessor, which is an unequivocal act of renunciation. (*In re R. F. Yeaton*, Lowell, 420)

If the assignee rejects the lease, and the bankrupt collects rents from a sub-tenant, the district court, on the application of the lessor, may direct that such sub-rents shall be applied to pay so much of the original rent as is provable in bankruptcy. (*Wylie v. Breck*, 2 Woods, 673.)

If a joint lease to the bankrupt and another reserves the right to re-enter for the non-payment of the rent, and the tenants, by a sub-agreement, apportion the property and the rent among themselves, the tenants will be entitled to as full use of the whole premises as the assignee, until the latter pays in full what the bankrupt was to pay by the sub-agreement in order to enjoy the exclusive use of his part as against the solvent tenant. But the solvent tenant is not entitled to the exclusive use of the entire premises until the assignee pays the arrears of rent. (*In re Hotchkiss*, 9 B. R. 488; s. c. 7 Ben. 235.)

Rent for the use of premises to store goods of the bankrupt, from the time of the commencement of proceedings in bankruptcy to the date of surrender, should be paid by the assignee, and charged as a part of his expenses. (*In re Walton*, 1 B. R. 557; s. c. 1 Deady, 598; s. c. 1 L. T. B. 162; *in re Appold*, note, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; s. c. 1 B. L. T. 625; *in re Merrifield*, 3 B. R. 98; *in re Laurie*, Blood & Hammond, 4 B. R. 32; s. c. Lowell, 404; *in re Dunham & Hawkes*, 7 Phila. 611; *in re Webb & Co.* 6 B. R. 302; *in re H. L. Butler*, 6 B. R. 501; s. c. 19 Pitts. L. J. 146; *in re Lynch & Bernstein*, 7 Ben. 26; *in re Peter Hufnagel*, 12 B. R. 554.)

The landlord is not entitled necessarily as a question of law to full rent of the premises from the commencement of the proceedings in bankruptcy to the date of the surrender. (*In re Lynch & Bernstein*, 7 Ben. 26.)

A landlord has no lien on the goods on the premises for the rent that accrues after the commencement of proceedings in bankruptcy, for the debt is not provable. (*Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578.)

The fact that an injury to the building was prevented by not removing the machinery, is not a circumstance that can be considered in determining the amount of the compensation for the use of premises. (*In re Breck & Schemerhorn*, 12 B. R. 215; s. c. 9 Pac. L. R. 242.)

A reasonable compensation may be allowed to the landlord for the use of premises after the commencement of the proceedings in bankruptcy, where the estate has received a benefit to that amount. (*In re Breck & Schemerhorn*, 12 B. R. 215; s. c. 9 Pac. L. R. 242; *in re Hamburger & Frankel*, 12 B. R. 277.)

If the landlord desires to obtain compensation equal to the rent offered by other persons, he should ask the court to sanction the rate of rent or give up the premises. It is not enough to ask possession or rent from the marshal. (*In re Joseph Metz*, 6 Ben. 571.)

A covenant to pay taxes upon a certain piece of ground as to all taxes imposed after the discharge can not be proved. (*Murray v. De Rottenham*, 6 Johns. Ch. 52.)

A claim for storage which accrued after the commencement of proceedings

in bankruptcy, is not a provable debt. (*Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.)

SEC. 5072.—No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

Statute Revised—March 2, 1867, ch. 176, § 19, 14 Stat. 525.)

The provisions in regard to what debts may be proved are arbitrary, but do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If a debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable, it does not come in for a dividend, and will not be discharged. (*In re May & Merwin*, 9 B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238.)

If creditors whose debts arose subsequent to the bankruptcy were permitted to share with those whose demands accrued before, the latter would be exposed to the hardship of having only a dividend in bankruptcy, while the former, besides an equal dividend, would retain a remedy for the residue against the bankrupt himself and his future property. The privilege, therefore, of creditors to prove and of the bankrupts to be discharged from debts is wisely made coextensive and commensurate. (*Rathbone v. Blackford*, 1 Caines, 588.)

SEC. 5073.—In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition,\* or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.

Statute Revised—March 2, 1867, ch. 176, § 20, 14 Stat. 526. Prior Statutes—April 4, 1800, ch. 19, § 42, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual, and must be in the same right. (*Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610.)

The term "debt" is fairly to be construed to mean any debt for which the act provides. A debt which may be proved, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section. (*Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419.)

The term "mutual credits" in the bankrupt act is more comprehensive than the term "mutual debts" in the statutes relating to set-off. The term credit is synonymous with trust, and the trust or credit need not be of money on both sides. Where a creditor has goods or choses in action of the bankrupt put in his hands before bankruptcy, by a valid contract, by the terms of which the deposit will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankrupt act. (*Ex parte Caylus et al.* Lowell, 550; *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192; *Murray v. Riggs*, 15 Johns. 571.)

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\* So amended by act of 22 June, 1874, ch. 390, § 6, 18 Stat. 179.

A creditor who at the time of the bankruptcy has in his hands goods or chattels of the bankrupt, with a power of sale, or *chooses in action*, with a power of collection, may sell the goods or collect the claims and set them off against the debt the bankrupt owes him. (*In re Dow et al.* 14 B. R. 307.)

A party who holds stock of the bankrupt as collateral for a certain debt which was overdue at the commencement of the proceedings in bankruptcy, may, if he has power to sell the stock, retain the surplus by way of set-off on another claim which he holds against the bankrupt. (*In re Dow et al.* 14 B. R. 307.)

Where the same persons conduct business under two different names in different places, there is no implied ulterior lien upon the surplus of the securities deposited with one house for any deficiency in the value of the securities deposited with the other house. (*Sparhawk v. Drexel*, 12 B. R. 450.)

If the debtor knows that two houses are composed of the same persons, and the declarations or acts of the parties pending the business indicate a belief upon each side, that either house may control the securities deposited with the other house, an ulterior lien will attach in favor of either house upon any surplus in the value of the securities deposited with the other house. (*Sparhawk v. Drexel*, 12 B. R. 450.)

A partnership can not retain the surplus arising from the sale of securities deposited with a member of the firm to secure a loan made by him without a positive appropriation by the bankrupt to their claim, or an agreement of equivalent effect. (*Sparhawk v. Drexel*, 12 B. R. 450.)

A creditor who purchases a secured claim and receives a transfer of the securities, can not retain the surplus arising from the sale of the securities on account of his own claim. (*Sparhawk v. Drexel*, 12 B. R. 450.)

If a banker in the regular course of business receives drafts for collection, he may retain the amount so collected to pay an indebtedness due to him, although the money was collected after the commencement of the proceedings in bankruptcy. (*In re Farnsworth, Brown & Co.* 14 B. R. 148; s. c. 5 Biss. 224.)

The words "mutual credit" are broad enough to include an indorser on a bill of exchange which was protested before the commencement of the proceedings in bankruptcy, although he did not pay it until afterwards. (*Marks v. Barker*, 1 Wash. 178.)

Before an indorser can offset a liability on a draft indorsed for the bankrupt, he must show the debt to be subsisting in him alone, for the debt attempted to be set off must be a good and subsisting one at the time the action is brought. (*Marks v. Barker*, 1 Wash. 178.)

The claim may be set off by the holder, although he has never proved it in bankruptcy. (*Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419.)

A stockholder can not set off a claim held by him upon the corporation against a demand for an unpaid subscription for stock. The debts are not mutual. The debt due on the subscription is a trust fund devoted to the payment of all the creditors of the company. As soon as the company becomes insolvent, and the fact becomes known to the stockholder, the right of set-off for an ordinary debt, to its full amount, ceases. It becomes a fund belonging in equity equally to all the creditors, and can not be appropriated by the debtor to the exclusive payment of his own claim. (*Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610; *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424; *Jenkins v. Armour*, 14 B. R. 276; s. c. 6 Biss. 312.)

A claim for a loss on a policy of insurance may be set off against an indebtedness from the holder to the company for money deposited with him as a banker.



(*Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424.)

If a stockholder purchases a claim against the corporation and accepts his stock note in return therefor, he is liable for interest from the date of the conversion. (*Jenkins v. Armour*, 14 B. R. 276; s. c. 6 Biss. 312.)

Losses upon policies of insurance may be set off against money borrowed from the insurance company. (*Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.)

A party who has acted under a deed of trust, for the benefit of creditors, declared void as being contrary to the provisions of the bankrupt act, is entitled to set off the value of the services rendered by him under such deed against the claim for property that came to his hands under it, even though he did have notice of the act of bankruptcy committed by the bankrupt at the time of the rendering of the services. (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

A joint claim—that is to say, a debt due to several joint creditors—can not be set off against a debt due by one of them. If a debt is due to A. and B. how can any court compel the appropriation of it to pay the indebtedness of A. to the common debtor, without committing injustice towards B.? The debtor who owes a debt to several creditors jointly can not discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim, and can not be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. (*Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. [N. S.] 195; *Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276.)

If A. and B. are indebted upon a joint note to a bankrupt insurance company, and B. and C. have a joint claim for a loss under a policy issued by the company, the claim under the policy can not be set off against the note, for there is neither a mutual debt nor a mutual credit. (*Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. [N. S.] 195.)

The set-off can not be allowed in such a case, even though the liability on the note is several as well as joint, and C. consents to the set-off. (*Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. [N. S.] 195.)

A joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt, and the fact that it may be subject to be marshaled makes no difference. The joint debtors are severally liable *in solido* for the whole debt. (*Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. [N. S.] 195; *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419; *contra*, *Wright v. Foster*, 3 McLean, 229.)

The partnership is a different thing from the partners themselves, and the debts of the firm are different in character from other joint debts. A joint debt incurred by all the partners can not be set off against a demand of the firm upon the creditor who holds the joint obligation. An illegal claim can not be set off. (*Forsyth v. Woods*, 5 B. R. 78; s. c. 11 Wall. 484.)

An unliquidated demand against the bankrupt, as supercargo, for violating his instructions in not keeping the vessel insured, can not be set off against a demand for wages due to him and moneys advanced by him. (*Brown v. Cumming*, 2 Caines, 33.)

A demand against the bankrupt which has arisen since the bankruptcy can not be set off against the assignee. (*Barclay v. Carson*, 2 Hay [N. C.] 243.)

A bond due from the bankrupt can not be set off against a note made after the commencement of the proceedings in bankruptcy, and passed by the payee to the assignee. (*McIver v. Wilson*, 1 Cranch C. C. 423.)

A party who has funds in his hands, arising from the sale of goods, may, in an action of assumpsit therefor set off a claim held by him against the bankrupt, although the goods were shipped to him under a special contract, that the proceeds should be applied to another purpose, and not to such claim so held by him. (*Marks v. Barker*, 1 Wash. 178.)

If a party who had joined with the bankrupt in sending a vessel on a voyage, where he retained the government of the adventure, subsequently indorsed for the bankrupt without a special agreement that he should hold the bankrupt's share in the venture as security, he can not claim to retain the proceeds of the venture to reimburse himself for moneys paid on the indorsements, especially if the cargo did not come into his possession until after the commencement of the proceedings in bankruptcy. (*Tunno v. Bethune*, 2 Dessau. 285.)

If a party takes a deed of land in his own name, and subsequently loans his notes to the person for whose benefit he holds the title, he may retain the land until the notes are paid. (*Frazer v. Hollowell*, 1 Binn. 126.)

A debt payable *in futuro* can be set off against a debt payable *in presenti*. Though there are not debts mutually payable between the parties, there are mutual credits, and the case is within the equity of the statute. (*In re City Bank*, 6 B. R. 71; s. c. 4 C. L. N. 81; *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.)

A claim for unliquidated damages can not be set off by the bankrupt against the claim of a creditor. The creditor has the right to prove his claim in full. (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.)

*Quære.* Can a party, by way of defense to an action by the assignee, plead and set off a claim which has been once presented for proof, and rejected? (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

When the assignee brings an action upon a demand due to the bankrupt, the defendant may plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the judge, and appeal taken to the circuit court. (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

A party has the right to have his credit for a deposit in a bankrupt bank set off against his indebtedness as indorser upon a note held by the bank and duly protested. And if the parties before bankruptcy do what the law allows, and the indorser thus takes up the note, it can not be recovered from him. (*Winslow v. Bliss*, 2 Lans. 220.)

A bank may set off the amount due on a protested draft, against a deposit made by the bankrupt, and need not pay such deposit to the assignee. (*In re H. Petrie*, 7 B. R. 332.)

Any collections in excess of the advances for which they were specifically pledged, made after the commencement of proceedings in bankruptcy, are collections for the account of the assignee, and as to them no right of set-off exists. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.)

A creditor is entitled to retain money due to the bankrupt and apply it to his claim, although he has attempted to obtain a preference thereon, for the debt is a valid debt against the bankrupt, although it can not be proved, and the law allows and requires the set-off. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.)

A creditor who has received and sold the goods of the bankrupt under an agreement to account for the same to a committee of creditors can not set off the balance due from him on the special account against the general balance due him from the creditor. (*In re Troy Woolen Co.* 8 B. R. 412.)

A claim purchased before the filing of the petition in voluntary cases, or be-

fore the act of bankruptcy upon which the adjudication was made in involuntary cases may be set off, although the purchaser knew that the debtor was insolvent. (*Hovey v. Home Ins. Co.* 10 B. R. 224; 13 A. L. Reg. 511; *in re City Bank*, 6 B. R. 71; s. c. 4 C. L. N. 81; *contra*, *Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276.)

A consent to an assignment of an open account given after the commission of the act of bankruptcy, but before the filing of the petition against the debtor, does not confer any higher or better rights upon the holder. (*Rollins v. Twitchell*, 14 B. R. 201.)

A chose in action which is not negotiable, and on which the assignee must sue in the name of the assignor, does not by assignment become a mutual debt or credit in the hands of the assignee, so as to be a matter of set-off. (*Rollins v. Twitchell*, 14 B. R. 201.)

A party who takes a nominal transfer of a claim will be deemed to be trustee for the owner, and can not set it off against a claim due by him to the estate. (*In re Lane, Brett & Co.* 13 B. R. 43.)

If a debtor makes an assignment, and afterwards becomes bankrupt, an agreement made between him and one member of a firm before the assignment that a debt due to him by the partner should be set off against a debt due by him to the firm, can not avail where the other partners only assent to it after the assignment, and some only after the commencement of the proceedings in bankruptcy. (*Clark v. Sparhawk*, 2 W. N. 115.)

A set-off may be allowed against the indorsee of a note who took it after the commencement of proceedings in bankruptcy against the maker, and with notice thereof, whether the note was due or not at the time of the indorsement, for the filing of the petition was legal notice that wherever mutual debts subsisted between the bankrupt and his creditors, the right of set-off attached. (*Humphries v. Blight*, 4 Dall. 370; s. c. 1 Wash. C. C. 44.)

A person who purchases the bankrupt's note while the proceedings in bankruptcy are pending must be deemed to have constructive notice of those proceedings, and is not a *bona fide* purchaser. He succeeds merely to the rights of the creditor, and can not set the note off against a claim due by him to the bankrupt. (*Smith v. Brinkerhoff*, 6 N. Y. 305; s. c. 18 Barb. 519.)

A party can not set off checks of the bankrupt held by him against his own note, unless he proves that he had possession of the checks at the time of the commencement of proceedings in bankruptcy, and upon this point the burden of proof rests on him, because his defense consists of a particular fact of which he is supposed to be connasant. It would be unjust if one person who happened to be indebted to another at the time of the bankruptcy, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. Such an act would be a fraud on the equality of the bankrupt act. (*Ogden v. Cowley*, 2 Johns. 274.)

A party who goes into a court of equity to have an assigned claim allowed as a set-off, must show that he is more than the nominal owner. (*Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276.)

If the debt owing to the bankrupt is not yet due, the creditor may file a bill in equity to obtain the set-off. (*Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.)

The bankruptcy of the payee of a note taken for a debt due to his principal will not affect the right of the maker to such offsets as he acquired under the honest belief that the payee was the owner of the note. (*Yarborough v. Wood*, 42 Tex. 91.)

Proving the entire debt in the proceedings in bankruptcy without offering to abate the claim by any set-off which the creditor may have, is a waiver of the

right to do so, and an election to proceed on such claim alone in the bankrupt proceedings, and the subsequent assertion of part of the same debt by a plea of set-off in an action against the creditor is equivalent to the prosecution of an original suit upon the claim, against the prohibition of the bankrupt law. (*Brown v. Farmers' Bank*, 6 Bush, 198; *Russell v. Owen*, 15 B. R. 322; s. c. 61 Mo. 185.)

SEC. 5074.—When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Statute Revised—March 2, 1867, ch. 176, § 21, 14 Stat. 526.

Two classes of persons are mentioned as embraced in this provision, to wit: 1st, any bankrupt liable upon any bill of exchange, promissory note, or other obligation, in respect to distinct contracts, as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy; 2d, or as a sole trader and also as a member of a firm. Considered separately, the first part of the clause would afford strong support to the proposition that the term sole trader is used in a technical sense; but the whole clause must be construed together, and the last part provides that the circumstance that such firms are, in whole or in part, composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent such proof, and the receipt of dividends, and thus shows that the term sole trader is not used in a technical sense, and that its meaning was intended to be enlarged by the latter part of the clause. (*Emery v. Canal Nat'l Bank*, 7 B. R. 217; s. c. 5 L. T. B. 419.)

SEC. 5075.—When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property; subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and de-

livered up, the creditor shall not be allowed to prove any part of his debt.

Statute Revised—March 2, 1867, ch. 176, § 20, 14 Stat. 526. Prior Statutes—April 4, 1800, ch. 19, § 63, 2 Stat. 36; Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

### Construction.

The general purpose and policy of the act is to produce equality among the creditors of insolvent debtors with the exceptions provided for in the act, and to attain that end its provisions should in cases of extreme doubt be construed beneficially for the general unsecured creditors. (*In re Jaycox & Green*, 8 B. R. 241.)

The term "lien" comprehends all privileges and charges upon the thing recognized by local statutes or long established usages or the principles of general law. (*In re W. C. H. Waddell*, 1 N. Y. Leg. Obs. 53.)

A lien denotes a legal claim or charge on property, whether real or personal, for the payment of any debt or duty. (*Downer v. Brackett*, 21 Vt. 599; s. c. 5 Law Rep. 392; *Storm v. Waddell*, 2 Sandf. Ch. 494.)

In the different States there are various securities upon property, which, by the laws of the respective States, are as essentially a lien on the property as those existing at the common law. These liens or securities, peculiar to the several States, are preserved as well as common-law liens. It is of no importance what they are called, whether liens or securities or anything else. (*Haughton v. Eustis*, 5 Law Rep. 505; *Downer v. Brackett*, 21 Vt. 599; s. c. 5 Law Rep. 392.)

When a party is compelled to pay the debt of a third person in order to protect his own rights, a court of equity substitutes him in the place of the creditor as a matter of course, without any agreement to that effect. (*Whithed v. Pillsbury*, 13 B. R. 241.)

The term "has" is of broader signification than the term holds. Although the holder of a promissory note, the indorser of which is secured by a mortgage upon the property of the bankrupt, has no legal title or common-law right to any mortgage, pledge or lien upon the property of the bankrupt, which can be directly enforced by him under the strict and technical rules of the common law, yet he has in equity and potentially a mortgage, pledge or lien, upon the property of the bankrupt for securing the payment of his debt within the intent and meaning of this provision. (*In re Jaycox & Green*, 8 B. R. 241.)

A mortgage to indemnify a surety does not render the principal debt a secured debt. (*In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts L. J. 113.)

The provision in regard to the proof of secured claims applies only to securities upon property real or personal of the bankrupt. (*In re Anderson*, 12 B. R. 502.)

A claim that is secured by the guaranty indorsement or collateral liability of a third person may be proved as unsecured. (*In re Anderson*, 12 B. R. 502; *in re Hugo Broich*, 15 B. R. 11; *in re Wm. M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

Every line of this section points most distinctly and directly to property of the bankrupt, and only to property of the bankrupt which the district court in bankruptcy can deal with, and does not contemplate the sale of property of third parties held by the claimant as security for his demand. A distinction is taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of the security of a third person transferred to the creditor by the bankrupt or otherwise. In the former case the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent. In the latter case he may prove his debt

in bankruptcy without surrendering the security of the third person which he holds, and may notwithstanding such proof, proceed to enforce his security against such third person, provided, however, that he does not take under the bankruptcy and the security more than the full amount of his debt. (*In re Cram*, 1 B. R. 504; s. c. 1 L. T. B. 65; *in re Dunkerson & Co.* 12 B. R. 413; s. c. 4 Biss. 253; *in re Samuel H. Babcock*, 3 Story, 393.)

When one partner pledges his property as security for a firm debt, the creditor may prove his full claim against the firm without a valuation of the securities. (*In re Dow et al.* 14 B. R. 307.)

The holder of a bill of exchange which the bankrupt accepted for the accommodation of the drawer has the right to prove his debt, and also to proceed against the drawer by attachment until he has recovered the full amount of his debt. The most that the assignee is entitled to is to have the aid of the court in having the attachment suit carried on to its proper conclusion for the benefit of the bankrupt's estate, as far as regards any surplus which may remain after the creditor has received from the dividends in bankruptcy and under the attachment, the full amount of his debt. The creditor is not bound to pursue the attachment suit at his own expense, unless he chooses so to do, but he is bound, if he does not choose to carry it on upon his own account, to allow the assignee to carry it on for the benefit of the bankrupt's estate at the expense thereof. (*In re Samuel H. Babcock*, 3 Story, 393.)

### What Liens are Preserved.

All vested legal or equitable rights and interests in property created by the laws of the State are left undisturbed. But this still leaves open the question, whether a particular claim is a right or interest in property. If it is not, it is not a lien or security. (*In re Stuyvesant Bank*, 9 B. R. 318; s. c. 10 B. R. 399; s. c. 49 How. Pr. 133; s. c. 12 Blatch. 179.)

There is no distinction in the bankrupt law between different kinds of liens. Its provisions apply equally to all liens, of whatever kind, character, or description. (Davis, Assign. of Bittel *et al.* 2 B. R. 392; *Peck v. Jenness*, 7 How. 612.)

The bankrupt act does not divest liens acquired and consummated before the adjudication of bankruptcy. When it speaks of the estate of the bankrupt, it means such estate with all the incumbrances existing upon it at the time of the bankruptcy; in other words, the net value of the property after the liens upon it are satisfied. (*In re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201.)

All the rights, and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a State court commenced after the petition is filed. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116.)

The wife's right of dower is preserved, and will prevail against her husband's assignee. (*In re Angier*, 4 B. R. 619; s. c. 10 A. L. Reg. 190; s. c. 1 L. T. B. 48; *in re Bairlie*, 4 B. R. quarto, 103, 127; *in re Hester*, 5 B. R. 285; *contra*, *Hill v. Bowers*, 4 Heisk. 272; *Bostick v. Jordan*, 7 Tenn. 370.)

A bankrupt's wife has no inchoate dower in real estate, held as partnership assets. (*Hiscock v. Green*, 12 B. R. 507.)

If the real estate of the bankrupt is covered by a mortgage, the inchoate dower of his wife attaches to the equity of redemption only. (*Hiscock v. Green*, 12 B. B. 507.)

The money paid to extinguish the dower of the bankrupt's wife will be apportioned to the parties interested according to the amount of the proceeds which each is entitled to receive. (*In re Geo. A. Bartenbach*, 11 B. R. 61; s. c. 2 A. L. T. [N. S.] 33.)

If the lien expires by the statute of limitations after the commencement of the proceedings in bankruptcy, the title of the assignee becomes absolute. (*Bruner v. Sherley*, 27 Miss 407.)

If a man is seized during coverture of an equity of redemption, and the land is sold under the mortgage, his wife is not entitled, as against his assignee, to a dower interest in the surplus that remains after paying off the mortgage debt. At any time before sale, she can bring her bill to redeem and protect herself against an unreasonable refusal on the part of her husband's assignee to pay the mortgage, especially when such refusal is given with the intent to defeat her interest by suffering a sale to be made. But after a foreclosure and a conversion of the estate into money, it is too late for an application on her part to share in the proceeds. She is as much barred of her right as if foreclosure had been without sale by entry for breach of condition and lapse of time. When the husband's estate in the land is converted into personalty by a sale under the mortgage, it belongs to those who are entitled to his personal estate. (*Newhall v. Savings Bank*, 101 Mass. 428.)

A creditor, by filing a bill in chancery to reach the equitable or other assets of the debtor, obtains a lien thereon from the time of the service of the process. (*Clarke v. Rist*, 3 McLean, 494; *Fetter v. Girode*, 4 B. Mon. 482; *Storm v. Waddell*, 2 Sandf. Ch. 494; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Smith v. —*, 4 Edw. Ch. 653; *contra, in re W. H. C. Waddell*, 1 N. Y. Leg. Obs. 53.)

The mere filing of the bill without service of process does not create a lien. (*In re Charles Smith*, 1 Penn. L. J. 149.)

The lien acquired by filing a creditor's bill extends only to property which can not be reached on execution. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

Until a receiver is appointed in the creditor's action, there is no lien as against chattels that are subject to levy and sale on execution that can be upheld as against the assignee. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

If a creditor, after the commencement of proceedings in bankruptcy, takes out an insurance policy on the life of the bankrupt as security for the debt, and the bankrupt dies before any dividend is made, he must credit the net amount so realized on his claim, and can only receive a dividend on the balance. (*In re Frank Newland*, 9 B. R. 62; s. c. 7 Ben. 63.)

If the creditor, after the value of the policy held by him as a security has been fixed and credited on his debt, keeps the policy alive, he must, in case the bankrupt dies before a dividend, credit the net amount so realized upon his claim, and only receive a dividend for the balance. He holds the same relation to the estate, as if he had taken out a new policy. (*In re Frank Newland*, 9 B. R. 62; s. c. 7 Ben. 63.)

Each partner has a specific lien upon the partnership property for the satisfaction of the partnership debt, and for the payment of any surplus that may remain to him after the adjustment of the rights and equities between themselves; and a suit instituted in a State court of equity to enforce such lien, wherein a receiver has been appointed, is not terminated or discontinued by the partnership's being adjudged bankrupt under proceedings subsequently commenced, but the suit may be continued, and the property distributed in the State court. (*Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49.)

The assignment to the assignee is for the benefit of the creditors, and is not affected by secret unrecorded liens. (*Brooks v. Terrell*, 2 B. R. 643.)

If the by-laws of a bank provide that no transfer of stocks shall be made so long as the holder is indebted to the bank, the bank has a lien on the stock for the indebtedness of the holder, and this lien is not waived by taking a note with an indorser. (*In re Thomas Morrison*, 10 B. R. 105; s. c. 6 C. L. N. 110.)

A national bank has no lien on its stock for debts due to it by the holder of the stock. (*Second Nat'l Bank v. Nat'l State Bank*, 11 B. R. 49; s. c. 10 Bush, 367; *contra, in re Robert Dunkinson & Co.* 4 Biss. 227; *in re Bigelow et al.* 1 B. R. 667; s. c. 2 Ben. 469.)

A banking corporation has a general lien on collaterals deposited to secure a particular debt, and may retain them as security for other debts. (*In re Lemuel Peebles*, 13 B. R. 149.)

The taking of collaterals expressly as security for a particular debt does not waive the lien which a banking corporation by its charter has reserved on the shares of a stockholder for other debts. (*In re Lemuel Peebles*, 13 B. R. 149.)

A broker who holds stocks on a margin is bound to take notice of the bankruptcy of the buyer, and if he continues to hold them for an unreasonable period after that time and then sells them without notice, he must sustain the loss. (*In re John H. Daniels*, 13 B. R. 46; s. c. 6 Biss. 405.)

A tenant of leasehold premises owned by the bankrupt can not interfere between the owner of the reversion and the assignee, and ask that the rents derived from the tenements shall be appropriated to the extinguishment of the ground rent until he is personally charged with it. (*In re Mark Banks*, 1 N. Y. Leg. Obs. 250; s. c. 5 Law Rep. 371.)

If a receiver was authorized to issue certificates and make them a lien on the property for the purpose of preserving it, the assignee can not object to the validity of the lien. (*Jerome v. McCarter*, 15 B. R. 546.)

If the lien depends upon possession, the creditor will be deemed to have waived and abandoned it by a voluntary surrender of the property to the assignee. (*In re J. C. Mitchell*, 8 B. R. 47; s. c. 5 C. L. N. 271.)

In West Virginia, the State has a prior lien for taxes on all realty. If the lien, however, is for a debt other than taxes, the State is not entitled to any preference over other creditors of the same class. (*In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.)

The State of New York has a lien upon the machinery and tools of a contractor which are used by him on the prison premises for operating a contract for the services of convicts. (*In re Edward Burt et al.* 13 B. R. 137; s. c. 12 Blatch. 252.)

If there are several judgments, the priority of the lien on the real estate is determined by the order in which the judgments are obtained, and the priority of the lien on the personal property is determined by the order of the levy of execution. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A mortgage which is recorded before the filing of a mechanic's lien claim, is, under the laws of New York, entitled to priority. (*Moran v. Schnugg*, 7 Ben. 399.)

The assignee is not entitled to object to any mistake in regard to the order of priority in which liens are to be paid for, he is only interested in the surplus. (*Jerome v. McCarter*, 15 B. R. 546.)

The power of marshaling assets will not be exercised to the material injury or prejudice of the creditor holding both funds. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

A mere delay or postponing of payment is not regarded as a material injury, for the interest of the claim is deemed an adequate compensation to the party



for such delay. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

An action to foreclose a mortgage is not a doubtful remedy, and will not unreasonably delay the party or materially injure or prejudice his rights. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

Where a third party has assigned his property to a creditor to secure the debt, he may require the creditor to first exhaust all the property of the bankrupt upon which he has a claim before proceeding against the property so assigned. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

Where a third party has assigned his property to a creditor to secure the debt, the creditor is not required to exhaust such security before he can enforce his remedies against the bankrupt's estate. (*In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.)

If the United States holds collaterals, it may assert its claim against the estate without first exhausting the collaterals. (*Lewis v. U. S.* 13 B. R. 83; s. c. 14 B. R. 64; s. c. 92 U. S. 618.)

### Attorney's Lien.

An attorney's lien on the papers of a bankrupt for professional services is preserved. (*In re New York Mail Steamship Co.* 2 B. R. 74; *in re Orrin Brown*, 5 Law Rep. 324.)

There is no lien on any papers for opposing the petition in involuntary bankruptcy. (*In re New York Mail Steamship Co.* 2 B. R. 74.)

In adjusting and liquidating such a lien the following points must be ascertained:

1. What suits ought to be proceeded with by the assignee, either in prosecution or defense.

2. What papers in such suits are in the possession of the attorney, which are necessary to the assignee in prosecuting or defending such suits.

3. The amounts due and unpaid to the attorney in respect of professional services rendered by him in and about such suits severally, which are liens on such papers, and which ought to be paid to the attorney on the delivery of such papers to the assignee. (*In re New York Mail Steamship Co.* 2 B. R. 74.)

The statement of the notes on the schedule as part of the bankrupt's estate by the attorney is not a waiver of his lien thereon. (*In re Orrin Brown*, 5 Law Rep. 324.)

### Pledges.

In order to constitute a mortgage, the legal title must pass to the creditor. If the transaction is merely a pledge, the creditor will waive his lien by surrendering the possession to the debtor. (*In re Harlow*, 10 B. R. 280.)

A party who loans money to a party on a note indorsed by him, does not take it as a pledge. (*In re George S. Weeks*, 13 B. R. 263.)

Where a promissory note is pledged by a debtor to secure a debt, the special property of the pledgee is not lost by a redelivery to the pledgor to enable him to collect the note. Money which he may collect thereon is the specific property of the creditor. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 264.)

If a note is in the possession of a prior pledgee, an actual delivery of the note

to a subsequent pledgee is not indispensable to the validity of the pledge. (*In re William H. Wiley*, 4 Biss. 171.)

A past consideration is a sufficient consideration for a pledge, if there still remains a subsisting liability. (*In re William H. Wiley*, 4 Biss. 171.)

Commercial paper deposited by the bankrupt as security, is personal property within this clause. If the bankrupt has indorsed such paper, the pledgee can only prove for the amount due, for the bankrupt can not, by giving him a promise for more, enable him to prove beyond the real debt. Against the promisors on the collateral notes, he can prove for the full amount of the notes, but he can receive in dividends from both parties no more than his whole debt. There is no technical difficulty in the way of this mode of dealing with the subject, because the creditor can surrender the principal note to the bankrupt, and make his proof on the indorsement up to the amount of his debt against the bankrupt, and he will then have no security for his debt. (*Ex parte Farnsworth*, Lowell, 497.)

If, together with an indorser, the note of the bankrupt is secured by a collateral put up by the maker, equity will treat the collateral as for the benefit of the indorser. The holder has two resources, and if he makes the money out of the indorser the latter has an equitable right to the application of the collateral for his benefit, or he may require in equity that the collateral shall be first applied. (*In re Thomas Morrison*, 10 B. R. 105; s. c. 6 C. L. N. 110.)

A party with whom a sum of money has been deposited to indemnify him as security in an appeal from a judgment rendered against the bankrupt which is still pending, may hold the same until his liability is terminated. (*In re Buse*, 3 B. R. 215.)

If the assignee collects a note that has been pledged, the court may direct that the proceeds shall be applied to extinguish the liability of the pledge. (*In re William H. Wiley*, 4 Biss. 171.)

A pledgee has a right to use his collaterals either by sale or collection until the full amount of his debt is satisfied. (*Jerome v. McCarter*, 15 B. R. 546.)

An assignee can not object that a pledgee was allowed to prove for the full amount of a bond issued by the bankrupt and delivered to him as a collateral. (*Jerome v. McCarter*, 15 B. R. 546.)

An irrevocable power of attorney to transfer stock as a security for a debt is not revoked by the death of the attorney, and the creditor is entitled to the security as against the assignee of the debtor. (*Lightner v. Nat'l Bank*, 15 B. R. 69; s. c. 82 Penn. 301.)

### Vendor's Lien.

The vendor's lien for unpaid purchase money will prevail against the assignee under the bankrupt law. The lien is not extinguished by taking notes, nor by obtaining judgment upon the notes. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.)

The vendor's lien is personal, and not assignable. It does not pass to the transferee of a note given for the purchase money. (*In re S. W. Brooks*, 2 B. R. 466.)

A vendor's lien is not waived by taking a mortgage on the land therefor, and takes precedence over a judgment lien obtained prior to the mortgage. (*In re Bryan*, 3 B. R. 110.)

A vendor's lien is not waived or in any manner affected by taking a mortgage upon the property therefor. (*In re Hutto*, 4 B. R. 787; s. c. 1 L. T. B. 226; s. c. 3 L. T. B. 197.)

A vendor has no lien on the rents for the unpaid purchase money. (*Hall v. Scovel*, 10 B. R. 295.)

If the vendor of land sold to the bankrupt, collects the rents, he is entitled to credit them on the unpaid purchase money. (*Hall v. Scovel*, 10 R. R. 295.)

The right to the rents of land vests in the assignee from the time of the commencement of the proceedings in bankruptcy, and an agreement that the vendor may collect them, and apply them to the unpaid purchase money is thereby terminated. (*Hall v. Scovel*, 10 B. R. 295.)

If the vendor of land still holds the title, his claim for the purchase money is secured. (*In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.)

### Mechanics' Liens.

The laws of Massachusetts, Oregon, New Jersey, Pennsylvania, Nevada, and Wisconsin create a lien as soon as the labor is performed, or the material furnished and used, but declare that it shall be dissolved unless the creditor shall file a lien claim within a prescribed period. Such lien claim may be filed after the commencement of proceedings in bankruptcy. These steps are necessary to keep the lien alive, and can not be deemed encroachments upon the authority of the bankrupt court. No sale can be made during the pendency of the proceedings in bankruptcy. The State court will order the suit to stand continued to await the result of the action in the bankrupt court. (*Clifton v. Foster*, 3 B. R. 656; s. c. 103 Mass. 233; *in re Coulter*, 5 B. R. 64; s. c. 2 Saw. 42; s. c. 1 L. T. B. 257; *in re Cook & Gleason*, 3 Biss. 122; *in re Dey*, 3 B. R. 305; s. c. 3 Ben. 450; s. c. 9 Blatch. 285; *Keller v. Denmead*, 68 Penn. 449; *in re Hope Mining Co.* 1 Saw. 710; *vide in re Philo R. Sabin*, 12 B. R. 142.)

A mechanic's lien which derives its existence wholly from a State statute, and the continuance of which is by such statute made dependent on the commencement of a suit within a prescribed period, is not preserved as a valid incumbrance on the property when no suit is commenced in the State court, and no step taken in the bankrupt court equivalent to such suit, within the time limited by the statute for the preservation and enforcement of the lien, although proceedings in bankruptcy are commenced within that period. (*In re William Brunquest*, 14 B. R. 259.)

To preserve a statutory lien, dependent for its continued existence upon the observance of the terms of the statute, those terms must be complied with by performance of the required act or its equivalent. (*In re William Brunquest*, 14 B. R. 259.)

A lien claimant can, as an equivalent for commencing a suit in a State court, prove or assert his lien in the bankruptcy proceedings within the time limited by the statute creating the lien. (*In re William Brunquest*, 14 B. R. 259.)

When the material is not in fact used by the bankrupt in the building, the creditor must show that he sold it to be so used. (*In re Cook & Gleason*, 3 Biss. 122.)

The amount required to finish a contract should be deducted from the stipulated price. (*In re Cook & Gleason*, 3 Biss. 122.)

No claim can be allowed for work done after the filing of the petition in bankruptcy. (*In re Cook & Gleason*, 3 Biss. 122.)

The liens of mechanics and others for work and material relate back to the commencement of the building, without reference to the time when the work is done or material furnished, and have a priority over all liens created by the party after that time. Hence they prevail over a mortgage executed after the commencement of the building. (*In re Hoyt*, 3 Biss. 436.)

There is no preference as between the claimants of mechanics' liens. The circumstance of one commencing work first does not give any priority. They

all stand on the same footing, and are to be paid in full or *pro rata* as the funds may suffice. (*In re Hoyt*, 3 Biss. 436.)

Hauling quartz to be crushed in a mill is performing labor in carrying on the mill. (*In re Hope Mining Co.* 1 Saw. 710.)

No allowance out of the bankrupt's estate can be made to the counsel for a lien creditor who has successfully resisted an attempt on the part of the assignee to vacate the lien. (*In re Hope Mining Co.* 7 B. R. 598.)

Where a legislature in one act consolidates all the old laws on the subject of mechanics' liens and repeals the former laws, the new act is to be considered as substituted for and continuing in force the provisions of the old laws rather than as abrogating and annulling them. (*In re Hope Mining Co.* 1 Saw. 710.)

An act which repeals a lien law, and thereby takes away the lien for labor already performed, is unconstitutional and void so far as it impairs the obligation of the contract. (*In re Hope Mining Co.* 1 Saw. 710.)

The proceeds arising from the sale of a vessel are subject to the following liens, in the following order, to wit:

1st. Strictly maritime liens, such as seamen's wages, materials, supplies and repairs in ports of other States, for damages for collision, and for tonnage and wharfage in foreign ports.

2d. Mortgage liens under mortgages made and recorded according to the requirements of section 4192. (*In re Dwight Scott*, 3 B. R. 742; s. c. 1 Abb. C. C. 136.)

A maritime lien is not divested by the proceedings in bankruptcy. (The *Ironsides*, 4 Biss. 518.)

Liens created by State laws upon vessels are void. (*In re Scott*, 15 I. R. R. 59; *in re Edith*, 6 B. R. 449; s. c. 5 Ben. 432.)

Material-men have a lien upon domestic vessels for repairs made in the home port. (*In re Kirkland, Chase & Co.* 12 A. L. Reg. 300.)

If the repairs are made on the credit of the respective vessels, and charged on the books to the vessels, the lien is not waived by merely making out a general account against the owner. (*In re Kirkland, Chase & Co.* 12 A. L. Reg. 300.)

The new rule in admiralty applies to all libels *in rem* by material-men filed after the passage of the rule, whether the repairs were made before or after its passage. (*In re Kirkland, Chase & Co.* 12 A. L. Reg. 300.)

### Judgments.

The lien of a judgment is preserved. (*Livingston v. Livingston*, 2 Caines, 300; *Haworth v. Travis*, 13 B. R. 145; s. c. 67 Ill. 301; *Loudon v. Blanford*, 56 Geo. 150.)

The bankrupt act does not discourage diligence in the collection of debts. Creditors who have obtained a lien, by a legitimate effort to collect an honest debt, must be permitted to enjoy the advantages gained by their diligence. (*In re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72.)

Where the judgment is not a lien by the State laws, it will not be treated as a lien by the bankrupt court. (*In re McIntosh*, 2 B. R. 506; *in re Cozart*, 3 B. R. 508.)

The filing of a transcript of a judgment on Christmas is a mere ministerial act, and will give a valid lien. (*In re R. C. Worthington*, 14 B. R. 385; s. c. 3 Cent. L. J. 526; s. c. 8 C. L. N. 362; 9 C. L. N. 346.)

An indorser who pays the judgment against him may take an assignment of the judgment against the maker of the note, and claim the lien thereby secured. (*Clason v. Morris*, 10 Johns. 524.)

Where a judgment has been obtained in a State court by fraudulent conduct on the part of the plaintiff, its validity can not be contested in the bankrupt court. Assignees and creditors must resort to the State court in which the judgment was rendered to test its validity. (*In re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445.)

The objection that there is usury in the consideration of the debt upon which the judgment is founded, can not be raised in the bankrupt court. The district court can not go behind the judgment of a State court and inquire into the consideration of the debt upon which the judgment is founded. If any matter of fact constitutes the ground for a review, a writ of error *coram nobis* in the court wherein the judgment was rendered would be the proper mode of redress. A court of equity is not the proper forum. (*McKinsey v. Harding*, 4 B. R. 39.)

A judgment can not become usurious by means of a stipulation that the accruing interest shall bear interest if not paid annually. The State laws provide the rate of interest a judgment shall bear, and the parties can not change it by stipulations or terms inserted therein. Such stipulations are simply void. The payment of a judgment confessed for a sum due may be enforced by execution; but if the creditor neglects or forbears to use this remedy, he can not recover interest on interest accruing in the mean time. The fact that such a stipulation was never attempted to be enforced is a good defense to the charge of usury. (*In re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 243.)

The statutory right of a judgment creditor to redeem the lands of his debtor, sold under judicial process, is not taken away by the bankruptcy of the debtor occurring after the rendition of judgment and before the offer to redeem. (*Trimble v. Williamson*, 14 B. R. 53; s. c. 49 Ala. 525.)

Under the laws of New York, a judgment confessed to secure future advances of notes and other commercial paper is valid. (*Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.)

In New York, the filing and docketing of a transcript of a judgment in the office of the county clerk makes the judgment a lien on all the real estate of the defendant situated in the county. (*In re J. P. & J. Smith*, 1 B. R. 599; s. c. 2 Ben. 122; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112.)

In New York, a judgment rendered against four persons as joint debtors in an action, in which one of them was not served with process, and in which he did not appear, is not a legal lien upon the individual property of the person who was not served with a process. Nor is it entitled to payment out of real estate purchased in his name prior to the creation of the debt on which such judgment is founded, although one-half of the purchase money was furnished by one of the other joint debtors whom it binds. Nor will the fact that these two were partners give it any claim to payment therefrom, on the ground that the one who was served with process had an equitable interest therein. Such an equitable interest is not bound by a judgment and execution against the owner. Nor will the fact that the four joint debtors were partners make it a lien upon such property. The judgment is not even evidence of indebtedness as against the party not served, and *a fortiori* is no lien in equity any more than at law upon his separate property. No lien is obtained upon equitable interests or *choses in action* by judgment and execution alone. In order to obtain a lien, the creditor must have his execution returned unsatisfied, and file a bill in equity, or take other legal proceedings to reach such *choses in action* or equitable interests. (*In re Hinds et al.* 3 B. R. 351.)

In Texas, from Feb. 14, 1860, to Nov. 9, 1866, a judgment in a court of record created no lien on real estate, unless the same was recorded in the clerk's

office of the county court in the county where the land was situated. A deed made before, but recorded after the rendition of a judgment, passes a legal title, and prevents the judgment from becoming a lien on the lands so conveyed. (*In re C. Dean*, 3 B. R. 769.)

In Georgia, a judgment is not a lien upon a promissory note, nor entitled to priority of payment out of the proceeds thereof. The State laws relating to the distribution of the estate of a decedent, and of money brought into a State court, do not govern the distribution of the estate of a bankrupt. The bankrupt's assets must be divided in accordance with the provisions of the bankrupt act. (*In re Erwin & Hardy*, 3 B. R. 580.)

In Georgia, a judgment becomes dormant when there has been no entry upon the execution for seven consecutive years, although the stay laws were in force and the rebellion existed during a portion of that time. (*In re Cozart*, 3 B. R. 508)

In Ohio, the sheriff may make a levy on land by getting a description of the land from the recorder's office, and indorsing a description of the lands and the fact of the levy on the back of the execution, without going near the land, and such a levy becomes a valid lien on the land. (*Armstrong v. Rickey Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145.)

In North Carolina, a judgment prior to the enactment of the Code of Civil Procedure was not a lien on the property, either real or personal, of the defendant until a levy was actually made. Without the levy there was no lien. (*In re McIntosh*, 2 B. R. 506; *in re Mebane*, 3 B. R. 347.)

In Missouri, a judgment is not a lien upon personal property until there has been an actual seizure thereof. (*In re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39.)

In Mississippi, the enrolment of a judgment makes the judgment a lien upon all the estate, real and personal, of the defendant situated in the county where the enrolment is made. (*Pennington v. Sale & Phelan et al.* 1 B. R. 572; *Jones v. Leach et al.* 1 B. R. 595.)

The question of the validity of a lien can not be decided on *ex parte* affidavits. (*In re Hafer & Bro. [in re Beck]*, 1 B. R. 586; s. c. 6 Phila. 474.)

If an assignment is fraudulent, a creditor may obtain a lien upon the real estate by getting a judgment, and upon the personal property by the levy of an execution thereon, and such lien, if obtained before the commencement of the proceedings in bankruptcy, is valid as against the assignee. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A creditor who is precluded from assailing an assignment as fraudulent can not obtain a lien on the property which will be valid as against the assignee. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A creditor who, with full knowledge of the facts that constitute the fraud, concurs with other creditors in assenting to its execution, can not impeach it as fraudulent. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A party who takes a colorable transfer of a claim from a trustee who has accepted the trust with full knowledge of all the facts, can not impeach the assignment. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A creditor who has assented to an assignment may purchase a claim from a creditor who has not done so, and as to that claim, may impeach the assignment. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A creditor who purchases property from the trustee in ignorance of the fraud is not precluded from impeaching the assignment. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A party who purchases a judgment has no higher right to impeach a fraudulent assignment than his assignor had. (*Johnson v. Rogers*, 15 B. R. 1.)

A judgment against a partner individually is a lien on real estate held by the firm, subject, however, to the payment of the firm debts and the equities of the other partner. (*Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.)

A judgment rendered after the commencement of the proceedings in bankruptcy, is not entitled to a lien on a fund in a State court. (*Loudon v. Blandford*, 56 Geo. 150.)

### Executions.

A levy that is good, and creates a valid lien under the State laws, will be held valid in the bankrupt court. (*McLean v. Rockey*, 3 McLean, 285; *in re Dudley*, 1 Penn. L. J. 302; *in re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17; *Armstrong v. Rickey Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145.)

The lien of a levy is not affected by the fact that the execution creditor held further securities for the judgment. (*In re Peter Hufnagel*, 12 B. R. 554.)

The lien of a levy made under an execution issued upon a final judgment, obtained *bona fide* and without collusion, provided such lien attached before the commencement of proceedings in bankruptcy, is preserved. (*In re Bernstein*, 1 B. R. 199; s. c. 2 Ben. 44; *in re J. P. & J. Smith*, 1 B. R. 599; s. c. 1 L. T. B. 112; s. c. 2 Ben. 122; s. c. 2 Ben. 432; *in re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72.)

Where a creditor obtains a judgment, and holds or uses it for the purpose of preventing or obstructing other creditors in the collection of their claims, courts will see that no undue advantage is taken. (*In re Kerr*, 2 B. R. 388; s. c. 4 L. T. B. 39; s. c. 6 Phila. 445.)

In the absence of fraud, or preference in obtaining a judgment and execution, mere delay in making a levy will not defeat the lien which the law gives against the goods of a defendant in execution from the time the writ comes into the hands of the sheriff. (*In re Chas. R. Weeks*, 4 B. R. 364; s. c. 2 Biss. 259.)

The sheriff has no lien upon goods under the levy of an execution issued upon a judgment obtained in violation of the bankrupt law, and thus rendered void. (*In re David Kempner*, 43 How. Pr. 129.)

When a constable levies on property in the hands of a sheriff by virtue of a judgment subsequently declared to be invalid, as a fraud upon the bankrupt act, but suspends further proceedings, the lien thus acquired will be preserved, even though the period fixed by law for the lifetime of an execution does elapse before he can enforce it. (*Houghey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47.)

The mere delivery of an execution to the sheriff does not give to the judgment creditor a lien which will prevail over the title acquired by the assignee or the personal effects of the defendant in the execution. (*In re Elam Rust*, 1 N. Y. Leg. Obs. 326.)

If a judgment creditor had levied an execution on the property before the commencement of the proceedings in bankruptcy, he is entitled to payment out of the proceeds, although an appeal was taken from the judgment without filing a bond to stay execution. (*In re Gold Mountain Mining Co.* 15 B. R. 545; s. c. 3 Saw. 601.)

Where writs are in the hands of different officers, they take priority according to the time of the levy, and not according to the time of the issue. (*In re Hughes & Son*, 11 B. R. 452; s. c. 7 C. L. N. 162.)

As between different writs issued from different courts, the one first actually executed binds the property, without regard to the priority of lien created by the delivery of the writ to the officer. The warrant issued in a case of involun-

tary bankruptcy is such a writ or legal process as will divest the lien of a prior execution which has never been levied. (*In re Tills & May*, 11 B. R. 214.)

The receipt of a second execution after the levy under the first, and while such levy remains in force, operates as a constructive levy under the second, and an actual levy is unnecessary. (*In re J. P. & J. Smith*, 1 B. R. 599; s. c. 2 Ben. 122; s. c. 2 Ben. 482; s. c. 1 L. T. B. 112.)

A general description of the property is sufficient when the legal import of the return is that the sheriff took possession. The lien of a levy is not lost by taking a delivery bond. The execution creditors are entitled to a lien upon the property levied upon by the sheriff, although it is afterwards seized by the marshal. (*Swope v. Arnold*, 5 B. R. 148.)

A levy does not create a valid lien unless the sheriff designates the property seized under the execution either in the body of the return or by reference to a schedule accompanying it. (*Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.)

Where a levy is made prior to the commencement of the proceedings in bankruptcy, the lien thereof is not lost under the laws of Missouri, although the sheriff does not sell during the term, but returns the writ, for the property may be sold under a new execution. (*Webster v. Woolbridge*, 3 Dillon, 74.)

The lien of a levy is preserved, although the property is left in the debtor's store under the charge of his employee, who gives the sheriff a receipt therefor. (*In re Peter Hufnagel*, 12 B. R. 554.)

A levy does not create a valid lien if the debtor is allowed to remain in possession of the property and exercise acts of ownership over it. (*Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.)

If the levy has been actually made, the execution is a lien on the property, although the custodian appointed by the sheriff is temporarily absent at the time when the marshal takes possession. (*In re Hughes & Son*, 11 B. R. 452; s. c. 7 C. L. N. 162.)

The lien of an execution is lost unless the execution is renewed from term to term until the proceedings in bankruptcy are commenced. (*Stewart v. Hargrove*, 23 Ala. 429.)

The execution of a forthcoming bond by a third person who claims the goods taken under an execution does not destroy the lien. The lien may be kept in abeyance, but its active energy will be revived, and the lien may be coerced so soon as the claim interposed shall be determined to be indefensible. (*Doremus v. Walker*, 8 Ala. 194.)

A judgment creditor does not obtain a specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied, but by the commencement of a suit in equity, after the execution has been so returned. (*Blake v. Bigelow*, 5 Geo. 437; *Powell v. Knox*, 16 Ala. 364; *in re Hinds et al.* 3 B. R. 351.)

The return of the sheriff is a matter of record, and therefore conclusive, and can not be inquired into in the proceedings in bankruptcy. If the return is false, the sheriff is answerable for it to the proper party in a proper action, but its truth or falsity can not be inquired into in an action between other parties. (*Armstrong v. Rickey Brothers*, 2 B. R. 478; s. c. 1 C. L. N. 145.)

The return of *nulla bona* does not preclude the execution creditor from showing that there was property of the bankrupt on which the execution was a lien. (*In re Tills & May*, 11 B. R. 214.)

The plaintiff in a judgment obtained in a Federal court on which an execution was issued, and under which the marshal sold property of the defendant, is entitled to the proceeds of such sales, although that judgment, execution, and levy under it were subsequent to a judgment, execution, and levy of process



from a State court. 'The marshal can only sell such right or interest in property as the process in his hands will warrant, though he may declare that he sells more or a higher interest, or even so states in his conveyance. His conveyance transfers no more or greater interest to the purchaser than the law, by virtue of the process and the proceedings upon which the same is based, allows to pass. If a prior lawful incumbrance or lien exists, the sale can only be and is made subject to such incumbrance or lien. A purchaser at an execution sale is as much bound to know of the existence of a prior lien or incumbrance existing against the property offered by force of a judgment, execution, and levy, as if there were an incumbrance existing by a mortgage, or in any other way. (*In re Wm. G. Jordan*, 3 B. R. 182.)

The sheriff is entitled to poundage fee on a levy at the time he makes the levy. A sale is not necessary. (*In re Black & Secor*, 2 B. R. 171.)

Poundage can be allowed only on the amount which the property brought, and is a lien thereon. (*In re William Welch*, 5 Ben. 278.)

If the sheriff acts in good faith, he is entitled to be paid, without reference to the validity of the judgment. (*In re William Welch*, 5 Ben. 278.)

The taxation of costs by a State court, without notice either to the bankrupt or the assignee, or any other person, will not be regarded as in any sense a judicial act. (*In re David Kempner*, 43 How. Pr. 129.)

### Mortgages.

A note signed by the bankrupt and his wife, and secured by a mortgage upon the wife's real property, may be allowed as a secured demand. The court, on proper motion, will attend to the application of the security and to the interests of the assignee in the realty. (*In re J. Hartel*, 7 B. R. 559.)

The assignment of a lease by the lessor and the execution of a power of attorney to collect the rent, gives the grantee a lien upon the rent thereby reserved. (*Meador v. Everett*, 10 B. R. 421; s. c. 3 Dillon, 214.)

Where the mortgage embraces property situated in two States, and is duly recorded in one State, but is not duly recorded in the other, it is valid as to the property situated in the first, but will not bind the property situated in the second. It must be regarded as if the property situated in the State where it was not duly recorded was not embraced in it. (*In re Soldiers' Business Messenger and Dispatch Co.* 2 B. R. 519; s. c. 3 Ben. 204.)

When a mortgage contains a stipulation that the mortgagor shall remain in possession and sell the mortgaged property as the agent of the mortgagee, and account for the proceeds thereof until the mortgage debt is paid, the proceeds of all sales made subsequent to the execution of the mortgage must be credited *pro tanto* toward the payment of the mortgage debt, and the debt itself will be extinguished as soon as the proceeds of such sales equal the amount of the debt and interest, whether the same have been paid to the mortgagee or not. (*Hawkins v. National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462; *Smith v. Ely*, 10 B. R. 553.)

If the mortgagee never had any such notes as those described in the mortgage, the mortgage is ineffectual. (*Jewett v. Preston*, 27 Me. 400.)

A mortgage of real property by a corporation must be under the corporate seal or it will be of no effect. (*In re St. Helen's Mill Co.* 10 B. R. 414; s. c. 3 Saw. 88.)

A mortgage executed by the officers without due authority from the corporation does not bind the corporation even as an equitable mortgage. (*In re St. Helen's Mill Co.* 10 B. R. 414; s. c. 3 Saw. 88.)

The distinction between real and personal property, and between the means which are necessary to affect them, is well settled. Personal property, according

to the common law, could always be transferred or incumbered without the use of a deed for that purpose. A seal has never been held necessary to the validity of a bill of sale. A chattel mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial. (*Gibson v. Warden*, 11 Wall. 244; *Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.)

If the laws of the State do not require a mortgage of personal property to be under seal, the fact that a seal is attached does not change its character or effect. The seal may be regarded as surplusage. (*Gibson v. Warden*, 14 Wall. 244; *Hawkins v. National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462.)

One partner can bind the firm by an instrument under seal in the name of the firm where all the partners are interested in the transactions, if there is a previous parol authority or a subsequent parol assent to the act. (*Gibson v. Warden*, 14 Wall. 244; *Hawkins v. National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462.)

It is not necessary that an agent should have written authority to make a bill of sale of personal property. When an agent without authority executes a bill of sale under seal, the ratification need not be by an instrument under seal. (*Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.)

A mortgage given to secure future advances to the amount of \$25,000, with a stipulation that the account shall be adjusted at a certain time, under which \$53,000 was advanced, and more than \$25,000 repaid, is not thereby fulfilled and extinguished, but stands as a security for the balance that was due at the stipulated time of settlement, even though a note for the \$25,000 was given at the time of the execution of the mortgage. (*In re York & Hoover*, 3 B. R. 661.)

Under the laws of Louisiana, notes mentioned in a mortgage as secured thereby, which were placed in the hands of an agent for negotiation, but not negotiated until after the inscription of the mortgage, are protected by the same. The mortgagor's purpose was to raise money by a loan, and, preparatory thereto, the notes were made and a mortgage, declaring the existence of a debt, executed and inscribed, and both mortgage and notes placed in the hands of an agent for negotiation. It may be that, until they were negotiated, there was no creditor, no debtor, no right of action, and no perfect obligation; but the agent, from the date of inscription, was in the possession of all the means to the making of a perfect contract by the delivery of the securities to a *bona fide* holder. These securities, by such a delivery, become operative from their date, and are binding *ab initio*. (*In re York & Hoover*, 3 B. R. 661.)

Under the laws of New Jersey, a chattel mortgage is good against judgment creditors from the time of filing. (*Miller v. Jones*, 15 B. R. 150.)

An assignee can not recover the value of property covered by a mortgage if the mortgagee took possession before the commencement of the proceedings in bankruptcy. (*Miller v. Jones*, 15 B. R. 150.)

A statement which notifies creditors of the extent of the mortgagee's lien is sufficient to accompany the refile of a mortgage. (*Miller v. Jones*, 15 B. R. 150.)

A mortgage stipulating for the payment, at or before the expiration of nine months from the date thereof, of certain notes therein described, one note only being described, and for the payment of any and all notes given or indorsed by the mortgagee for the accommodation of the mortgagor during the pendency of the mortgage, secures all notes of the kind mentioned until it is given up, or in some way canceled or abrogated. It is not terminated by the payment of the described note and of all notes given or indorsed within nine months after its date. (*In re Chas. W. Griffiths*, 3 B. R. 731; s. c. Lowell, 431.)

A mortgage made in good faith to secure future advances is valid to the extent of the advances actually made. (*Marvin v. Chambers*, 13 B. R. 77; s. c. 12 Blatch. 495.)

Where a mortgage made by a railroad corporation provides that it shall include all property subsequently acquired by the mortgagor, it will include a railroad with its appurtenances subsequently leased by the mortgagor, and the title thereto will be valid as against the assignee of the mortgagor. (*Barnard v. N. & W. R. R. Co.* 14 B. R. 469; s. c. 3 Cent. L. J. 608.)

A mortgage or other conveyance made as security for a debt evidenced by a note or bond, will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. But the rule is different when the security itself is changed, and not the evidence of the debt. When a deed is made in substitution of a prior deed, the prior deed ceases to have any validity or effect. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *in re Jas. Jordan*, 9 B. R. 416; s. c. 7 Pac. L. R. 194; *Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

If the mortgage by mistake describes the note as made by A. and indorsed by B, it may be corrected in equity so as to cover a note made by A. and signed by B. as surety. (*In re Clark & Daughtrey*, 10 B. R. 21.)

A mortgage of personal property does not cover what is afterward acquired. As to such property, it is in the nature of a revocable license to take possession. Under some circumstances, the term "goods and merchandise," may include fixtures, but the facts of the case may limit the construction of the language. (*In re Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362.)

If a mortgagee takes possession of the vessel mortgaged, and omits to sell it within a reasonable time, this operates as a satisfaction of the debt to the extent of its value when he took possession. (*In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231.)

If the mortgage contains a stipulation, that the counsel fees and costs to which the mortgagee may be put in collecting the debt, shall be paid by the mortgagor, the usual commission for collection may be allowed. (*Maus v. McKellip*, 38 Md. 231.)

The fee paid to counsel for resisting a suit by the assignee to sell the property free from all liens, can not be allowed. (*Maus v. McKellip*, 38 Md. 231.)

If the mortgage contains a stipulation that the mortgagee may retain the possession of the property until the mortgage debt is paid, the assignee can not divest the mortgagee of the possession until the debt secured by the mortgage is paid. (*Pindell v. Vimont*, 14 B. Mon. 400.)

In order to obtain the profits when the mortgage is not full security for the debt, the mortgagee may enter or bring his writ of entry. If he chooses to lie by and suffer the mortgagor to keep possession, he consents that the intermediate profits may be received by him and held without account. He can only acquire an equitable lien upon the rents or profits by a bill in equity and the appointment of a receiver, before the growing crop is severed, or the rent is collected, and becomes vested in the mortgagor or his legal representatives in possession. The filing of the petition in bankruptcy fixes the rights of the several parties in interest; and the rights, equitable or otherwise, not actually acquired by lien, in virtue of a bill and the appointment of a receiver, remain unacquired or unsecured, as the case may be. When no such lien has been acquired, the assignee is entitled to the proceeds of grass cut by him from the mortgaged premises, and the mortgagee has no prior claim upon the same. (*In re M. J. Snedaker*, 4 B. R. 168; s. c. 2 L. T. B. 152; *Ellis v. Bost. & Hart. R. R. Co.* 107 Mass. 1; *Foster v. Rhodes*, 10 B. R. 523; *in re J. S. K. Bennett*, 12 B. R. 257; *in re Mark Banks*, 1 N. Y. Leg. Obs. 250; s. c. 5 Law Rep. 371.)

The mortgagee is entitled to the rents from the time of filing a claim therefor in court, and due notice thereof to the assignee. (*In re J. S. K. Bennett*, 12 B. R. 257.)

A mortgagee is not entitled to have the rents which fell due after the commencement of the proceedings in bankruptcy, and were collected by the assignee, applied to his mortgage claim, although the mortgage also conveys the rents, issues and profits of the land. (*Foster v. Rhodes*, 10 B. R. 523.)

If there be doubt whether the mortgaged premises are adequate security for the payment of the debt and interest, the district court will recognize the proper lien of the mortgage upon the land, and the equitable right of the mortgagee to have the rents separated from the general estate of the bankrupt, by a receivership or otherwise, and not permit them to be applied to the payment of other debts, or even to the expenses of the assignee or his fees. (*In re Sacchi*, 6 B. R. 497; s. c. 43 How. Pr. 250.)

The assignee, upon the application of the mortgagee, may be directed to pay to the mortgagee a reasonable compensation for the use of the mortgaged premises, as rents and profits. (*Hutchings v. Muzzy Iron Works*, 8 B. R. 458; s. c. 6 C. L. N. 27.)

If the defendant becomes bankrupt before the service of process on him in a proceeding to foreclose a mortgage, the mortgagee will be entitled to the rents collected by a receiver subsequently appointed therein. (*Hayes v. Dickinson*, 15 B. R. 350; s. c. 16 N. Y. Supr. 277.)

A covenant to insure for the benefit of the mortgagee runs with the land. If the mortgagor does in fact keep the premises insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee, nevertheless has an equitable interest or lien upon the proceeds of the policy, in case of loss, which will be enforced for his benefit. Although the mortgage stipulates that the insurance shall be made in companies to be selected at the option of the mortgagee, the mortgagee is entitled to the benefit of the insurance that is made, whether it was effected without or even contrary to his selection. (*In re Sands' Brewing Co.* 6 B. R. 101; s. c. 3 Biss. 175.)

When changes are made after acknowledgment, the mortgage should be re-acknowledged. (*Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496.)

Under the laws of Texas, a mortgage executed and recorded after the rendition of a judgment, but before the recording of the same, is entitled to priority over the lien of the judgment. (*In re Lacy*, 4 B. R. 62; s. c. 1 L. T. B. 226.)

If there are two mortgages upon a vessel, one upon one-half of the vessel, and the other upon three-quarters of the vessel, the first will, if possible, be paid out of the one-fourth not covered by the latter, and the remaining three-fourths will be applied to the latter. This applies to the distribution the familiar principle that where there are two funds, and one of them is subject to the lien of one suitor, and the lien of another suitor covers both, the latter suitor will be paid, if possible, out of the fund that is subject only to his own lien. (*In re Edith*, 6 B. R. 449; s. c. 5 Ben. 432.)

The bankrupt can not have the inscription of a judgment rendered against him erased, if it has not been paid. The bankrupt act does not provide that a sale of the property shall operate as a release of the mortgage, and attach it to the proceeds. (*State v. Recorder*, 21 La. An. 401.)

A mortgage of personal property to be subsequently acquired, constitutes an equitable lien which may be enforced against the assignee, for wherever the parties, by their contract, intend to create a positive lien or charge upon personal property, whether it is then owned by the contractor or not, and whether it is then *in esse* or not, the lien attaches in equity as soon as the contractor acquires a title thereto. (*Mitchell v. Winslow*, 2 Story, 630; *Barnard v. N. & W. R. R.* Co. 14 B. R. 469; s. c. 3 Cent. L. J. 608; *Brett v. Carter*, 14 B. R. 801.)

### Equitable Liens.

Equitable liens, mortgages, and securities are as much within the act as legal liens, unless there is some prohibition in the State laws which renders them invalid. (*Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, 2 Story, 555; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362.)

Possession is not necessary to create or support an equitable lien. (*Parker v. Muggridge*, 2 Story, 334.)

Every agreement for a lien or charge *in rem*, whether upon real estate or personal estate, or money in the hands of third persons, constitutes a trust, and may be enforced as an equitable lien. (*Fletcher v. Morey*, 2 Story, 555.)

It is a universal maxim that, wherever persons agree concerning a particular subject, in a court of equity, as against the party himself and any claiming under him voluntarily or with notice, it raises a trust, and the same rule prevails in bankruptcy. (*Parker v. Muggridge*, 2 Story, 334.)

If the equitable lien is valid by the laws of the State, it may be allowed, although no remedy is provided for its enforcement by the State jurisprudence in the State courts. (*Fletcher v. Morey*, 2 Story, 555.)

An agreement that goods to be purchased with future advances are pledged and hypothecated for the repayment thereof, constitutes an equitable lien on the goods. (*Fletcher v. Morey*, 2 Story, 555)

### Sale Free from Incumbrances.

On the application of the assignee, the district court may order incumbered property to be sold free from incumbrances, the lien being transferred to the fund in court. (*In re T. R. Stewart*, 1 B. R. 278; s. c. 1 L. T. B. 16; *in re Barrow, re Loeb, Simon & Co. re Winter*, 1 B. R. 481; s. c. 1 L. T. B. 63; *in re McClellan*, 1 B. R. 389; *in re Columbian Metal Works*, 3 B. R. 75; *in re Salmons*, 2 B. R. 56; *in re Alabama & Florida Railway Co.* 1 B. R. quarto, 100; *Conrad v. Prieur*, 5 Rob. [La.] 49; *Benjamin v. Prieur*, 8 Rob. [La.] 193; *Ducros v. Fortin*, 8 Rob. [La.] 165; *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *in re Rhodes*, 19 Pitts. L. J. 99; s. c. 3 Pac. L. R. 99; s. c. 6 W. J. 123; *in re Nat'l Iron Co.* 8 B. R. 422; s. c. 20 Pitts. L. J. 208; s. c. 30 Leg. Int. 272; *Sutherland v. Lake Superior Canal Co.* 9 B. R. 298; s. c. 1 Cent. L. J. 127; *Houston v. City Bank*, 6 How. 486.)

The disposition of the securities is a matter resting in the sound discretion of the district court, upon all the circumstances of each particular case. The district court has full authority to ascertain the true value by a sale or by an appraisement, or in any other mode which it may deem best for the interest of all concerned in the estate, or it may allow the creditor to take any one or more or all of the securities at their nominal value, if that is ascertained to be the true and highest value of the security. (*In re Benjamin B. Grant*, 5 Law Rep. 303.)

The liens, mortgages and other securities within the purview of this provision, so far as they are valid, are not to be annulled, destroyed or impaired under the proceedings in bankruptcy, but they are to be held of equal obligation and validity in the Federal courts as they would be in the State courts. The district court sitting in bankruptcy, is bound to respect and protect them. But this does not, and can not, interfere with the jurisdiction and right of the district court to inquire into and ascertain the validity and extent of such liens, mortgages and other securities. (*In re William Christy*, 3 How. 292.)

If it be ascertained that the property of a bankrupt is incumbered by lien or mortgage, the assignee may, if he shall believe it to be to the interest of that class of creditors whom he especially represents—for instance, the class entitled

to *pro rata* distribution—file his petition and obtain an order directing him to sell the property incumbered on such terms as to the court may seem proper, and convey the property free from such incumbrance. The court will then protect the lien creditors by a proper distribution of the proceeds. But it is not a part of the duty of the assignee so to petition, unless he shall believe that such a sale will create a larger fund for distribution to creditors generally than if there should be a sale by the lien creditor. (*In re Mebane*, 3 B. R. 347; *in re McClellan*, 1 B. R. 389.)

Although the mortgage contains a clause *de non alienando*, a purchaser will acquire a valid title, and his assignee may sell the property free from the mortgage. (*Ducros v. Fortin*, 5 Rob. [La.] 165.)

A secured creditor does not have absolutely the election to stand outside of the operation of the bankrupt act. The assignee has the right to bring him into the court of bankruptcy, and contest the amount of his debt and the validity of his lien, and to have the court make such equitable orders as to the disposition of the property as seems best. The court of bankruptcy has the right to prevent the control from being taken away by resort to other tribunals against its will. (*Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497, 511, note; *Bromley v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511; *Clark v. Rosenda*, 5 Rob. [La.] 27.)

The bankrupt court has the right to take possession of the mortgaged property after a default in payment, and sell it without first satisfying the mortgage, although the mortgagee is in possession. (*In re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383.)

When the proceedings to foreclose a mortgage in the State court have reached a stage where substantially all the expenses except those which would attend any sale of the property, even by the bankrupt court, have been incurred, and incurred by the action of the assignee while a party to such suit in suffering proceedings to go on without applying to the bankrupt court to restrain them, the petition for leave to sell the property free from incumbrances will be denied. (*In re H. Brinkman*, 6 B. R. 541; s. c. 7 B. R. 421; *Augustine v. McFarland*, 13 B. R. 7.)

When an order is made to sell property against which a judgment of foreclosure has been entered, the injunction against the sale under the judgment may be so far modified, if deemed desirable in order to obtain a better price for the property, that the sale may take place under both the order and the judgment, and the referee may unite in the deed. (*In re Hanna*, 4 B. R. 411; s. c. 4 Ben. 469.)

The power ought not to be exercised where the rights of the secured creditor will be injuriously affected, as where the property has no market value, or one that is clearly less than the mortgage debt. In such a case the secured creditor ought to have the right to hold the property, and wait the chances of a market if the assignee will not redeem. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *in re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383; *in re Jacob F. Hahnen*, 1 Penn. L. J. 10.)

The petition for leave to sell free from incumbrances must set forth the facts and circumstances which justify the application, so that the court may decide whether or not the application shall be granted. (*Ray v. Nerseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128.)

The application for a sale must state what persons have liens, incumbrances, and interests in the property, and notice must be given prior to the sale to all persons claiming to have liens, incumbrances or interests therein. (*In re Anon.* 29 Leg. Int. 20.)

Proper notice of the application for leave to sell incumbered property should be served on the secured creditor. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *Houston v. City Bank*, 6 How. 486; *Fowler v. Hart*, 13 How. 373.)

If the mortgagee is not made a party to the proceeding to sell the property free from incumbrances, his rights will be unaffected thereby. (*Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128; *Meeks v. Whatley*, 10 B. R. 498; *contra*, *Wilson v. Turpin*, 5 Gill, 56.)

The assignee ought not to be permitted to make private sales, or sales on credit, without first submitting the price and terms of the sale to the court on notice to the mortgagee for approval and confirmation. (*In re Frederick S. Kirtland*, 10 Blatch. 515.)

A sale by the assignee of property free from all incumbrances will not divest the right of the State to enforce the payment of taxes on the property wherever it may be found, and the purchaser takes it subject to that right. (*Stokes v. State*, 9 B. R. 191; s. c. 46 Geo. 412; *Meeks v. Whatley*, 4 B. R. 498.)

A mortgagee can not demand, as a matter of right, that the assignee shall, upon his offer, convey the premises to him on condition of his agreeing not to present a claim for any part of the debt against the other assets of the bankrupt. Neither the refusal of the assignee to accede to such a proposition, nor the refusal of the court to permit him to accept, will be at the peril of throwing the cost of any effort to secure a better price upon the other creditors. It is the duty of the assignee and of the court to take that course in the premises which, in their judgment, having due reference to the rights of the mortgagee, will be most beneficial to all the parties interested. (*In re Ellerhorst et al.* 7 B. R. 49; s. c. 2 Saw. 219.)

The selling of property free from incumbrances is a matter of judicial discretion. The apportionment of costs is also a matter, to some extent, of judicial discretion. The district court, as incident to its power to adjust and liquidate the lien, is authorized to adjust the costs of the proceedings necessary to give effect to the specific lien, and does not exceed the bounds of sound discretion in charging upon the proceeds of the mortgaged property the costs of the proceedings adopted to enforce and liquidate the specific lien. The costs of the sale, including commissions to the assignee, may be charged upon the proceeds. (*In re Ellerhorst et al.* 7 B. R. 49; s. c. 2 Saw. 219.)

Where property is sold free from incumbrances, under a proceeding instituted before the expiration of a lien, the rights of the lienor are deemed to be fixed from the commencement of the proceeding, and he need not renew or continue his lien. (*Moran v. Schnugg*, 7 Ben. 399.)

A sale of the property free from incumbrances does not pass to the purchaser the right to the growing crops which the tenant had agreed to pay by way of rent. (*In re Bledsoe*, 12 B. R. 402; s. c. 10 Pac. L. R. 46.)

Where the record shows a proceeding to bring the general jurisdiction to bear on the special case, the purchaser need not look beyond the order of sale to see whether every particular has been complied with in the appointment and qualification of the assignee. (*Zeigler v. Shomo*, 78 Penn. 357.)

Where an assignee sells property which is incumbered or in dispute under an order of court, it is the order and not the assignment which empowers him to act. (*Zeigler v. Shomo*, 78 Penn. 357.)

A sale may be made in bulk where that is the only possible mode which will enable purchasers to buy with confidence. (*Jerome v. McCarter*, 15 B. R. 546.)

Where the property is sold free from incumbrances, the assignee can only deduct the costs of the proceedings necessary for proving the lien, and must appropriate the balance of the proceeds to the payment of the claim of the secured creditor. (*In re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; *in re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136; *in re Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362; *in re Blue Ridge R. R. Co.* 18 B. R. 315.)

In a proceeding to sell property free from incumbrances, the bankrupt court has no authority to adjust the claims of a trustee under a mortgage, nor to ascertain what is due by the trustee to his counsel. (*In re Blue Ridge R. Co.* 13 B. R. 315.)

Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of upon equitable principles. It can not be denied upon authority as well as principle, that if a mortgagee allows the mortgaged property to be so used and managed, and the mortgage itself to be so placed and continued upon the records in a condition to induce in the minds of reasonable men a suspicion or belief that the mortgage is a mere cover to protect the property of the mortgagor from his creditors, and the creditors act upon such suspicion or belief, they should be reimbursed their costs and expenses out of the mortgage fund, notwithstanding the mortgage is eventually held to be valid, there being no other assets. A mortgage given for \$4,000, when only \$1,000 is actually advanced, is *prima facie* fraudulent, and creditors who have endeavored to have it declared void are entitled to be reimbursed the amount of their reasonable costs, expenses, and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale. (*In re Dumont*, 4 B. R. 17; s. c. 2 L. T. B. 114.)

If the property is sold free of incumbrances, the mortgagee can not be allowed the costs and commissions of a *scire facias* to foreclose the mortgage, issued and served on the bankrupt alone after the commencement of the proceedings in bankruptcy. (*In re Abraham A. Devore*, 24 Pitts. L. J. 185.)

If an assignee voluntarily paid a mortgage debt in gold prior to the change in the law made by the last decisions of the Supreme Court, he is not entitled to relief. All matters that were closed by the parties before the change are, in the absence of fraud, beyond the reach and influence of any retrospective action of the law caused by such change. (*In re Henry M. Dunham*, 29 Leg. Int. 389; s. c. 2 Md. L. R. 485.)

The petition for leave to sell property free from incumbrances may, in case of improper conduct, be dismissed with costs to be paid by the assignee personally and not out of the estate. (*In re H. Brinkman*, 6 B. R. 541; s. c. 7 B. R. 421.)

If the estate is sold free from incumbrances, the State court may grant a *mandamus* against the State officer, directing an erasure of the mortgages. (*Conrad v. Prieur*, 5 Rob. [La.] 49.)

The district court has jurisdiction to decree an erasure of the mortgages, where the property is sold free from incumbrances. (*Conrad v. Prieur*, 5 Rob. [La.] 49.)

### Surrender to Creditor.

The assignee is invested with the right, independent of the sanction of the court, to release the bankrupt's right of redemption to the secured creditor. (*Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367.)

The powers of an assignee are in no sense judicial, and his acts bind only those whom he represents. In the sale of the estate of a bankrupt he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else. The act of the assignee in allowing a creditor to retain an alleged security, after deducting the value of the same from the amount of the claim, does not include other creditors claiming the same security, if they have not proved their claims. (*Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367.)

When the assignee, in the exercise of the discretion left to him, abandons all claim to incumbered property, then the State courts may subject such property



to the satisfaction of the secured creditor's claim, and may afford him any relief touching such property as he would have been entitled to if the proceedings in bankruptcy had never been instituted. (*Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367.)

### Sale Subject to Incumbrances.

The assignee may sell, without petitioning the court, or without any order of the court, any property of the bankrupt in his possession incumbered in any manner. But when he so sells, he does so subject to any and all lawful incumbrances, and can convey no higher or better interest. The proceeds of such a sale are supposed to be the price or value of the interest so sold, and with a knowledge of the incumbrances. (*In re Mebane*, 3 B. R. 347; *in re McClellan*, 1 B. R. 389; *Kelley v. Strange*, 3 B. R. 8; *Kiny v. Bowman*, 24 La. An. 506; *Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367; *Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128; *Wicks & Co. v. Perkins*, 13 B. R. 280; s. c. 1 Woods, 383.)

When property subject to an incumbrance has been sold without an order of the court, it will be taken for granted that the assignee sold only such right or title to the property as was vested in him, and, therefore, sold it subject to the incumbrance. (*Kelley v. Strange*, 3 B. R. 8; *Meeks v. Whatley* 4 B. R. 498; *Linthicum v. Fenley*, 11 Bush, 131.)

\* Where property is sold subject to liens, the purchaser takes the title subject to the terms of the sale. (*Seibel v. Simeon*, 62 Mo. 255.)

Property may be sold clear of incumbrances, to the prejudice of the rights of no one, by an agreement between the assignee and a secured creditor, and the creditor will then be entitled to be paid out of the balance of the proceeds that remain after the payment of the costs of sale and the lawful commissions of the assignee. (*In re Mebane*, 3 B. R. 347.)

As a general rule of equity jurisprudence, there is an equity of redemption in chattel mortgages. In Massachusetts, the statute remedy is not exclusive. The mortgagor may tender performance, and have his action at law; or, if for any reason this remedy is incomplete, he may proceed in equity. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.)

It is not necessary for the assignee to take any proceeding whatever in regard to incumbered property, unless by so doing he can realize a net sum of money free from incumbrances for the benefit of the estate. It would be idle to go through the form of selling the property, if the property be of less value than the amount of the incumbrance. (*In re Lambert*, 2 B. R. 426; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448.)

If the petition ask for leave to sell the property subject to certain specified incumbrances, and the report sets forth that the property was sold free from all incumbrances, except those specified, the report will not be adopted by a mere confirmation of the sale. It should explicitly appear in the order of confirmation that the report was confirmed, and that the sale as such confirmed, so as to show that the court acted upon that part of the report, and confirmed the sale by making it free and clear from all other incumbrances. That is indispensably necessary in order to make it binding on the court, because it could only be effectual by a ratification brought home to the knowledge of the court of the particular clause in the report. The assignee acted under a power. He was bound to follow the instructions of the power. If it is sought to be enlarged, the court ought to know of that enlargement, and ratify and confirm it as such. (*In re McGilton et al.* 7 B. R. 294; s. c. 3 Biss. 144.)

If a lien creditor is present at a sale by an assignee, he is present in contemplation of law, only with knowledge of the facts which are stated in the petition for sale, and in the order of the court. If the petition simply asks for leave to sell

the property subject to certain incumbrances, it is questionable whether he would be bound by an unauthorized statement of the assignee. (*In re McGilton et al.* 7 B. R. 294; s. c. 3 Biss. 144)

If the assignee sells the property without an order of the court, a secured creditor may enforce his claim against the property in a State court, although he has proved his debt. (*King v. Bowman*, 24 La. An. 506.)

The fact that land against which a mortgagee seeks to enforce his mortgage has been sold by the assignee, does not deprive the State tribunal of jurisdiction over the suit. (*King v. Bowman*, 24 La. An. 506.)

If the property is sold subject to a lien, the lien claimant may proceed in the State court to enforce his lien. (*Douglass v. St. Louis Zinc Co.* 56 Mo. 388)

Where hypothecary proceedings are instituted after the sale of the property by the assignee, it is not necessary to serve notices of the proceedings on the assignee or the bankrupt. The assignee has no interest in the hypothecated property, and the discharged bankrupt is no longer bound for the debt. (*Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128.)

### Sale on Application of Secured Creditor.

Liens upon the property of the bankrupt, so long as it remains in the possession of the bankrupt court, can only be enforced in the district court sitting as a court of bankruptcy. (*In re People's Mail Steamship Co.* 2 B. R. 553; s. c. 3 Ben. 226; *Davis*, Assig. of Bittel, *et al.* 2 B. R. 392; *Jones v. Leach*, 1 B. R. 595; *in re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *Lee v. Franklin Av. S. Inst. et al.* 3 B. R. 218; s. c. 1 C. L. N. 370; *in re Kerosene Oil Co.* 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; *in re Israel M. Rosenberg*, 3 B. R. 130; s. c. 3 Ben. 366; *in re J. M. Snedaker*, 3 B. R. 629; *in re High et al.* 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.)

The filing of a petition in bankruptcy operates from the time of such filing as a practical restraint on a pledgee of the property of the bankrupt, who is notified of such filing, from disposing of it otherwise than at his own risk, until the bankrupt court can act in the premises. (*In re Grinnell & Co.* 9 B. R. 29; s. c. 7 Ben. 42.)

A judgment which is a lien upon land must be proved, and can only be enforced through the bankrupt court. (*Davis v. Anderson*, 6 B. R. 145.)

For just and equitable purposes and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management in reducing it to money in his chosen way without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent to the court, and at the same time the representative of the rights of all parties in interest, is supposed to be above the temptation to fraud, and directs him in such capacity and under the pledge of his official bond as assignee, and under the direction of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all the priorities shown to exist in the proceedings in bankruptcy by the proof of the claims against the bankrupt. So far from taking any right or rights from the secured creditors, under the mortgage, lien, or pledge by which he holds the same, it simply regulates the mode and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice, and to see that the rights of all the creditors are secured to them under the proof of claims, and under the law. (*In re J. M. Snedaker*, 3 B. R. 629.)

Where the members of a firm are adjudged bankrupts individually, and not as copartners, a pledgee holding collaterals to secure a firm debt need not obtain

an order of the court for leave to sell the same. (*In re Geo. B. Grinnell*, 9 B. R. 137.)

If a corporation pledged its own bonds to secure a loan, the pledgee may sell them after an adjudication. (*Jerome v. McCarter*, 15 B. R. 546.)

A secured creditor may apply to the district court to have the incumbered property sold, and the proceeds applied *pro tanto* toward the payment of his debt. (*In re T. R. Stewart*, 1 B. R. 278; s. c. 1 L. T. B. 16; *in re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *Davis*, Assign. of *Bittel et al.* 2 B. R. 392; *in re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5.)

The application can not be made until the claim has been duly proved. To grant permission for a sale without proof would be to assume the existence of facts which may never be made to appear. For it can not otherwise be known that the creditor has any debt, or, if he has, that the property is properly held as security for the debt. In other words, to grant the order without proof, would be to assume as proved the facts upon which the right to the order is, by the bankrupt act, made dependent. (*In re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *in re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; *in re Frizelle et al.* 5 B. R. 119; *in re Geo. B. Grinnell*, 9 B. R. 137; *contra*, *in re High et al.* 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.)

When property is claimed under deed, by persons other than the bankrupt or assignee, a creditor asserting that he has a lien thereon, and desiring to enforce the same, must institute an original proceeding for that purpose and make the other claimants parties thereto. (*In re C. Dean*, 3 B. R. 769.)

A subsequent mortgagee who was not made a party to a petition against the assignee by a prior mortgagee to reform his mortgage, may state this as an objection to a sale or in claiming the proceeds. (*Fowler v. Hart*, 13 How. 373.)

The sale can not take place before an assignee is appointed. The assignee is the only person who can represent the creditors other than the particular secured creditor. Whether such other creditors are wholly unsecured or insufficiently secured, they have an interest in seeing that the debt of the particular secured creditor is duly proved, and is not fraudulent or illegal, and that the securities held for it are applied on it at their proper value, whether such value is ascertained by agreement between such particular secured creditor and the assignee, or by a sale. Before such application of the securities is made, the assignee has a right on behalf of such other creditors to elect whether he will redeem the pledged property by paying the debt and taking the property, or whether he will give it up to the secured creditor on receiving an agreed sum as its excess of value over the debt. Nothing of all this can be done until there is an assignee. (*In re Geo. B. Grinnell*, 9 B. R. 137.)

Notice of the application should be given to the assignee. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 B. R. 297; s. c. 2 Ben. 113; *in re High et al.* 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9; *in re S. F. Frizelle*, 5 B. R. 122.)

Generally, when the proceeding is by a secured debtor, notice upon the assignee who represents the estate will be sufficient, without notice to the creditors, though exceptions might be allowed to this rule in some cases very properly. (*In re High et al.* 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.)

If the time for the payment of a debt secured by a mortgage has been extended, an order of the bankrupt court passed without notice to the bankrupt permitting the mortgagee to sell before the time of the extension expires, will be void as to the bankrupt. (*In re Betts*, 15 B. R. 536; s. c. 4 Cent. L. J. 558; s. c. 13 Pac. L. R. 203.)

A secured creditor can not apply to have his lien satisfied until something has

been realized out of the property subject to his lien. (*In re Fallon*, 2 B. R. 277.)

The difference between the net proceeds of the sale of mortgaged property and the amount of the mortgaged debt is not to be paid in full out of the general funds of the estate. This difference is simply a claim against the estate, like all other unsecured claims. (*In re Purcell & Robinson*, 2 B. R. 22; s. c. 2 Ben. 485; s. c. 36 How. Pr. 42; *in re Ruehle*, 2 B. R. 577; s. c. 2 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5; *in re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17.)

Inasmuch as the lien creditor seeks and enjoys the aid of the district court in enforcing and realizing his lien, he is bound to pay the cost incurred in obtaining this aid. But, with regard to the costs of general administration, in which he has no concern, and in which he can have no interest until his lien is either satisfied or realized, it would be inequitable to require him to bear the burden of them. (*In re Hambright*, 2 B. R. 496; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; *in re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.)

The fund should be charged with the costs and expenses of sale and orders relative thereto, and its proportion of the general expenses of the estate. (*In re York & Hoover*, 3 B. R. 661.)

### Proceedings in State Courts.

After the commencement of proceedings in bankruptcy, a mortgagee can not foreclose the mortgage, under a power of sale contained therein, in the mode and manner prescribed by the State statutes. (*Phelps v. Sellick*, 8 B. R. 390; *Whitman v. Butler*, 8 B. R. 487.)

The power of a mortgagee to sell the property in the name of the mortgagor and his attorney is not affected by the bankruptcy of the mortgagor, for it is a power coupled with an interest. (*Hall v. Bliss*, 14 B. R. 329; s. c. 118 Mass. 554; *contra*, *Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

Where the title does not, under the State laws, pass to the mortgagee, a power to sell is not a power coupled with an interest, and is revoked by the bankruptcy of the mortgagor. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

The mere possession of the property is not of that dignity and nature which can be engrafted on a power in a mortgage, so as to make it a power coupled with an interest. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

If the power to sell is limited to a certain period, it is lost by a failure to exercise it during that period. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

A mortgagee holding a power of sale can not purchase the land himself, either in severalty, joint tenancy, or otherwise. He can not be vendor and vendee; the characters are inconsistent, and the power does not extend so far. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

Where the right to purchase is provided for in the mortgage, a mortgagee may purchase at a sale made by him in pursuance of a power contained in a mortgage. (*Hall v. Bliss*, 14 B. R. 329; s. c. 118 Mass. 554.)

A mortgagee holding a power of sale coupled with an interest, should, after the bankruptcy of the mortgagor, convey the property in his own name, and not in that of the bankrupt, who is *civiliter mortuus*, or at least incapable in law to execute a deed of conveyance. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

A power of sale in a mortgage is merely cumulative, and does not bar a foreclosure. (*Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.)

A purchaser at a sale under a deed of trust, after the commencement of proceedings in bankruptcy against the grantor, obtains a legal title which will be deemed valid until it is set aside by the assignee. (*McGready v. Harris*, 9 B. R. 135; s. c. 54 Mo. 137; *Roden v. Jacob*, 17 Ala. 344.)

A sale under a deed of trust is valid, although the holder of a second deed of trust on the property was bankrupt at the time thereof. (*Long v. Rogers*, 6 Biss. 416.)

A mortgagee holding a mortgage of personal property may take possession of the property after the commencement of proceedings in bankruptcy. (*Bentley v. Wells*, 61 Ill. 59.)

Where no advantage can result to the estate of the bankrupt, there is no reason why the district court should interfere with a suit brought in a State court after the commencement of the proceedings in bankruptcy to enforce a lien, when neither the assignee nor any creditor invokes such interference, and it appears without contradiction that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right of redemption. There is nothing to be sold subject to the mortgage which will yield anything, and any action of the district court for the liquidation and settlement of the amount of the lien, and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing. Under such circumstances, the district court may exercise a discretion on the subject, and may decline interference. (*In re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Tichenor v. Allen*, 13 Gratt. 15.)

The case should be clear, and the proof that nothing can be saved to the estate should be satisfactory. If the court can see that any prejudice to the interests of creditors may happen, it should not permit those interests to be put at hazard by a proceeding to which the general creditors are not parties, and in respect to which they have no protection but through the proceedings in bankruptcy. (*In re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320.)

In all matters of controversy, where the subjects in dispute are of a local nature, the rights of parties must be determined by actions in the local courts. Thus the title and disposition of real estate, where there are adverse claims, can not generally be determined in a court out of the State in which the land is situated. The right of a mortgagee to have a foreclosure of his mortgage can not be administered by a district court in another State, sitting as a court of bankruptcy. In such a case, the State court where the land is situated can afford a remedy by foreclosure and sale. (*Whitridge v. Taylor*, 66 N. C. 273.)

The claimant of a lien, by electing to pursue the property in the State court, will deprive himself of any right to prove his debt in bankruptcy for the deficiency. (*In re Iron Mountain Co.* 4 B. R. 645; s. c. 9 Blatch. 320; *Brown v. Gibbons*, 13 B. R. 407; s. c. 37 Iowa, 654.)

A foreclosure to which the assignee is not made a party is of no effect as to him, and his equity of redemption remains in full force. (*Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377; *Barron v. Newberry*, 1 Biss 149; *Truitt v. Truitt*, 38 Ind. 16; *City Bank v. Walton*, 5 Rob. [La.] 158; *Cole v. Duncan*, 58 Ill. 176; *Pierce v. Phillips*, 3 Robt. 488.)

If the bankrupt also had an interest in the mortgage debt, the assignee is a necessary party to an action to foreclose the mortgage, although he has sold all the bankrupt's interest in the land. (*Clark v. Clark*, 56 N. H. 105.)

A proceeding instituted in a State court to foreclose a mortgage after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against those who are parties thereto. (*Brown v. Gibbons*, 13 B. R. 407; s. c. 37 Iowa, 654; *Hulverson v. Hutchinson*, 39 Iowa, 316.)

After a surrender in bankruptcy, the bankrupt has no interest in property mortgaged by him, and can not be proceeded against by the appointment of a curator *ad hoc* to represent him in an action to foreclose the mortgage. A service of the citation on such curator is a nullity, and the proceeding is void. (*Kennedy v. Rust*, 25 La. An. 554.)

After the discharge of the bankrupt has been granted, the mortgagee may file a bill to foreclose the mortgage in a State court. (*Cole v. Duncan*, 58 Ill. 176; *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70.)

A mortgagee does not lose the lien of his mortgage by omitting to prove it in bankruptcy, but may enforce it after the proceedings in bankruptcy are terminated. (*Wicks & Co. v. Perkins*, 13 B. R. 280; s. c. 1 Woods, 883.)

If the assignee does not seek to redeem the mortgaged property, the mortgagee may institute an action in a State court to foreclose the mortgage. (*Brown v. Gibbons*, 13 B. R. 407; s. c. 37 Iowa, 654; *McKay v. Funk*, 13 B. R. 334; s. c. 37 Iowa, 661.)

When the bankrupt court consents, a mortgagee may foreclose the mortgage in a State court. (*Societe D'Espargues v. McHenry*, 49 Cal. 351.)

If a decree to foreclose a mortgage does not fix any personal liability upon the bankrupt, it is proper where the bankrupt transferred the property before his bankruptcy, although the proceedings to foreclose the mortgage were instituted in a State court after that time. (*Cockrill v. Jones*, 28 Ark. 193.)

Where no action is taken by the assignee or the creditor in the bankrupt court, the State court has jurisdiction to make the lien available. (*Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223.)

If the bankrupt transferred the property before the commencement of the proceedings in bankruptcy, the holder of a mechanic's lien claim thereon may enforce it in a State court. (*Glendon Company v. Townsend*, 120 Mass. 346.)

If the assignee appears in the State court and claims a surplus arising from the foreclosure of a mortgage, without objecting to the power of the court to render a judgment, he can not, when the decision is adverse to him, appeal to the supreme court, and raise the objection there. (*Mays v. Fritton*, 11 B. R. 229; s. c. 20 Wall. 414; *Scott v. Kelly*, 12 B. R. 96; s. c. 22 Wall. 57.)

*A fi. fa.* may be issued after the commencement of proceedings in bankruptcy to enforce the lien of the judgment. (*Russell v. Cheatham*, 16 Miss. 703; *McCance v. Taylor*, 10 Gratt. 580; *Freeny v. Ware*, 9 Ala. 370; *Talbert v. Melton*, 17 Miss. 9; *Sorden v. Gatewood*, 1 Ind. 107; *contra*, *Johnson v. Poag*, 39 Tex. 92; *Stemmons v. Burford*, 39 Tex. 352; *Blum v. Ellis*, 13 B. R. 845; s. c. 73 N. C. 293.)

The bankruptcy court will treat the enforcement of a lien in the State courts as valid, on the application of the lien holder, and a showing by him that the estate and the other creditors will suffer no injury thereby. (*Phelps v. Sellick*, 8 B. R. 390.)

A purchaser from the mortgagee is a necessary party to the bill to redeem. (*Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377.)

An owner of an equity of redemption in real estate, which has been sold under a foreclosure to which he was not a party, can not recover against the mortgagee or the purchaser at the mortgage sale, a personal judgment for the value of his interest in the mortgaged premises. (*Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377.)

If a creditor proves his debt, he can not afterwards resort to a State tribunal to enforce his lien against property which was the subject of proceedings in bankruptcy to which he was a party. (*Spilman v. Johnson*, 27 Gratt. 33.)

If a judgment creditor proves his claim as unsecured, and receives a dividend thereon from the estate of one joint debtor, he can not enforce the lien of the

judgment against the other joint debtor through a State court. (*Heard v. Jones*, 15 B. R. 402; s. c. 56 Geo. 271.)

The district court may authorize a judgment creditor to proceed in the usual way to collect his judgment, if that course seems best for the estate. (*In re McGilton et al.* 7 B. R. 294; s. c. 3 Biss. 144)

In order to entitle a mortgagee to apply to the bankruptcy court for leave to foreclose his mortgage in another court, he must prove his debt as a secured debt. The petition must allege this fact, and also the date of the proof and the amount of the debt as proved. The mortgage and the property covered by it must be fully described in the petition, and it must be stated whether there are other and what incumbrances on such property, with a full description of such incumbrances if any. It must be made to appear that the estate has no ultimate interest in the mortgaged property, and to this end the petition must state the actual value of the mortgaged property, in order that the court may be informed whether there is or is not a surplus of value over the incumbrances. In case the value of the property is greater than the incumbrances, it must be made to appear that the rights of the petitioner can not be fully protected by a sale of the property by the assignee under the bankruptcy proceedings, either subject to the incumbrances or free from the same, and the debt or debts paid out of the proceeds, and to this end the petition must state the facts from which such conclusion is claimed to follow. (*In re Philo R. Sabin*, 9 B. R. 383.)

If a proceeding to foreclose a mortgage is instituted in a State court after the commencement of the proceedings in bankruptcy, it may be stayed on the application of the assignee. (*Markson v. Heany*, 12 B. R. 484; s. c. 47 Ind. 31.)

SEC. 5076.—Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy or a commissioner of a circuit court in the judicial district where such creditor or either one of joint creditors reside; but proof taken before a commissioner shall be subject to revision by the register of the court.

Statutes Revised—March 2, 1867, ch. 176, § 22, 14 Stat. 527; July 27, 1868, ch. 258, § 3, 15 Stat. 228. Prior Statutes—April 4, 1800, ch. 19, § 6, 2 Stat. 23; Aug. 19, 1841, ch. 9, §§ 5, 7, 5 Stat. 444, 446.)

A proof of a debt taken before a justice of the peace is not duly proved, and must be rejected. (*In re Strauss*, 2 B. R. 48.)

The proof of a debt in bankruptcy may be taken by a register or by a commissioner, in all cases, whether of a resident or non-resident creditor, or whether such commissioner holds his office in the same town or in the same building in which a register holds his office, the only limitation being that it shall be taken before a register or commissioner of the same judicial district in which the creditor resides or in which the proceedings are pending. The law never did require, nor does it seem to have contemplated, that such proof should be taken before the register to whom the case in bankruptcy has been referred, to the exclusion of all others. (*In re W. B. Merrick*, 7 B. R. 459; *in re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484; *contra*, *in re Haley*, 2 B. R. 36.)

It is no doubt the wiser policy for creditors, in all cases where they can do

so conveniently, to make their proof before the register in charge, because he is thereby afforded an opportunity of putting such questions to them and making such explanations to them as to their rights and liabilities as he may see fit, and the creditor may then be saved the trouble of being afterwards summoned before the court to submit to an examination in regard to his claim. But all the court can do is to commend that course to creditors as the wiser policy. (*In re W. B. Merrick*, 7 B. R. 459.)

The court has no discretion to refuse to receive and file a proof of debt which appears on its face to have been taken by a proper officer and to be correct in form and substance. By the receipt and filing of the proof of debt, and by it alone, the court obtains jurisdiction of the claim and of the creditor presenting it, and then, and then only, does the revisory power of the court over such proof commence. (*In re W. B. Merrick*, 7 B. R. 459.)

The receiving and filing of a proof of debt concludes nothing. Unless otherwise ordered, it entitles the creditor to be placed on the list of creditors, vote for assignee, and receive dividends, but the court may otherwise order and do all things in regard to it which the act authorizes to be done. (*In re W. B. Merrick*, 7 B. R. 459.)

A proof made by the creditor before his own attorney can not be allowed. (*In re Henry Nebe*, 11 B. R. 289.)

A proof of debt made by an officer of a corporation before a register in a State other than that under whose laws the corporation was organized is insufficient. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

SEC. 5076 A (22 June, 1874, ch. 390, § 20, 18 Stat. 186).—That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

The impression of a notarial seal can not be received as evidence unless the name of the notary is engraved on the seal so as to make it his official seal. (*In re Henry Nebe*, 11 B. R. 289; *in re Port Huron Dry Dock Co.* 14 B. R. 253.)

The requisites of a notarial seal are determined by the law of the locality from which he derives his authority. (*In re Wm. W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.)

An official seal is an impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. (*In re William W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.)

In the absence of express legislation, an official seal need not contain the name of the official. (*In re Wm. W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.)

Any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat. (*In re William W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.)

It is the seal, and not its composition or character of words and devices, which raises the presumption of official character of which the courts take judicial notice. (*In re William W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.)

The presumption is that a seal is the official seal of the person it purports to



he, and who subscribed the jurat. (*In re* William W. Phillips, 14 B. R. 219; s. c. 8 C. L. N. 409.)

The power given to notaries to take proof of debts carries with it the incidental power to take acknowledgments of letters of attorney. (*In re* Butterfield & Burr, 14 B. R. 195; *in re* McDuffee, 14 B. R. 336.)

SEC. 5076 B (Act of August 15, 1876, ch. 304, 19 Stat. 206).—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do.

A bankrupt may verify his schedules before a notary public. (*In re* John W. Bailey, 15 B. R. 48.)

SEC. 5077.—To entitle a claimant against the estate of a bankrupt to have his demands allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Statute Revised—March 2, 1867, ch. 176, § 22, 14 Stat. 527.

### The Proof.

The statement of the debt in the schedule is not a proof of it. It may be stated in fraud, and may not exist. The bankrupt may have made payments, or may have counter-claims and offsets. The debt must be proved by the oath of the creditor. This applies to a lien creditor as well as to an unsecured creditor. (Davis, Assign. of Bittel *et al.* 2 B. R. 392.)

A creditor need not wait until the first meeting of creditors to prove his claim, nor is it the duty of the register to notify the bankrupt of the filing of the proof. (*In re* Patterson, 1 B. R. 100; s. c. 1 Ben. 448.)

A "deposition" by a debtor, proving his claim against the estate of the bankrupt, is neither an affidavit nor a deposition, as known in the ordinary practice of law. It is the result of an examination of the creditor made by the officer of the law authorized to make it. The creditor is not only required to testify to the amount of his claim, but he must testify to its consideration, and whether he has received any payment, or holds any security whatever for the same, and to other facts required by the act. In no other court of justice is such testimony required for the due proof of any debt, and it is evident that Congress intended that the court and its officers should, by a careful examination of the creditor, purge his conscience, and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, exists. (*In re Strauss*, 2 B. R. 48; *in re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.)

There is no requirement that the deposition shall be written by the officer taking it, or by some disinterested person in his presence, or by the witness. Neither is it of so much importance in view of the fact that what the creditor must swear to is clearly and explicitly pointed out in the act, and the exact form in which he shall do it is also prescribed. It is a practice, however, not to be commended. It is far preferable, and more in accordance with the spirit of the act, that the officer, with the act and the form before him, should examine the creditor on oath touching the matter specified, and himself reduce the depositions to writing, or fill up the printed blank, if such is used. (*In re W. D. Merrick*, 7 B. R. 459.)

The proof of a debt against a firm should state that the firm or company, describing it by its firm name, and the individuals who composed it, was indebted to the creditor, and how and for what amount. It should not be uncertain whether the demand is a firm debt, or a joint claim against the individuals who compose the firm. (*In re Walton et al.* 1 Deady, 510.)

When partners are adjudged bankrupts, the result is, or may be, that several distinct estates are to be administered in that proceeding. There is the estate and debts of the partnership, and the separate estate and debts of each individual included in the partnership. Proof of a debt against either of these estates ought not to include or be joined with the proof of a debt against either of the others. Two distinct debts against different estates can not be included in one proof or deposition. (*In re Walton et al.* 1 Deady, 510.)

A proof of debt can not be filed unless it is correctly entitled in the cause. (*In re Pius Walther et al.* 14 B. R. 273.)

The proof should contain at least one full christian name of the creditor as well as his surname. (*In re William H. Valentine*, 12 B. R. 389; s. c. 4 Biss. 317.)

As a general rule, the proof of a claim must be established by the same degree and character of evidence as that required in a trial at law or a hearing in equity. (*In re Northern Iron Company*, 14 B. R. 356.)

If the deposition refers to an annexed account which merely gives dates and amount without stating the subject-matter of the account, that is not sufficient. (*In re Port Huron Dry Dock Co.* 14 B. R. 253.)

The amount of interest to which a claimant is entitled is not to be determined by himself, but the data must be furnished by him under oath, and the computation is to be made by the register. (*In re Port Huron Dry Dock Co.* 14 B. R. 253.)

A proof in due form makes out a *prima facie* case against an indorser, although there is no evidence of a protest, for the creditor is not obliged by the mere interposition of an objection to produce such evidence as would be necessary at an ordinary trial. (*In re W. A. Saunders*, 13 B. R. 164.)

Where a claim consists of a promissory note, the creditor must produce the note, or a copy thereof. (*In re Northern Iron Co.* 14 B. R. 356.)

Where a note appears to have been discounted after the commencement of the proceedings in bankruptcy, the holder must show something more from which his good faith may be inferred than a bare assertion that he has discounted it for a specified sum. (*In re Port Huron Dry Dock Co.* 14 B. R. 253.)

A statement that a note has been regularly protested on an indorser does not state a fact, and hence does not prove that the liability of the bankrupt has been fixed by demand and notice. (*In re Port Huron Dry Dock Co.* 14 B. R. 253.)

When the debt is evidenced by a promissory note, the note must be produced and exhibited when required by the register, the assignee, or the bankrupt, on proper occasions. Forms Nos. 31 and 33 distinctly show that a bill or note or security held for a debt is to be exhibited at the time the proof of debt is handed in; and Forms Nos. 27 and 31 show that it is to be again exhibited before a dividend is paid on it. When the note is merged in a judgment, it need not be produced. (*In re Knoepfel*, 1 B. R. 70; s. c. 1 Ben. 398; *in re Jaycox & Green*, 7 B. R. 303.)

The proof need not anticipate the defense of the statute of limitations, or give any facts to take the debt out of the statute. The statute may be waived, and, when relied on as a defense, must be set up affirmatively by the party making the defense. (*In re Knoepfel*, 1 B. R. 70 s. c. 1 Ben. 398.)

A transfer of the claim is valid unless it is fraudulent or oppressive. (*In re Morris*, 12 B. R. 170.)

One object of the law in requiring the consideration to be stated is, to enable the register to say whether it is legal in its nature, and will support a demand or promise; another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment before its allowance; another, to afford the assignee means for comparing the books of the bankrupt with the proof. But the chief object, no doubt, is to put a check upon the proof of fraudulent and fictitious claims by requiring the claimant to give such a particular and definite statement of the consideration as will enable other creditors to trace out, discover, and expose the fraud or illegality of the claim, if any exist. The requirement is intended to be for the benefit of all other creditors of the estate and the bankrupt, and to prevent fraud. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient. A general statement that the consideration of a demand is goods, wares, and merchandise, or hay, barley, and board, is not sufficient. The kind of goods, the quantity, the price, and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be stated. If the proof falls short of this, the register ought not to consider it satisfactory, and should withhold his approval. (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140; *in re Northern Iron Co.* 14 B. R. 356.)

When the debt consists of a promissory note, the proof should set forth the consideration of the note, and state whether any and what payments have been made thereon. (*In re Loder Bros.* 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159; *in re Jaycox & Green*, 7 B. R. 303; *in re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376.)

The proof of a claim for contribution by a partner should set forth the amount paid by him for the debt on account of which the claim is made. (*In re E. R. Stephens*, 6 B. R. 538; s. c. 3 Biss. 387.)

The assignee of a simple *chose in action* or contract for the payment of money must state the consideration which passed between the original parties. (*In re Lake Superior S. C. R. R. & I. Co.* 10 B. R. 76.)

The holder of a negotiable paper, who took it for value in good faith before-

the maturity thereof, need only state the consideration which he gave for such paper. (*In re Lake Superior S. C. R. R. & I. Co.* 10 B. R. 76.)

The creditor must make the proof *simpliciter*, and he is not at liberty to interpose any protest or qualification or reservation. (*Dutton v. Freeman*, 5 Law Rep. 447.)

Where a party has a demand by its terms payable in coin, he should prove it according to its terms. The demand should then be entered upon the books of the assignee, as payable in coin, and the claimant will be entitled to receive his dividend thereon in the stipulated currency. (*In re Eldér*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.)

A note dated March 18th, 1861, and payable three years after date, in current money of the State, is payable in lawful currency, and not in State treasury notes subsequently issued. The parties could not have contemplated payment in treasury notes. (*In re Whittaker*, 4 B. R. 160.)

### Proof of Secured Debt.

A secured creditor can resort to one of three remedies: 1st. He may rely upon his security; 2d. He may abandon it, and prove the whole debt as unsecured; 3d. He may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. Before he can prove his whole debt as a general creditor, he must surrender the security. Any attempt on the part of a creditor to prove a debt before a register, without complying with the conditions imposed by the law, should be disregarded by him. (*In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.)

A secured creditor should always prove his claim; any other theory is entirely irreconcilable with the provisions of the bankrupt act. If the enforcement of his lien satisfies his demand, the debt will be discharged; but if it does not, then the balance remains as a general claim against the estate, like all other unsecured claims. (*Davis*, Assig. of Bittel *et al.* 2 B. R. 392; *in re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5; *in re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17.)

The bankrupt court has jurisdiction over the debtor and all his creditors, and also over all demands affecting the bankrupt's estate. The secured creditor must prove his demand, and obtain the aid of the bankrupt court for its enforcement, and cannot wait until bankruptcy proceedings are closed, and then enforce his lien through the State court. (*Davis v. Anderson*, 6 B. R. 145.)

The word "debt," as used in this section, means the amount upon which the dividend is to be computed, and the phrase "proved his debt," is equivalent to the phrase "share in the distribution of the assets" (*In re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *Jervis v. Smith*, 3 B. R. 594; s. c. 7 Abb. Pr. [N. S.] 217.)

This rule that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, remaining after the deduction of the value of his security, had its origin in chancery, and probably in the doctrine of election. The debt or obligation of the debtor is the principal thing; the pledge, the collateral or incident. If the debtor makes default, the creditor has a right of election as to his remedies. He may institute a personal action against his debtor upon his obligation, and by means of judgment and execution thereon, collect his debt out of the estate of his debtor, or he may proceed to make his collateral securities available to the payment of his debt. The natural and usual course is to proceed against the debtor, in the first instance, by a personal action. If the collateral securities have not, by some conventional act or intervening equity, become the primary fund for the payment of the debt, there is nothing in reason or natural justice which requires the creditor to proceed against the securities in the first place. But the lord

chancellor, in the exercise of his summary powers over suitors and the commissioners of bankruptcy, long before any statutory provision, was accustomed to compel creditors to elect between the commission and the other remedies they might have for the recovery of their debts, and to stand to the election; and he restrained the commissioner from admitting a lien creditor, or permitting him to prove his debt, until he had exhausted his lien or security. Subsequently the practice of valuing securities was adopted to avoid delays. (*Jervis v. Smith*, 8 B. R. 594; s. c. 7 Abb. Pr. [N. S.] 217.)

A deposition, according to Form No. 21, is such a proof as is allowed by this section, even though the value of the security is not determined, nor the property sold. (*In re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; *in re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *in re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5.)

The value of the securities held by the creditor is not required by the bankrupt act to be set forth in the deposition, and Form No. 21 only requires an estimate of that value to be made. A creditor does not prove, as against the estate, or offer to prove, the whole indebtedness of the bankrupt exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness, in order to arrive at the balance, for which balance alone the creditor seeks to be admitted to share in the distribution of the assets. (*In re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95.)

The proof of a claim by a secured creditor differs from that of an unsecured creditor in this: the latter at once steps into the column of general creditors who are to be paid out of the assets of the bankrupt *pro rata*, according to the amount of their claims; while the former, or secured creditor, halts awhile to have the value of his security determined in such manner as the court may direct, and then becomes a general creditor, or shares in the bankrupt's assets for the balance, after deducting the value of his securities. (*In re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252.)

The proof of a secured claim, according to Form No. 21, does not invalidate the right of the creditor to the securities which he is found to hold. (*In re Bigelow et al.* 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *in re J. M. Snedaker*, 3 B. R. 629; *King v. Bowman*, 24 La. An. 506.)

A collateral consisting of a policy of insurance upon the life of the bankrupt is not a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, but nevertheless, the creditor must credit the present value of the security on the debt. The present value of the policy is its cash surrender value, and the creditor is entitled to prove for the balance after deducting this amount from his debt. (*In re Frank Newland*, 7 B. R. 477; s. c. 6 Ben. 342.)

If a secured creditor also has an unsecured claim, he may prove such claim, and vote for an assignee. (*In re S. Hanna*, 7 B. R. 502; s. c. 5 Ben. 5; *in re J. F. & C. R. Parkes*, 10 B. R. 82.)

An estimate of the value of the securities made by the secured creditor is not sufficient for the purpose of adjusting the amount on which he may be admitted to vote for assignee. The ascertainment of such value must rest in abeyance until after the election of an assignee. (*In re S. Hanna*, 7 B. R. 502; s. c. 5 Ben. 5.)

The claim of a creditor who has sold his collaterals can not be rejected absolutely, but may be allowed for such amount as may be found to be actually due. (*In re Nounnan & Co.* 6 B. R. 579; s. c. 1 Utah Ter. 44; s. c. 4 L. T. B. 228.)

The holder of a promissory note, the indorser of which is secured by a mortgage upon the property of the bankrupt, may release and surrender his security,

and then prove his debt as wholly unsecured. This may be done by a direct and formal release, or by such acts as, either in law or equity, are equivalent to such express release. As the beneficiary of the trust, created or implied for his sole benefit, he can release and discharge the trust, the trustee, and the trust property, without the aid or intervention of a trustee having no interest in the continuance of the trust; and as such release and discharge, without the consent of the surety, must release and discharge the surety, at least to the extent of the full value of the trust property released, the surety has no interest in opposition to the release. (*In re Jaycox & Green*, 8 B. R. 241; s. c. 7 B. R. 303.)

### Effect of Proving Secured Claim as Unsecured.

A secured creditor who proves his claim without reference to his lien or security, and without apprising the bankrupt court of its existence, thereby waives his lien, and relinquishes it to the assignee. (*Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. [N. S.] 68; *in re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126; *in re Stansell*, 6 B. R. 183; *in re Granger & Sabin*, 8 B. R. 30; *in re Jaycox & Green*, 8 B. R. 241; *Hoadley v. Cawood*, 40 Ind. 239; *Briggs v. Stephens*, 7 Law Rep. 281.)

A secured creditor, who in his proof claims a lien upon the entire estate of the bankrupt, when he only has a lien upon a certain portion thereof, does not thereby lose the real lien to which he is entitled, nor is his proof vitiated. (*McKinsey v. Harding*, 4 B. R. 39.)

The proof without a release or conveyance is contrary to law, but does not of itself operate to discharge a mortgage. It may prevent the creditor from setting up a mortgage against the assignee, but the assignee alone can avail himself of the rights which this provision is intended to secure. Third parties can derive no right or advantage therefrom. (*Cook v. Farrington*, 104 Mass. 212.)

There is no provision in the bankrupt act that the claim of a proving creditor against joint debtors with, or sureties for, the bankrupt, shall be assigned or given up by the creditor to the assignee. Indeed, such provision would be manifestly absurd. The claim of the creditor against the surety of the bankrupt is, in no sense, the property of the bankrupt. The bankrupt has no right or interest in it, and, consequently, can transfer none to his assignee. A creditor who has proved a claim against the bankrupt's estate, arising from a contract made by the bankrupt and certain others, as joint contractors, without stating in his proof that the same was in any manner secured, may, nevertheless, maintain an action upon such contract against the other joint contractors. (*Hoyt v. Freel*, 4 B. R. 131; s. c. 7 Abb. Pr. [N. S.] 220; s. c. 2 L. T. B. 144.)

Before a secured creditor can prove his full claim as an unsecured debt, he must surrender his security. Such a proof should not be received until a release or conveyance is filed. (*In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.)

But where a release has not been made, and the title to the property comes in question in a controversy between the assignee and other parties, that will be considered as having been done which ought to have been done. (*Wallace v. Conrad*, 3 B. R. 41; s. c. 3 Brews. 329; s. c. 7 Phila. 114.)

If an indorser takes a mortgage from the maker to secure the payment of all notes indorsed by him and to indemnify him against his indorsements for the maker, and the creditor is not a party to the transaction, it is optional with the creditor to seek and take the benefit of any trust or equitable lien which the law may give him, or to waive such right and rest content with the personal responsibility of the indorser. He can not be coerced to avail himself of the security. If the maker, therefore, becomes bankrupt, the holder does not lose his right of action against the indorser by proving the debt as unsecured. (*Merchants' Nat'l Bank v. Comstock*, 11 B. R. 235; s. c. 55 N. Y. 24.)

If the holder of a note, the indorser whereof is protected by a mortgage, proves his claim as unsecured, this does not extinguish the mortgage, for the assignee is subrogated to the rights of the holder. (*Hiscock v. Green*, 12 B. R. 507.)

It will not be presumed that a creditor fraudulently concealed the fact of his lien in proving his claim. (*Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.)

Merely proving a secured claim as a general claim does not waive the security. (*Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.)

### Amendment of Proof.

Proofs of debt can not be taken from the file. (*In re Loweree*, 1 B. R. 74; s. c. 1 Ben. 406; *in re McIntosh*, 2 B. R. 506; *in re Emison*, 2 B. R. 595; *contra*, *Morse v. Lowell*, 48 Mass. 152.)

A secured creditor, who inadvertently proves his debt as an unsecured claim, will not be required to surrender his lien and participate in the general distribution of assets, but will be allowed, if he elects to do so, to withdraw or amend the proof, and rely upon his security. (*In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; see Rule I; *in re Clark & Binninger*, 5 B. R. 255; *in re Hope Mining Co.* 1 Saw. 710; *in re Harwood*, Crabbe, 496; *in re Lapsley*, 1 Penn. L. J. 245.)

Participating in the election of an assignee will not preclude a creditor from amending his proof from unsecured to secured, when there is no evidence that he gained any advantage thereby, or that the other creditors have been in any wise prejudiced in consequence of it, or that he was influenced by any fraudulent intent. In the absence of evidence, the presumption is that none existed. (*In re William McConnell*, 9 B. R. 387; s. c. 31 Leg. Int. 61; *King v. Bowman*, 24 La. An. 506; *in re J. F. & C. R. Parkes*, 10 B. R. 82.)

If the secured creditor has received a dividend, he may be allowed to amend, upon condition that he refunds the dividend, with interest. (*In re J. F. & C. R. Parkes*, 10 B. R. 82.)

Where a creditor has been guilty of laches in claiming his security, the court may, as a condition for allowing an amendment, require that there shall be a deduction from the proceeds realized by selling the security, of a portion of the costs and expenses of the proceedings. (*In re William McConnell*, 9 B. R. 387; s. c. 31 Leg. Int. 61.)

Where proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. Even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal, if there has been a mistake and no want of diligence. The proof may be withdrawn for the purpose of proceeding against a dormant partner of the bankrupt. (*In re Edward Hubbard*, 1 B. R. 679; s. c. Lowell, 190.)

An order allowing a withdrawal of a proof may be passed by the register, if, after due notice, no opposition is made; otherwise, by the court. (*In re Edward Hubbard*, 1 B. R. 679; s. c. Lowell, 190.)

Where a proof is sworn to and filed, and afterwards, upon the objection of other creditors, is postponed, the creditor has no right to withdraw it upon his mere demand. (*In re Abraham Halle*, 7 Ben. 182.)

A creditor will not be allowed to withdraw a proof merely for the purpose of continuing an arrest of the bankrupt, which was made before the commencement of the proceedings in bankruptcy. (*In re Wiener*, 14 B. R. 218.)

The power of the court to allow a creditor to withdraw a proof that has been filed inadvertently, is wholly discretionary. (*In re Wiener*, 14 B. R. 218.)

It is the policy and purpose of the act to do equal and exact justice between the estate of the bankrupt and creditors. The court has ample power to investigate a claim at any stage of the proceedings, and to make any correction equity and justice demand, not only to reduce the amount if it is too large, but also to increase it if, through inadvertence, it is smaller than by right it should be. Questions of amendment address themselves to the equitable consideration of the court, and great discretion is exercised in disposing of them. (*In re Henry B. Montgomery*, 2 B. R. 429; s. c. 3 Ben. 565.)

A creditor can not authorize an attorney to alter a proof without having it sworn to again after such alteration. (*In re Pius Walther et al.* 14 B. R. 273.)

So long as the right to prove continues, the right to amend a proof filed should not be denied. (*In re Myrick*, 3 B. R. 154; *in re Henry B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565.)

When the proof is defective, a party may be allowed, and ought to be required to amend it. (*In re Loweree*, 1 B. R. 74; s. c. 1 Ben. 406; *in re Myrick*, 3 B. R. 154.)

The register has the right, and it is his duty, to permit and require a defective proof to be amended; but if, in such case, an issue of law or fact is raised, he must adjourn the same into court for decision. (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; 1 L. T. B. 198; 3 L. T. B. 140.)

When the amendment sought relates to a new and different claim from any one of those embraced in the existing proof of debt, leave to amend the existing proof must be denied. The proper course is for the creditor to prove his newly discovered debt independently. (*In re Henry B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565.)

An amendment of a proof relates back to the original filing unless the rights of others have in the mean time intervened, and an objection that a note was not attached to the original proof, or that the claim was barred at the time of the filing of the objection, can not be maintained. (*In re J. W. Maybin*, 15 B. R. 468)

SEC. 5078.—Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Statute Revised—March 2, 1867, ch. 176, § 22, 14 Stat. 527. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

In the proof of debts by a creditor firm composed of several members, the firm is to be treated as one creditor, and any one member may act for all in proving the debts. (*In re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.)

A receiver appointed in one State may file a proof of claim in the district court in another State. Any person who is authorized to give an acquittance of a debt is entitled to prove the debt in bankruptcy, if he be acting in a represent-



active capacity as trustee, assignee, receiver, executor, administrator or in any other of the various representative capacities which the law provides for the administration of human affairs. (*In re Republic Ins. Co.* 8 B. R. 197; s. c. 3 Biss. 504.)

A deposition by an assignee for value, before bankruptcy, of a *chose in action*, is sufficient to entitle him to be considered the creditor in respect to such debt, to all intents and for all purposes. His deposition should show the facts and the date of the transfer, and the name of the original creditor. It is not necessary that the assignor should join in making the deposition. Such assignee of a *chose in action*, so proving, should have the right to take any such action or proceeding in the cause in the name of his assignor, at his own expense, as he may be advised. An appeal from the disallowance of such a claim ought, perhaps, to be taken in the name of the original creditor. (*In re Fortune*, 3 B. R. 312; s. c. Lowell, 384; s. c. 2 L. T. B. 99.)

A party to whom a debt has been assigned after the commencement of proceedings in bankruptcy, may prove it. It is true that the Forms require that the debt shall be due to the creditor at the time of the commencement of proceedings in bankruptcy, but these may be modified to suit the facts of each particular case. Taken literally, they would exclude administrators, or other assignees, by mere operation of law, which certainly can not have been intended. There is nothing in this section to avoid a real and honest transfer without any purpose of influencing the proceedings in bankruptcy, but rather an implication that it may be done if there is no such purpose. (*In re Murdock*, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; *in re Frank*, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.)

If the holder of a negotiable note indorses it after the bankruptcy of the maker, the indorsee may prove the debt. (*Humphreys v. Blight*, 4 Dall. 370; s. c. 1 Wash. 44.)

A party who in good faith undertakes to buy up all the claims against the bankrupt, with the intention of stopping the proceedings and giving the debtor time to pay them, does not violate any of the provisions of the bankrupt act. The bankrupt act should not be construed so strictly as to prevent the bankrupt from making efforts to extricate himself from the bankruptcy proceedings, and if he can find a friend to buy up his debts, for the purpose of giving him time to convert his property into money to pay them, he may do so. The bankrupt act encourages all honest efforts, and sustains all honest transactions of a debtor. The clause which provides that the creditor must prove that the claim was not procured for the purpose of influencing the proceedings under this act, does not relate to transfers after the filing of the petition any more than before, and is not intended to interfere with ordinary transfers, but only of notes and demands, such transfers as are procured for the purpose of influencing the proceedings in bankruptcy. If the person who honestly undertakes to purchase up the debts, fails, he may prove the claim and participate in the estate. (*In re Strachan*, 3 Biss. 181; *in re Pease et al.* 6 B. R. 173.)

There must be an assignment of the claim. A receipt of payment is not sufficient. If the claimant has paid the claim, he may have a demand for money paid against the bankrupt, but, when such payment is made after the filing of the petition, the demand is not a provable debt. (*In re Strachan*, 3 Biss. 181.)

The true mode of proving an assigned claim, is that the holder should himself make the affidavit, else, the statement that the claim was not procured, etc., becomes merely illusory, for it is not made by the party who has bought the claim, and might be entirely true in respect to the affiant, and false as to the real party in interest. (*In re Pease et al.* 6 B. R. 173.)

An agent can not make oath to the deposition in proof of his principal's debt, without showing that the creditor is absent from the United States, or prevented by some other good cause from testifying. This cause is to be proved to the satisfaction of the judge or register before whom the debt is offered for proof.

The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it, and unless he is absent, or in some way prevented from testifying, no one can do so for him, unless he is a person having actual knowledge. (*In re H. F. Barnes, Lowell, 560.*)

If one partner is sick and the other is out of the State, this is not a sufficient reason for allowing an agent to make the proof, although his knowledge is superior to that of the absent partner. (*In re William Whyte, 9 B. R. 267.*)

If an agent has personal knowledge of all the facts necessary to make proof of it, and the creditor has no knowledge of the matter at all, the former may prove the debt. (*In re Martin Watrous et al. 14 B. R. 258.*)

An agent holding negotiable paper can not prove it when the owner is in a situation to make the proof himself. (*In re W. S. Saunders, 13 B. R. 164.*)

Mere absence from the State or the locality where the proof is made, is not alone regarded as cause for proof by an agent. (*In re George Jackson et al. 14 B. R. 449.*)

If the creditor is confined to his house by sickness, so that he is unable to testify, this is a sufficient reason for allowing an agent to make the proof. (*In re William Whyte, 9 B. R. 267.*)

When an agent testifies positively of his own knowledge, the proof need not show any reason why the creditor himself could not have made the deposition, nor need he testify to the best of his knowledge, information and belief, nor set forth his means of knowledge as to the claim. (*McKinsey v. Harding, 4 B. R. 39.*)

A person who has acted as the agent of the bankrupt in purchasing claims against the bankrupt's estate, can not prove them. (*In re Lathrop et al. 3 B. R. 413; s. c. 3 Ben. 490.*)

A creditor who makes the proper deposition, but retains the proof in his own hands, can not be considered a creditor who has proved his debt within the technical meaning of the bankrupt act. (*In re L. Sheppard, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.*)

A bankrupt may testify to support a claim of his wife against the estate, where such testimony would be competent under the State laws. (*In re Levi Bean, 14 B. R. 182; s. c. 1 W. N. 432.*)

The proof of a claim by a State should be made by the State Treasurer or by some officer holding a relation to the State similar to the relation which a president, cashier or treasurer bears to a corporation of which he is such officer. A warden can not make the proof. (*In re Corn Exchange Bank, 15 B. R. 216; s. c. 9 C. L. N. 254, 431.*)

SEC. 5079.—Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the case.

Statutes Revised—March 2, 1867, ch. 176, § 22, 14 Stat. 527; July 27, 1868, ch. 258, § 3, 15 Stat. 228.

A proof can not be taken before a consular agent. (*In re Robert V. Lynch, 16 B. R. 38.*)

SEC. 5080.—If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine

the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Statute Revised—March 2, 1867, ch. 176, § 22, 14 Stat. 527.

The officer taking the proof, should append it to a certificate, that it is satisfactory to him. (*In re Belden & Hooker*, 4 B. R. 194.)

The register who has charge of the proceedings in bankruptcy, may reject a proof taken before another register, when the same does not appear to be in conformity to law, but if an issue of law or of fact is raised and contested thereon, the question must be adjourned into court for the decision of the judge. Proofs so rejected should be returned for amendment. (*In re Benj. H. Loder*, 3 B. R. 665; s. c. 4 Ben. 125.)

The register has the power to pass upon the satisfactory or unsatisfactory character of a proof, but the power is to be exercised in subordination to the provision of section 5009, which requires that an issue of law or fact raised, and contested by a party to the proceedings before the register, shall be adjourned into court for a decision. (*In re Bogert & Evans*, 2 B. R. 435; s. c. 38 How. Pr. 111.)

A register, in examining proofs of debt for admission, acts not only as a judicial officer who is to decide all the questions arising in the discharge of his duty according to law, but sitting also as an administrative officer in the interest and service of all the creditors, he is to take care that defective and insufficient proofs are not allowed to pass, through partiality, to any creditor, or inattention which would produce all the mischievous effects of partiality. (*In re Port Huron Dry Dock Co.* 14 B. R. 253.)

A claim may be said to be duly proved, when the statements of the deponent, if true, establish *prima facie* the existence of the debt, and the present right of the creditor to payment of the same out of the estate of the bankrupt. But a claim is not duly proven when any allegation which the act requires to be made in the proof concerning it is omitted, or where the proof is not made in conformity with the forms prescribed, and the rules and practice of the court. (*In re Walton et al.* 1 Deady, 510.)

The formal proof of the debt is *prima facie* sufficient. It is always a question of fact whether the debt has been paid or secured in whole or in part, or whether it is provable, and a question as to which pertinent evidence is always admissible. But the *prima facie* case is made out by the affidavit of the creditor. (*In re Colman*, 2 B. R. 563; *in re Fortune*, 3 B. R. 312; s. c. 2 L. T. B. 99.)

The creditor is a competent witness to establish his claim, although the bankrupt died before it was offered for proof. (*In re E. C. Merrill*, 16 B. R. 35.)

*Quære.* Can a creditor who has omitted to take his appeal from the rejection of his proof within the prescribed time, set up the rejected claim in any other action? (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

All proofs of debts are to be sent to the assignee for him to report them as required in this section. When the assignee has completed his lists, he must return them to the register, and they must, under Rule VII, be filed in the

clerk's office with the papers in the case. (Anon. 1 B. R. 219; 2 B. R. 68; *in re* L. Sheppard, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.)

A creditor may prosecute an action against a surety before a final distribution, although he has proved the note against the principal. (*Gregg v. Wilson*, 15 B. R. 142; s. c. 50 Ind. 490.)

If a treasurer of a bank fraudulently gives a certificate in his own name to a depositor, instead of in the name of the bank, the latter is bound to be prompt in disaffirming the contract, and demanding his money or a certificate in proper form to bind the bank, and can not do so after he has proved his claim against the treasurer, and received a dividend thereon. (*Shields v. Niagara Bank*, 10 N. Y. Supr. 477; s. c. 5 T. & C. 585.)

A certificate of deposit, after the bankruptcy of the maker, is dishonored paper, and after it is proved and filed, has no longer the qualities of negotiable paper. The claim is transferable neither by delivery nor indorsement; it may still be assigned, but not delivered or taken from the files. A purchaser of the claim takes it subject to all equities that exist against his vendor. (*In re John Sime & Co.* 12 B. R. 315.)

The proof of a judgment does not operate to release a sheriff from liability for relinquishing his levy, and surrendering the property to the marshal. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

In an action for misrepresentation in regard to the credit of another, the plaintiff may give evidence to establish the bankruptcy of such person and the proof of a claim against him by the defendant. (*Stafford v. Groul*, 120 Mass. 20.)

SEC. 5081.—The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

Statute Revised—March 2, 1867, ch. 176, § 23, 14 Stat. 527. Prior Statutes—April 4, 1800, ch. 19, § 16, 2 Stat. 26; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

Under this clause the court has at all times full control of all proofs of debts, and the right to entertain objections to the validity of the debts or the proofs thereof. (*In re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448; *in re Decatur Jones*, 2 B. R. 59.)

The objection to the proof of a claim must be by a written allegation specifying, with reasonable certainty and brevity, the grounds of such objection. (*In re Walton et al.* 1 Deady, 442.)

The creditor stands before the court in the attitude of a plaintiff invoking its jurisdiction, and ample provision is made for adjudication and determination of his claim in a court of law and by a jury, of which he may avail himself by taking an appeal to the circuit court. (*In re Paddock*, 6 B. R. 132; s. c. 2 L. T. B. 214.)

The claim of the petitioning creditor is open to contention. His debt must be established. The mere fact that he is a petitioner is not conclusive upon other creditors that he is to be allowed in the distribution of the estate just what he claims in his petition, nor is it conclusive upon the assignee. If this were not so, collusion between a debtor and a petitioner setting up a pretended

but fictitious claim would work the grossest injustice. (*In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114.)

A creditor may intervene and contest the allowance of the claim of any other creditor. (*In re Adolph Joseph*, 2 Woods, 390.)

Any creditor has the right to serve a notice on the register, protesting against the proof of any claims by certain persons, and requesting that he may be notified if such persons should tender their claims for proof. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113)

Persons who are not creditors can not question the right of another to prove a claim. That right must be questioned otherwise. (*In re Lathrop et al.* 3 B. R. 413; s. c. 3 Ben. 490.)

The court alone has the power to pass an order requiring a creditor to show cause why proof should not be vacated and annulled. The register can not make such an order. (*Comstock v. Wheeler*, 2 B. R. 561; s. c. 3 Ben. 236.)

The court may make an examination of a creditor without any application therefor, and when it sees, from the testimony before it, that certain claims are improperly proved, it will reject them. (*In re Lathrop et al.* 3 B. R. 413; s. c. 3 Ben. 490.)

A creditor who does not reside in the judicial district in which the court of bankruptcy sits, may be required by an order duly served upon him to attend and be examined in regard to his debt. A creditor who has proved his debt becomes subject to the jurisdiction of the court without regard to his place of residence, and is bound to obey all the orders of the court touching his alleged debt. In case of his disobedience of its orders, the court can deprive him of all the benefits of the bankrupt act given to creditors, and can reject and expunge his claims. In case it shall be made to appear that any creditor whose debt is contested can not personally attend, to be examined in the district where proceedings are pending, without hardship to him, owing to the distance of his residence, or other similar reasons, the court will provide by order for the taking of his examination before a register of the district in which he resides. (*In re Kyler*, 2 Ben. 414.)

Where the assignee appears under an order of reference procured on the petition of a creditor alleging that he and the assignee object to a certain claim, and states that he is satisfied with the proof filed with him since his election, no further proceedings should be taken under the reference. (*In re Theodore E. Baldwin*, 6 Ben. 196.)

The words "any creditor" must be held to mean not only a creditor who has proved a debt, but a creditor who has tendered proof of a debt which has not yet been allowed. (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 53.)

A note given by the bankrupt for more than was actually due, in pursuance of a combination between the bankrupt and the creditor for the purpose of enlarging the creditor's dividend, is illegal, and this illegality of a portion of the consideration makes the whole note void and unavailable, so far at least as the interests of creditors are concerned. (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.)

In a proper case, a claim may be allowed in part, or allowed or disallowed as a whole. But when a creditor, by a combination with the bankrupt, and in view of the commencement of proceedings in bankruptcy, fraudulently enlarges his claim by taking fictitious notes, both the real and fictitious claims will be disallowed. Fraud corrupts and destroys the whole debt. Every party to proceedings under the bankrupt law must be held to the utmost good faith; and he who attempts a fraud can not, if discovered, complain when he is made to abide by the legal consequences of his act. (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.)

A claim which has its origin in a transaction entered into by the claimant

with the bankrupt, for the purpose of delaying, hindering, or defrauding the creditors of the latter, is not provable. (*In re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.)

A claim which is valid independently of a fraudulent transfer, is not merged thereby. When the transfer is set aside, the claim is revived, and may be proved. (*In re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.)

Claims which are purchased by an agent of the bankrupt are illegal, and must be rejected. (*In re Lathrop et al.* 3 B. R. 413; s. c. 3 Ben. 490; s. c. 5 B. R. 43; s. c. 5 Ben. 199.)

If a creditor who has advanced a certain sum to a member of a firm to be put into the business as capital, subsequently takes a note of the firm therefor, and falsely claims that it as well as other sums were advanced to the firm, he forfeits his right to prove for his real advances. (*Marrett v. Atterbury*, 11 B. R. 225; s. c. 3 Dillon, 444.)

A proof of a judgment which is subsequently set aside should be expunged. (*In re Cosmore G. Bruce*, 6 Ben. 515.)

If a party who took a bill of sale as security deliberately proves a debt which assumes that he is the absolute owner of the goods, and persists in such false claim in an action by the assignee to recover the goods, and attempts to support it by his own oath, he is estopped from claiming them as security. (*Willis v. Carpenter et al.* 14 B. R. 521.)

After the claims of all *bona fide* creditors and all the expenses have been paid, the money expended by the agents of the bankrupts may be refunded to them. When the purchase has been made by one partner, his copartner must share the burden, if he desires the benefit. The balance will not be turned over to the bankrupts without providing for such money so used in the purchase of the claims. (*In re Lathrop et al.* 5 B. R. 43; s. c. 5 Ben. 199.)

The prohibition of the allowance of a claim founded in illegality is only in affirmance of the common law. What is or is not an illegal transaction depends upon the law of the place where the contract was made or the transaction had. (*In re Robert Pittock*, 8 B. R. 78; s. c. 2 Saw. 416.)

If a mortgage is merely constructively fraudulent, the mortgagee may prove for his actual advances when the mortgage is set aside. (*Kappner v. St. Louis & St. J. R. R. Co.* 3 Dillon, 228.)

It is not competent for the district court to go behind the judgment of a State court and inquire into the consideration of the debt upon which the judgment is founded. A judgment rendered upon a usurious contract can not be set aside by the court of bankruptcy. If insanity or any matter of fact constitutes the ground on which a review of the judgment is sought, the proper remedy is by a writ of error *coram nobis* in the court wherein the judgment was rendered. (*McKinsey v. Harding*, 4 B. R. 39.)

Creditors whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly. In bankruptcy, the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts, and may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy, or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, where the court rendering the judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence outside of the record that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is not bankrupt, nor

acting in contemplation of bankruptcy, he binds all the world by his acts and omissions in relation to his own affairs, and if he does not choose to defend an action to which he has a legal defense, and of which he has had full notice, his estate will be committed by his act or neglect, just as it would be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy. When, therefore, the judgment is either void or voidable as of right, by the debtor or by creditors, it may be examined into when offered for proof. Where it is valid against the debtor, and no fraud on creditors is shown, it is valid for the purpose of proof. If there is an intermediate case in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, the assignee might be allowed to pursue that remedy, the proof in the mean time being postponed. (*Ex parte O'Neil*, 1 B. R. 677; s. c. Lowell, 163; *in re James H. Dunn*, 11 B. R. 270.)

Evidence is not admissible to impeach a judgment merely on the ground of an excessive assessment of damages. (*Ex parte O'Neil*, 1 B. R. 677; s. c. Lowell, 163.)

Under section 4998 and Rule V, the register has the power to take the evidence required by this clause. When a question is raised as to the validity of a claim tendered for proof, and evidence is offered in regard to it, the register ought to investigate the question so raised, and not allow the claim merely because the creditor swears to it. (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.)

The register has no power to set on foot the inquiry provided for in this section, except for the purpose of ascertaining whether or not a claim shall be postponed. (*In re Herman et al.* 3 B. R. 618; s. c. 4 Ben. 126.)

When the question of due proof or not comes up before the court upon the application of creditors to have the claim rejected, if the evidence taken before the court shows the consideration to be legal and sufficient, the claim will not be rejected. If defects in the deposition have justified the application, costs can be imposed upon the party in fault. (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.)

When a creditor presents his claim for proof, he at once subjects himself and his claim to the power and jurisdiction of the court, and both thereby become subject to the orders of the court under and within the provisions of the bankrupt act. When he is examined in respect to his claim, he is examined as a party to the proceedings, and is in no sense a witness in the sense in which that word is used in the act of Congress allowing fees to witnesses. A claim for fees will, therefore, be disallowed. (*In re S. Paddock*, 6 B. R. 132; s. c. 2 L. T. B. 214; *in re Kyler*, 2 Ben. 414.)

When the claim of a creditor, who has proved his debt without surrendering his collaterals, is stricken out as illegal and void on account of usury, the court will not also compel him to surrender the collaterals. (*Dallas v. Flues & Co.* 8 Phila. 150.)

The decree of the district court in expunging a proof is in the nature of a judgment binding upon all the parties to it, and prevents a subsequent prosecution of the claim in a State court. (*Pease v. Bennett*, 17 N. H. 124.)

SEC. 5082.—A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against

whose estate it has been proved, and the date and amount of any dividend declared thereon.

Statute Revised—March 2, 1867, ch. 176, § 24, 14 Stat. 528. .

The instrument proven may be withdrawn, in pursuance of the provisions of this section. (*In re Emison*, 2 B. R. 595.)

The court may, upon cause shown, order the withdrawal of exhibits filed in a cause, but it will not order or allow them to be withdrawn, except upon the application of some person having an interest in them, who can show the proper use for which he desires them. (*In re McNair*, 2 B. R. 219, 341)

SEC. 5083.—When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Statute Revised—March 2, 1867, ch. 176, § 23, 14 Stat. 528.

The purport of this section is that it is the duty of a register, when he entertains a doubt of the validity of a claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, to postpone the proof of a claim until the assignee is chosen. (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361; *in re Herman et al.* 3 B. R. 618; s. c. 4 Ben. 126; *in re Noble*, 3 B. R. 96; s. c. 3 Ben. 332; *in re Bartusch*, 9 B. R. 478; *in re Jacoby*, 1 W. N. 15.)

The claim may be postponed, although the deposition for the proof thereof has been produced to, and filed with, the register. (*In re Ezra M. Stevens*, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.)

A claim of questionable character, and in dispute, should be postponed. (*In re Decatur Jones*, 2 B. R. 59.)

The claim of a creditor who has accepted a preference should be postponed. (*In re Herman et al.* 3 B. R. 618; s. c. 4 Ben. 126; *in re Ezra M. Stevens*, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121; *in re Walton et al.* 1 Dedy, 442.)

A creditor who has accepted a conveyance prohibited by the bankrupt law should not be allowed to prove his debt until an assignee is chosen. (*In re Chamberlain et al.* 3 B. R. 710.)

When a conveyance prohibited by the bankrupt law has been made to a third person, for the benefit of creditors, creditors who had no knowledge whatever of the facts that make up the intent to defeat the bankrupt act until after the conveyance was executed and delivered, and who were not consulted concerning it, and who did not in any way accept of it, except to declare verbally that they were satisfied with it, may prove their claims and participate in the election of an assignee. In no sense can it be said that they received the conveyance. The conveyance was not to them directly or indirectly; it was complete before they had any knowledge of it. (*In re Chamberlain et al.* 3 B. R. 710.)

In order to justify the postponement of a claim until after the election of an assignee, it is not necessary that the register shall be satisfied or have before him positive evidence that the claim is invalid or that the creditor has no right to prove it. (*In re George Jackson et al.* 14 B. R. 449.)



In order to postpone a claim, there must be such investigation as will influence the mind to a conclusion as to whether there is such doubt of the validity of the claim or of the creditor's right to prove it. (*In re George Jackson et al.* 14 B. R. 449.)

Upon facts and circumstances being laid before the register which create in his mind a substantial doubt upon the question of the validity of the creditor's right, it is his duty to postpone the claim for investigation. (*In re George Jackson et al.* 14 B. R. 449.)

Mere relationship to the bankrupt will not alone justify the postponement of a claim. (*In re George Jackson et al.* 14 B. R. 449.)

The register can not postpone a claim on mere objections. (*In re George Jackson et al.* 14 B. R. 449; *in re Bartusch*, 9 B. R. 478)

The doubt in the mind of the register should be a reasonable substantial doubt resulting from a judicial consideration of the question. (*In re George Jackson et al.* 14 B. R. 449.)

The proof of a claim which is not stated in items, and does not appear on the schedule, may be postponed. (*In re Elijah Milwain*, 12 B. R. 358; s. c. 9 Pac. L. R. 236.)

The register has no right to postpone any claim unless he has suspicion that it is unfounded. Such suspicion can not be entertained judicially unless predicated upon facts which legitimately excite it. If they exist, the creditor should be accorded the opportunity to explain them. A suspicion within the statute arises when the claim is not susceptible of a ready and simple explanation. (*In re Northern Iron Company*, 14 B. R. 356.)

When a creditor objects to the postponement of his claim, he should have the objection entered and the question certified before any further action transpires before the register. (*In re George Jackson et al.* 14 B. R. 449.)

When the power of postponement is erroneously exercised by a register, the creditor may have the judgment of the court on the question. (*In re George Jackson et al.* 14 B. R. 449.)

The proof of the claim of an officer of a bankrupt corporation, who is also a stockholder, should be postponed when the claim appears suspicious. Such a debt ought to be investigated by an assignee who has been nominated by other creditors. (*In re Lake Superior S. C. R. R. & I. Co.* 7 B. R. 376; *in re Northern Iron Co.* 14 B. R. 356.)

The proof of a claim which has been postponed is to be treated in all respects as if the claim had not been tendered before the election of an assignee and postponed. (*In re Herman et al.* 3 B. R. 649.)

SEC. 5084.—Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

Payment of a judgment or decree recovered against a creditor on account of a fraudulent preference, is not a surrender within the meaning of this section. To surrender, clearly implies action on the part of the person receiving the preference. To recover, as clearly implies action against the person receiving the preference. Under this section, it is left to the option of the person receiving the preference, whether he will give up the property he has received by the way of preference, or whether he will hold on to it; the only consequence being that he can not prove his debt or receive any dividend upon it, in case he chooses to pursue the latter course. In case of a recovery he has no such option. From this analysis it clearly appears that the recovery provided for in section 5128 is the alternative of the surrender provided for in this section. But when does this alternative arise, and in what case may it be resorted to? Clearly in those cases, and those only, in which there is a failure, refusal or neglect to surrender. A surrender may, probably, be made so as to fully answer the requirements of this section at any time before judgment, because the word "recover" is evidently used in its strict legal sense, and, in that sense, the obtaining of a judgment by the assignee in his favor, is the recovery meant. But after the rendition of the judgment there can be no surrender. The recovery is then complete, and anything done after that in satisfaction of the judgment or decree can in no sense be deemed a surrender. (*In re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; *in re Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; *in re John F. Lee*, 14 B. R. 89; *in re Cramer*, 13 B. R. 225; s. c. 8 C. L. N. 106.)

The provisions of this section must be construed in connection with the clause in section 5021 which prohibits certain creditors from proving their debts, in such a manner that, if possible, both may stand. The construction which attains this end is that the clause in section 5021 applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property; that the creditor who claims to retain the property makes himself conclusively a party to the fraud by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that, where the creditor avails himself of the *locus penitentiae*, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud, and may prove his debt. (*In re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; *in re H. B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565; *in re Scott & McCarthy*, 4 B. R. 414; *in re Hunt & Hornell*, 5 B. R. 433; *in re Reece & Brother*, 2 Bond, 359; *in re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387; *in re Walton et al.* 1 Dady, 442; *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; *in re Clark & Daughtrey*, 10 B. R. 21; *in re Drummond*, 4 Biss. 149; *contra*, *Bingham v. Richmond*, 6 B. R. 127; *Bingham v. Frost*, 6 B. R. 130.)

A claim on account of which a preference has been accepted, would, but for this section, undoubtedly be provable. This section operates to suspend the right until the creditor holding a preferred claim shall first have surrendered to the assignee the preference received by him. When such surrender is made the suspension ceases. The office of this clause, therefore, is in the first instance that of suspension merely, to ripen, however, into absolute prohibition in case of a refusal or neglect to surrender. Upon such surrender being made, the right of such creditor to prove his debt revives, and is in full force the same as if such suspension had never existed. (*In re Scott & McCarty*, 4 B. R. 414.)

It will not do to say that this clause is to be given effect in voluntary and not in involuntary cases, because that would involve the absurdity of saying that the quality and consequences of the act of the creditor in accepting a preference are to be measured and judged of not by the statute itself, but by what the debtor may see fit subsequently to do. It must be a strong necessity growing out of positive and unmistakable provisions of the law that would induce a court to adopt a construction leading to such unreasonable and inconsistent results. (*In re Scott & McCarty*, 4 B. R. 414; *in re E. R. Stevens*, 6 B. R. 533; s. c. 3 Biss. 387.)

Where there is nothing but a constructive fraud, and the creditor has acted in good faith and under the conviction that he has a valid right to retain the property, he may do so, and allow a suit to be prosecuted against him and proof to be introduced against him without being deprived of his right to surrender before the actual entry of a judgment. (*Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345; *in re Joseph Schoenenberger*, 15 B. R. 305.)

It makes no difference whether the transfer is constructively fraudulent under the statute of Elizabeth or under the special provisions of the bankrupt law. (*Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345.)

Until a recovery has been had by judgment or decree, a preferred creditor may surrender, and his right to prove his debt against the bankrupt's estate and to receive dividends therefrom will, by such surrender, be revived and become binding on all concerned, regardless of the question whether a suit shall or shall not have been commenced against him by the assignee and be pending at the time of such surrender. It is immaterial whether there was a demand and refusal before suit was brought. (*In re Kipp*, 4 B. R. 593; s. c. 1 L. T. B. 246; s. c. 4 L. T. B. 60; *in re Simeon Leland et al.* 9 B. R. 209.)

Mere possession of the property by the assignee is not a recovery of it unless he obtains such an adjudication as to the preference. (*In re Simeon Leland et al.* 9 B. R. 209.)

It is not necessary that there shall be a direct suit by the assignee against the preferred creditor, and a recovery of property from him and out of his possession, in order to constitute the recovery referred to by the statute. An adjudication in any proceeding where the court has jurisdiction over the subject and the parties is sufficient. (*In re Simeon Leland*, 9 B. R. 209.)

Where the fraud is only constructive and not actual, the creditor should in equity have a reasonable opportunity of considering whether he will surrender his preferences and pay all the costs and charges, but his decision must precede the final decree. The entry of the final decree may be suspended for a brief period to give him such an opportunity. (*Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 61 Leg. Int. 197.)

It may be a matter of discretion with the court whether a party shall be allowed to surrender after suit brought, and particularly after the testimony is taken, and the party becomes satisfied it is enough to defeat him. The spirit of the act does not warrant a practice of the kind. A party should not be allowed to experiment and speculate upon the ability of the assignee to prove a case against him, and when he sees that he has succeeded, then to plead guilty and make a surrender. Such a practice ought not to be tolerated. A party ought to elect, and having elected, will be held to his election. A surrender can not be made after suit brought except under very peculiar circumstances. (*In re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.)

In order to be allowed to prove a debt unlawfully preferred, the party must surrender the unlawful preference wholly, and wipe out the security entirely, even though a part of property is exempt from execution. (*In re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.)

A creditor may, of course, if he chooses, accept a preference. In doing so, however, he takes the chances of his debtor going into bankruptcy either voluntarily or involuntarily, and thus losing the advantage obtained. In such cases, all he has to do to remove the obstacle to proving his claim in bankruptcy, and his standing on an equal footing with the other creditors, is simply to surrender such advantage to the assignee. (*In re Forsyth & Murtha*, 7 B. R. 174.)

The creditor contemplated by this clause is a creditor who has received a payment or conveyance giving him a preference. A creditor who is appointed an assignee by a voluntary assignment of the debtor's property for equal distribu-

tion *pro rata* among all the creditors of the debtor does not thereby receive a preference, and consequently is not debarred from proving his debt. (*In re Joseph H. Horton et al.* 5 Ben. 562; *in re Wm. M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts, L. J. 113.)

If a creditor who has proved his claim as unsecured, afterwards unites in a proceeding to assert the validity of a security held by him for the claim without amending his proof, he stands as if he never had filed any proof of debt. The objection that the proof is a surrender of the security is one that the assignee may waive. If the creditor fails to sustain his right to the security, he can not afterwards set up his proof to avoid the forfeiture imposed by the statute. (*In re Simeon Leland et al.* 9 B. R. 209.)

A mortgage to indemnify the sureties on a bond is not a preference of the principal debt unless the creditor is a party to the transaction. (*In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts, L. J. 113.)

If the creditor is precluded from proving his claim, on account of receiving a preference and refusing to surrender it, a guarantor cannot prove it. (*In re C. B. Ayers*, 6 Biss. 48.)

The court will not, in a proceeding to recover the preference, enter a decree prohibiting the preferred creditor from proving his debt. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.)

A creditor who has received a preference may surrender it and prove his claim at the first meeting. (*In re W. A. Saunders*, 13 B. R. 164.)

A creditor who has been preferred by a deed of trust to which he has never assented, may renounce it and prove his debt at the first meeting. (*In re W. A. Saunders*, 13 B. R. 164.)

If the preferred creditor asks leave to prove his debt, the court can not in such proceeding render a judgment or decree directing the payment to the assignee of the money received as a preference. (*In re William D. Forbes*, 5 Biss. 510.)

If the assignee accepts the amount received by a preferred creditor after he has put in his proof, and the creditor has put in considerable proof before the special examiner to whom the action has been referred, and dismisses his suit upon payment of costs, this is a surrender, and the creditor may prove his debt. (*In re John Riorden*, 14 B. R. 332; s. c. 51 How. Pr. 271.)

The law has not determined the manner in which a surrender shall be made. An agreement that other creditors may share in the proceeds of a sale thereof may be treated as a surrender. (*In re Detert*, 11 B. R. 393; s. c. 7 C. L. N. 130; s. c. 14 A. L. Reg. 166.)

Where the creditor is allowed to surrender after the bringing of a suit, he may be required to pay the compensation of the assignee's counsel and the expenses to which the assignee may have been subjected in consequence of the suit, before he is allowed to prove his debt. (*Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345.)

No part of the debt can be proved, although a prior mortgage securing the debt in part was surrendered when the mortgage was taken. (*In re James Jordan*, 9 B. R. 416; s. c. 7 Pac. L. R. 194.)

The attempt of an indorsee to avail himself of a security given to the payee by proving his debt as secured, will not defeat his claim upon the note. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

When payments have been made upon a debt as an entirety, and afterward applied to certain notes constituting only a portion thereof, the preference affects the whole debt. To permit a creditor to avoid the effects of the acceptance of such a preference, by a subsequent application and indorsement of the amount

of such preference upon particular notes, nearly paying the same in full, would defeat the provisions of the law. (*In re Kingsbury et al.* 3 B. R. 318.)

If the preferred debt is single and entire, the illegal preference affects the whole of it, though the property received does not equal it in value. But otherwise, if in their origin, or by contract, the debts of the creditor are not single and entire, but divided, or divisible and disconnected, and the creditor receives a preference distinctly as one, and not the other. A claim consisting of a running and apparently continuous account, made up of items of goods purchased at various times, constitutes *prima facie* but one debt or claim within the meaning of the bankrupt act. The creditor may show that the debt preferred is disconnected from, and not the same debt as that which is offered for proof. An application for this purpose may be made, even after a decision from an appeal from an order disallowing the claim. The effect of the recovery by the assignee is to establish, as an adjudicated fact, that the creditor has received a fraudulent preference in respect to the preferred claim. (*In re Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; *in re John F. Lee*, 14 B. R. 89.)

Where a creditor has separate and disconnected debts as to which he has received separate and distinct preferences, he may surrender as to some, and prove and receive dividends as to them, without surrendering as to the others. (*In re D. G. Holland*, 8 B. R. 190.)

If a party proves a claim consisting of two items, an account and a note, he can not, when objection is made to the proof on account of a preference, divide the proof into two parts. (*In re Barnes, Brother & Herron*, 1 W. N. 21.)

Where there is no allegation of bad faith against the preferred creditor, he may be allowed a reasonable sum for his care in selling the goods. (*In re William D. Forbes*, 5 Biss. 510.)

When the conduct of a creditor in holding on to his preference is without excuse, his proof may be expunged with costs, including an attorney's fee. (*In re Forsyth & Murtha*, 7 B. R. 174; *in re James Jordan*, 9 B. R. 416; s. c. 7 Pac. L. R. 194)

When the unprovable character of the claim is founded largely upon presumptions, the proof may be expunged, without costs to either party. (*In re Forsyth & Murtha*, 7 B. R. 174.)

SEC. 5085.—The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

Statute Revised—March 2, 1867, ch. 176, § 23, 14 Stat. 528.

The district court has the power, upon the petition of a creditor whose claim has been rejected, to revise the decision of the assignee rejecting it. It is irregular to act upon such a petition without giving notice thereof to the assignee. He should have an opportunity to answer the petition and contest the claim. If the claim is allowed, the order should only require the assignee to place it upon the list of admitted claims, and pay dividends accordingly. (*In re Mittledorfer & Co.* 3 B. R. 39; s. c. Chase, 276.)

The list is the list shown by Forms Nos. 32 and 33. That list is to be given to the assignee. The list can be made from the register kept by the assignee under section 5080. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

SEC. 5086.—The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an

examination on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statutes—April 4, 1800, ch. 19, §§ 18, 23, 52, 2 Stat. 26, 28, 34; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

### Application for an Examination.

The words "any creditor" mean any creditor who has proved his claim. Before a creditor can apply for an order to examine the bankrupt, he must prove his claim. (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 53.)

Such order may be made, and such examination may be had, on the application of the assignee, or of any creditor, or on the suggestion of the court or register, without any application. The bankrupt and all other persons are subject to examination at all times, at the instance of the assignee, or of any creditor, or of the court, or of the register. A creditor may make an application at any time after he has proved his debt. (*In re Baum*, 1 B. R. 5; s. c. 1 Ben. 274; *in re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448; *in re Brandt*, 2 B. R. 215.)

If a protest is entered against the allowance of the claim of a creditor who asks for an examination, the register or the court may make the order, as they have the power to make it at all times without any application. (*In re Belden & Hooker*, 4 Ben. 225.)

The granting of an order for an examination of the bankrupt is not a matter of course, but should only be done in a proper case, on application of a party entitled to apply. The court or register has a discretion to require good cause for granting the order by a petition or affidavit, duly verified, and the exercise of this discretion by the register may be revised by the court. But the application need not be in writing unless required. (*In re Solis*, 4 B. R. 68; s. c. 4 Ben. 143; s. c. 2 L. T. B. 158; *in re Julius L. Adams*, 2 B. R. 95; s. c. 36 How. Pr. 51; s. c. 2 Ben. 503; *in re B. T. Vetterlein*, 4 B. R. 599; s. c. 5 Ben. 7.)

The proper way to make application is by a petition. (*In re Julius L. Adams*, 2 B. R. 95; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51; *in re Brandt*, 2 B. R. 215; *in re Lanier*, 2 B. R. 154.)

The petition need not specify the particular matters to which the examination is to be directed. (*In re Lanier*, 2 B. R. 154.)

The petition on the part of a creditor should show good cause for granting the order, and be verified by affidavit. (*In re Julius L. Adams*, 2 B. R. 95; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51.)

The petition on the part of the assignee need not show the grounds for the proposed examination, nor be verified by affidavit. As the bankrupt is, theoretically, the ward of the court, and the assignee a *quasi* officer of the court in each case, it is only necessary that the court should be satisfied of the *bona fides* of the assignee's application. (*In re Lanier*, 2 B. R. 154; *in re McBrien*, 2 B. R. 197; s. c. 2 Ben. 513.)

The application may be made to the court or to the register. If the application is made to the court, it is not necessary that the application should be sustained by any certificate of the register as to the propriety of granting the order. (*In re Brandt*, 2 B. R. 215.)

Every creditor has a right to examine the bankrupt. Such examination inures to the benefit of all the creditors. But the fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. Yet the time, manner, and course of the examination should be so regulated as to protect the bankrupt from annoyance, oppression, and mere delay, while at the same time full and fair opportunity is allowed to the creditors to inquire as to the matters specified in this section. (*In re Julius L. Adams*, 2 B. R. 272; s. c. 36 How. Pr. 270; s. c. 3 Ben. 7; *in re Gilbert*, 3 B. R. 152; s. c. Lowell, 340.)

If a full examination has been already had either upon the application of the assignee or of any other creditor, a subsequent application may be denied, unless it is made to appear that the first examination was either collusive or deficient in some material and specified particulars. (*In re James W. Frisbie*, 13 B. R. 349.)

Whether the court in the exercise of its discretion will direct a second examination, depends on the facts of each particular case. (*In re James W. Frisbie*, 13 B. R. 349.)

The assignee and a creditor stand upon the same footing as to their rights under this section. The particular province of the assignee is to examine the bankrupt as to the disposition, condition, and amount of his property, and the debts due and owing by him, so as to get in the assets properly. A creditor examines the bankrupt, not only for the purpose of discovering property, but more especially to elicit facts upon which objections to the discharge of the bankrupt can be alleged. A creditor, therefore, has the right to examine the bankrupt, although the assignee may have already examined him. Where two creditors, or the assignee and a creditor, examine the bankrupt at different times, the statute does not impose any regulations or restrictions upon the party asking for the second examination. The statute would be of little or no practical efficacy if every creditor should be required to investigate all previous examinations of the bankrupt, and so to shape every question as not to be liable to an objection that the bankrupt has answered that question on a previous examination. Each creditor, without reference to anything which may have been done by any other creditor, has the right to put his question in his own way. In view of the object for which the bankrupt invokes the statute, he is not warranted in regarding it as oppressive or unduly annoying, if every one of his creditors exercises his rights, under the statute, of investigating the condition, affairs, and dealings of the bankrupt, and ascertaining whether he has brought himself within the remedial provisions of the act, and is entitled to its benefit. An answer to the same question on a previous examination does not exempt him from answering again when the question is put by another creditor on a subsequent examination. (*In re Vogel*, 5 B. R. 393.)

When a party inadvertently makes default under one order, he may apply for a second order, and proceed to examine the bankrupt. The right to examine the bankrupt, however, is not to be abused. (*In re Van Tuyl*, 2 B. R. 70; *in re Robinson & Chamberlain*, 2 B. R. 516.)

When the bankrupt has been examined at considerable length by the assignee, and none of the creditors ask for an examination until the day appointed to show cause against the discharge, it would be unreasonable to require the bankrupt to submit to a new examination, especially when no reason for doing so is shown by the petition. (*In re Isidor & Blumenthal*, 1 B. R. 264; s. c. 2 Ben. 123; *in re S. F. Frizelle*, 5 B. R. 122.)

A party will not be entitled to a second order for examination, except upon notice and cause shown. (*In re Gilbert*, 3 B. R. 152; s. c. Lowell, 340.)

A voluntary bankrupt may be examined, even prior to an adjudication of bankruptcy. (*In re Thomas D. Lee*, 1 N. Y. Leg. Obs. 83; s. c. 4 Law Rep. 486; *in re Parker et al.* 1 Penn. L. J. 370.)

A debtor against whom proceedings in involuntary bankruptcy have been commenced may be examined, even before adjudication, when sufficient foundation is shown for the application. After due service of copies of the petition, and of the orders made in the case upon him, he may be examined when he is shown *prima facie* to have property which he has, in disobedience to an order of the court, refused to surrender to the marshal. For some purposes, the distinction between "debtor" and "bankrupt"—the former applying to a defendant before adjudication, and the latter to a defendant after adjudication—is used and observed in the bankrupt act; yet, for other purposes, these two terms are used as synonymous terms. (*In re Bromley & Co.* 3 B. R. 686; *in re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486; *in re Mendenhall*, 9 B. R. 285; *in re Heusted*, 5 Law Rep. 510.)

The power to examine a debtor prior to an adjudication of bankruptcy should not be exerted, unless in case of actual necessity. It is not as of course, but only under such exigencies as seem to require its exercise for the purpose of promoting justice and the rights of creditors. (*In re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486.)

The time to examine the bankrupt does not expire with the making of his application for his discharge. (*In re Solis*, 4 B. R. 68; s. c. 4 Ben. 143; s. c. 2 L. T. B. 158; *in re Wm. H. Long*, 3 B. R. quarto, 66.)

The words "at all times" must be read in connection with the subsequent clauses of the statute. All these provisions tend to show that it is only until his discharge that the bankrupt is under the summary jurisdiction of the court, to be proceeded against by order in its discretion and to be punished for neglect or refusal to pay by imprisonment, as for a contempt of court. He can not, therefore, be required to submit to an examination after he has obtained his discharge. (*In re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499; *in re G. C. Jones*, 6 B. R. 386; *in re C. Dean*, 3 B. R. 769; *in re Witkowski*, 10 B. R. 209; *contra, in re Heath & Hughes*, 7 B. R. 448.)

The law provides the means by which an absent bankrupt may be brought forward, at a given day and place, to be examined. But when he appears without this coercive power at a regular meeting, a party who happens to be present may ask for leave to examine him, and should be permitted to do so, unless there is no ground or reason for the request. (*In re Brandt*, 2 B. R. 215; *in re Bromley & Co.* 3 B. R. 686.)

No previous notice is required to be given to any person of the application for the order. The order is to be made *ex parte*. (*In re Mackintire*, 1 B. R. 11; s. c. 1 Ben. 277.)

The order may be made by the register. (*In re Mackintire*, 1 B. R. 11; s. c. 1 Ben. 277; *in re Lanier*, 2 B. R. 154; *in re Brandt*, 2 B. R. 215; *in re B. T. Vetterlein*, 4 B. R. 599; s. c. 5 Ben. 7; *in re Pioneer Paper Co.* 7 B. R. 250.)

Form No. 45 is the proper order. (*In re Lanier*, 2 B. R. 154; *in re Brandt*, 2 B. R. 215.)

The register is not entitled to charge any fee for making the order. (*In re Mackintire*, 1 B. R. 11; s. c. 1 Ben. 277.)

Form No. 45 is a summons, and, under Rule II, blanks not filled up, but bearing the signature of the clerk and the seal of the court, should, on application, be furnished to the register. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 309; s. c. 1 L. T. B. 22.)

It is not necessary that a subpoena for a witness should be served by the marshal. It may be served by any one. The party making the service is entitled to the fees. (*Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749.)



The service of the order should be personal. (*In re Joseph H. Hodges*, 11 B. R. 369.)

If the bankrupt is in another district, and the order is served on him there, the district court has no authority to arrest him for not appearing to answer process so served. (*In re Joseph H. Hodges*, 11 B. R. 369.)

The bankrupt is most certainly entitled to reasonable time, after notice of the application for his examination; but such time, or the length of such time, always depends upon circumstances and facts surrounding the bankrupt; the distance he is from court or the place of his examination, and also upon what, if any, particular facts he is to be examined. If the bankrupt is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would, manifestly, be much longer than in a case where the notice of examination was in regard to a few items of his property pertaining to his own person, such as watch, ring, and money in his pocket when service was made upon him. A reasonable notice is such time as will enable him to appear before the court with such knowledge as may be under his control upon the matters of the investigation or information asked for. An opportunity to study under the tutelage of counsel is not required, and will not be granted when the interrogatories are plain and simple, and do not call for the exercise of any skill. (*In re Bromley & Co.* 3 B. R. 686.)

### Mode of Conducting the Examination.

The examination may be had before the register. (*In re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. Lowell, 215; *in re Lanier*, 2 B. R. 154.)

The court may direct the examination to be taken before a register in another district. (*In re Joseph H. Hodges*, 11 B. R. 369.)

The bankrupt is bound to appear, and is not entitled to fees as a witness. (*In re Okell*, 1 B. R. 303; s. c. 2 Ben. 144; s. c. 1 L. T. B. 32; *in re McNair*, 2 B. R. 219.)

As an order for an examination is made *ex parte*, the bankrupt, on appearing in pursuance to the order, may make any objection or raise any question which would have been proper if an opportunity had been afforded him before the order was granted. (*In re James W. Frisbie*, 13 B. R. 349.)

It is for the creditor to see that due appointments are made with the register for the purpose of examining the bankrupt, and to give the other party notice of them. The bankrupt's duty is performed by being ready to be examined on due notice. (*In re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *in re Gilbert*, 3 B. R. 152; s. c. Lowell, 340.)

The testimony of the bankrupt taken on his examination is a deposition. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

The bankrupt is a witness, and subject to cross-examination like any other witness. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re Leachman*, 1 B. R. 391; *in re Maynard Bragg*, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.)

The statute does not intend that the bankrupt shall become a competent witness in all respects, so as to be enabled to give testimony on his own behalf beyond and out of the subject-matter of his examination. (*In re Maynard Bragg*, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.)

The bankrupt is to answer substantially like a witness, and not merely to have interrogatories filed and propounded after the manner adopted in equity and admiralty. It is not intended that the bankrupt, or his attorney, shall write the answers, but merely that the deposition shall be reduced to writing. (*In re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. Lowell, 215.)

The answers of the bankrupt are to be made orally to the court or to a duly appointed officer of the court. (*In re Bromley & Co.* 3 B. R. 686.)

The register has no power to decide upon the competency, materiality, or relevancy of a question. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496; *in re Rosenfield*, 1 B. R. 319; s. c. 1 L. T. B. 81; s. c. 15 Pitts. L. J. 245; *in re Koch*, 1 B. R. 549; *in re Lyon*, 6 I. R. R. 185.)

The manifest intention of Rule X is, that when a question is objected to, the question and the fact and grounds of objection shall be taken down by the register, and that the question, although incompetent, immaterial, or irrelevant, shall be answered, and that when the deposition is closed, the court shall deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial, or irrelevant. The bankrupt or other witness has the power, in a clear case of abuse, to refuse, under the advice and responsibility of counsel, to answer a question. Then, on application to punish the party for contempt, which must come before the court, the whole question as to competency, relevancy, and materiality, will be raised in a proper way for adjudication. The good sense of rule X is, that it extends, not only to objections to questions, but also to objections to answers and testimony, on the grounds of competency, materiality, and relevancy, and that neither question, nor answer, nor testimony, is to be held ultimately incompetent, immaterial, or irrelevant, unless objected to on the record for some ground of incompetency, immateriality, or irrelevancy, stated on the record. (*In re Levy et al.* 1 B. R. 136. s. c. 1 Ben. 496; *in re Bond*, 3 B. R. 7.)

The register should declare his opinion when the objection is made, and should order the party to answer the question, if he so decides. If an exception is taken, he should certify it for the summary consideration of the court, the examination proceeding in its other parts. If the party without such exception refuses to answer the question, his contumacy should be reported. (*In re Reakirt*, 7 B. R. 329)

The register is required to note the objection on the deposition—that is, not merely the fact of objection; but the ground of objection; and, if no ground of objection is assigned, he is not bound to note the fact of objection; and the ground of objection must be directed to the competency, materiality, or relevancy of that which is objected to. (*In re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.)

Questions arising in the course of the examination may be certified to the court, under section 5011, when put in proper form. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; *in re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496)

Whether the bankrupt has properly answered a question, is a point that may be certified to court for decision at the request of the creditor. (*In re Holt*, 3 B. R. 241.)

No rule can be laid down which will enable the register to determine whether the bankrupt under examination ought or ought not to be allowed to consult counsel. The solution of the matter must be left for the register to decide according to the circumstances of each particular case. Generally, he should not allow consultation. (*In re Patterson*, 1 B. R. 147; s. c. 1 Ben. 508; *in re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. Lowell, 215; *in re Judson*, 1 B. R. 364; s. c. 2 Ben. 210; s. c. 35 How. Pr. 15; *in re J. C. Collins*, 1 B. R. 551; *in re Lord*, 3 B. R. 243.)

One creditor has no right to interpose any objection to the examination of a bankrupt by another creditor. (*In re Edwin K. Winship*, 7 Ben. 194.)

The examination of the bankrupt may be adjourned for good cause shown. (*In re Mawson*, 1 B. R. 271.)

The bankrupt is exempt from arrest while obeying the order to appear for examination. (*In re G. W. Kimball*, 1 B. R. 193; s. c. 2 Ben. 38.)

A bankrupt who obeys the process of the court, and places himself within its jurisdiction, may file a preliminary objection, which goes to the right to examine him, and may refuse to be sworn upon that ground. (*In re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.)

When the bankrupt refuses to be sworn on account of a preliminary objection which goes to the right of the party to examine him, a certificate will not be given to court so that he may be declared in contempt, for he has a right to have the question decided, and his declining to be sworn after raising the objection is not an act constituting a contempt of court. (*In re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.)

So long as the debt of a creditor stands proved and unimpeached, the claim that it has been extinguished by an offset, or does not exist, furnishes no ground for a refusal by the bankrupt to be sworn and examined. (*In re N. W. Kingsley*, 7 B. R. 558; s. c. 6 Ben. 300; *in re Edwin K. Winship*, 7 Ben. 194.)

When satisfied that an examination has been sought, or is being carried on, to gratify malice or mere curiosity, it is the duty of the court to arrest it. (*In re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486.)

### Upon what Topics the Bankrupt may be Examined.

The bankrupt may decline to answer a question where, by answering, he would criminate himself. (*In re Patterson*, 1 B. R. 147; s. c. 1 Ben. 508; *in re Koch*, 1 B. R. 549.)

*Contra.* The power given to the court to examine the bankrupt at all times, upon reasonable notice, is a fundamental as well as an important element in the administration of the bankrupt law. Without such power, proceedings in bankruptcy, in many cases, would be ineffectual, thereby defeating the equity designed by the act. While it is true, from the necessity of the case, that difficult questions are liable to arise upon the examination of all bankrupts, yet it is also true that the bankrupt can not cover up his fraud behind the shield that if he answers he will criminate himself, by proving up his fraud in testifying as to the distribution of his property. Though such examination may expose him to penalties for fraudulent concealment, or fraudulent disposition of his property, he is left to the judgment of the law. Notwithstanding it may be possible, nay, probable, that he may be protected from disclosing some distinct criminal act, yet even in such case he can not be protected in refusing to discover all his estate and effects, and the full particulars relating to them, though thereby he may show that he has been guilty of fraud or of fraudulent concealment, or that he owns property which he has illegally obtained, and will thus be liable to penalties. It has been held that a bankrupt is bound to answer questions relating to particular property, though at the time an indictment was pending against him for the concealment of such property. It has been held also, that a bankrupt is compelled to answer questions touching his estate and effects, although such answer or answers might tend to convict him of perjury committed by him upon a former occasion, and also be evidence against him that he had incurred penalties by concealing his effects. And it has also been held that he can not refuse to answer questions tending to show that he has committed the act of bankruptcy charged in the involuntary petition. (*In re Bromley & Co.* 3 B. R. 686.)

The bankrupt must state whether or not he has played cards, faro, or any other game of chance with a certain person named in the interrogatory, and whether he has lost any money at games of chance, even though he declines to answer on the ground that his answers would criminate or degrade himself. (*In re Richards*, 4 B. R. 93; s. c. 4 Ben. 303.)

If the purpose of the examination be to elicit facts to be used in opposing the bankrupt's discharge, it is not competent for the register to summon any

witness or person who may know or be suspected of knowing facts pertinent, or that might be serviceable in the preparation of specifications. In regard to such facts, a creditor should be left to establish them on the trial of the issues, as parties do in ordinary trials at law. Such information no one has the right to demand or obtain otherwise than it may be voluntarily given, unless it be upon the trial of issues or questions made up. But it is not so with the bankrupt. In relation to such of his creditors as prove their debts, he stands upon different grounds altogether. When he files his petition, he asks that in consideration of his complying with every requirement of the law, he may be absolved from every legal obligation to his creditors. This is an extraordinary exemption, and the law only allows it when he surrenders himself to be dealt with in an extraordinary way, if the court shall see proper to exercise that power to the ends of justice. (*In re Brandt*, 2 B. R. 215; *in re Vogel*, 5 B. R. 393.)

The bankrupt can not be examined in regard to property which does not belong to him. (*In re Van Tuyl*, 1 B. R. 636; *in re Carson & Hard*, 2 B. R. 107.)

But he may be examined in regard to property in which it may possibly be shown that he has an interest. (*In re Bonesteel*, 2 B. R. 330; *in re Carson & Hard*, 2 B. R. 107.)

The bankrupt must answer questions in relation to his wife's property when it is shown that he may possibly have an interest in it. (*In re D. Craig*, 3 B. R. 100; s. c. 4 B. R. quarto, 50; s. c. 3 Ben. 353; *in re Clark*, *West et al.* 4 B. R. 237.)

The bankrupt can not be examined as to property acquired or business done after the date of the filing of the petition in bankruptcy, unless it can be shown that the same has some connection with his property or business before that time. (*In re Rosenfield, Jr.* 1 B. R. 319; s. c. 1 L. T. B. 81; s. c. 16 Pitts. L. J. 245; *in re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; *in re Levy et al.* 1 B. R. 136; s. c. 1 Ben. 496.)

Interrogatories in regard to money in the possession of the bankrupt soon after the commencement of proceedings in bankruptcy, are relevant and must be answered. The assignee is entitled to any facts directly or circumstantially tending to show that the bankrupt, before filing his petition in bankruptcy, was in possession of money which he had concealed, but which should have gone to the assignee. The point of inquiry in such cases is, when did the bankrupt acquire it, and how? The assignee will have to show that it was acquired before bankruptcy, and he may also show that, though acquired after, still it is the proceeds of property or effects belonging to the assignee. (*In re McBrien*, 3 B. R. 345; s. c. 3 Ben. 481.)

The bankrupt may be examined in regard to matters which transpired before the creation of the debt of the creditor. (*In re D. Craig*, 3 B. R. 100; s. c. 3 Ben. 353.)

Evidence can not be introduced to prove that the debt of a creditor was contracted by fraud. The question of fraud in the creation of a debt can not be litigated in the proceedings in bankruptcy. (*In re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509; *in re Tallman*, 1 B. R. 462; s. c. 2 Ben. 348; *contra, in re Koch*, 1 B. R. 549.)

The conduct of the bankrupt in withdrawing from the office of the register before the completion of his examination, is a contempt of court. (*In re Vogel*, 5 B. R. 393.)

The examination of the bankrupt is not competent evidence against him in a criminal action. Evidence given or statements made by a party, under compulsion or order of court, tending to criminate himself, can not be put in evidence in a criminal proceeding against him. (*U. S. v. Prescott*, 2 Dillon, 405; *in re Brooks*, 5 Pac. L. R. 191.)

The State courts have no jurisdiction to punish a party for the crime of perjury committed in the course of an examination before a register. (*State v. Pike*, 15 N. H. 83.)

An examination of a bankrupt by a creditor does not bar an action by the assignee against the vendee of the bankrupt to recover property fraudulently conveyed by the bankrupt to such vendee. (*Bradley v. Hunter*, 50 Ala. 265.)

SEC. 5086A.—(22 June, 1874, ch. 390, § 8, 18 Stat. 180).—That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness.

This section only applies to civil causes. The bankrupt is not a competent witness in a criminal proceeding against him. (*U. S. v. Black*, 12 B. R. 340; s. c. 10 Pac. L. R. 41.)

SEC. 5087.—The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute—April 4, 1800, ch. 19, § 14, 2 Stat. 25.

It is not necessary to give the bankrupt notice of the time and the place of the examination of a witness summoned by the assignee. An examination by an assignee, and an examination by creditors, are two independent proceedings, and one may be conducted without reference to the other. (*In re Levy et al.* 1 B. R. 107; s. c. 1 Ben. 454.)

A mere witness may be examined before the bankrupt himself, and there need not be any matter of controversy to be settled by testimony. (*In re Fredenburg*, 1 B. R. 268; s. c. 2 Ben. 133; *in re Blake*, 2 B. R. 10.)

A receiver appointed by a State court may be examined as a witness. (*In re William W. Hulst*, 7 Ben. 40.)

An assignee may be subpoenaed and required to testify in the same manner as any other witness, and the register has authority to make the requisite order. (*In re Elmer C. Smith*, 14 B. R. 432.)

An assignee is not subject as of course to an examination by any creditor whenever the latter may desire it, but will be protected against unnecessary annoyance by refusing an application for his examination unless upon some issue regularly referred to the register. (*In re Elmer C. Smith*, 14 B. R. 432.)

One creditor has no right to interpose objections to the course of the examination of a witness by another creditor. The only person who properly has an opposing interest in such an examination is the bankrupt himself, and to him is preserved and allowed the right of cross-examination. (*In re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33.)

A party whose transactions with the bankrupt are being investigated can not appear by counsel at the examination of a witness. (*In re Comstock & Co.* 13 B. R. 193; s. c. 3 Saw. 517.)

A witness is bound to attend before the register, although the summons is served on him out of the district, if he does not live more than one hundred miles from the place where he is required to attend. (*In re Wm. S. Woodward*, 12 B. R. 297; s. c. 7 O. L. N. 87; s. c. 10 Pac. L. R. 14.)

The witness may be examined, even though he is a party to proceedings instituted by the assignee to recover property alleged to belong to the bankrupt's estate. (*In re Feinberg et al.* 2 B. R. 475; s. c. 3 Ben. 162.)

A witness must answer questions put to him so far as they relate to any matter of examination specified in this section. (*In re Belden & Hooker*, 4 B. R. 194; *in re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33.)

A witness must state where he got the money with which he purchased certain claims against the bankrupt's estate. (*In re Lathrop, Cady & Burtis*, 4 B. R. quarto, 93.)

The right to refuse to answer a question on the ground of privilege does not warrant a refusal to be sworn as a witness. The privilege can not be interposed until a question is asked which invades the privilege. (*In re Woodward et al.* 3 B. R. 719.)

An attorney who took charge of an auction sale for the bankrupt must testify in regard to the amount and disposition of the proceeds. It is a mistake to suppose that an attorney is privileged from answering as to everything which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his clients as such. Questions in regard to the amount and disposition of the proceeds of a sale only call upon him to state his own proceedings in the disposition of the stock of goods, and the amount he received therefor. It is solely his own acts which he is required to disclose, and not anything whatever which his clients ever communicated to him. These acts were not professional, and did not appertain to the duty of an attorney, but were such as any agent could have done, being the ordinary proceedings of an agent in selling the property of his principal, and paying over the proceeds which were the subject of investigation and inquiry. (*In re O'Donohue*, 3 B. R. 245.)

An attorney who has received a conveyance of land from a bankrupt, and has shortly afterwards conveyed the property to the wife of the bankrupt, must answer questions touching such conveyances. In such a case the rights and privileges of the attorney, and his duty to his client, are entirely separate and distinct from his rights and duties as purchaser and vendor, the transaction in relation to the real estate not being a part and parcel of, or in and about, any lawsuit in which he was counsel for either the bankrupt or his wife. (*In re Belis & Milligan*, 3 B. R. 199; s. c. 38 How. Pr. 79; s. c. 3 Ben. 386; s. c. 1 L. T. B. 178.)

An attorney for the bankrupt may be required to state whether, at a certain date, he received any checks drawn to the order of the bankrupt by a certain person, and what disposition was made of any such checks so received. (*In re Jas. S. Aspinwall*, 10 B. R. 448; s. c. 7 Ben. 433.)

An attorney for the bankrupt may be required to state whether he drew or directed the drawing of a certain deed from the bankrupt. (*In re Jas. S. Aspinwall*, 10 B. R. 448; s. c. 7 Ben. 433.)

An attorney of the bankrupt may be required to state what affairs of the bankrupt were the subject of a conversation between him and other persons than the bankrupt, although he can not be compelled to disclose information about such affairs imparted to him by the bankrupt or received from persons to whom he was referred by the bankrupt for the purpose of obtaining such information as counsel for the bankrupt. (*In re Jas. S. Aspinwall*, 10 B. R. 448; s. c. 7 Ben. 433.)

A witness must answer all proper questions on matters relating to his trade

and dealings with the bankrupt prior to the commencement of proceedings in bankruptcy; and if, to answer properly, fully, and truthfully any such question, it is necessary that he shall produce a copy of any transaction of his with the bankrupt, as contained in any book of the witness, such copy must be produced. (*In re Earle*, 3 B. R. 564.)

It is no sufficient reason for a refusal to state the consideration paid by the witness for certain claims assigned to him, that the consideration did not come from the bankrupt or his estate, or that to testify would reveal his own private business, or that an answer might prejudice him in a suit then pending. (*In re Benjamin J. H. Trask*, 7 Ben. 60.)

A witness can not refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case brought, or to be brought, on behalf of the assignee. The main, if not the only, purpose of the statute authorizing such an examination, is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence. (*In re Fay et al.* 3 B. R. 660; *in re Danforth*, 1 Penn. L. J. 148.)

The assignee can compel the examination of a preferred creditor, and obtain a full disclosure. (*Garrison v. Markley*, 7 B. R. 246.)

The president of a corporation may be compelled to state what was the consideration of a judgment obtained by the corporation against the bankrupt, although the purpose is to impeach it as fraudulent. (*In re Pioneer Paper Co.* 7 B. R. 250.)

A witness on cross-examination is not bound to answer a question not relating to any matter of fact in issue, nor to any matter contained in his direct testimony, when an answer thereto would tend to degrade him. (*In re H. Lewis*, 3 B. R. 621; s. c. 4 Ben. 67.)

A mere witness can not have the assistance of counsel. (*In re Fredenberg*, 2 B. R. 268; s. c. 2 Ben. 133; *in re Feinberg et al.* 2 B. R. 475; s. c. 3 Ben. 162; *in re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33; *in re Comstock & Co.* 13 B. R. 193; s. c. 3 Saw. 517.)

The fees to which witnesses are entitled are 5 cents a mile for coming and returning, and \$1.50 for each day's attendance. The "traveling expenses," mentioned in Rule XXIX, mean no more than the traveling fees allowed by section 848. (*In re Wm. Griffen*, 1 B. R. 371; s. c. 2 Ben. 209.)

The clerk's certificate is only *prima facie* evidence of the number of days that a witness attended before a register. (*In re J. Crane & Co.* 15 B. R. 120)

A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend. (*In re J. Crane & Co.* 15 B. R. 120.)

The memoranda, or entries made by the register may be used as evidence to prove what proceedings have been had before him. (*In re J. Crane & Co.* 15 B. R. 120.)

The time for examining witnesses is not terminated by the application for a discharge. The time for filing specifications against a discharge may be kept open by adjournment until a reasonable opportunity is afforded for examination of witnesses. (*In re Seckendorf*, 1 B. R. 626; s. c. 2 Ben. 462; *in re Mawson*, 1 B. R. 271.)

The answers of a witness made by him in an examination under oath before a register in bankruptcy are admissible to contradict him. They fall within the rule which allows a witness to be impeached by proof that he has made conflicting statements at other times. The fact that the examination was not completed, and the answers not signed, affects the weight of the testimony, but does

not render it incompetent. The answers which are reduced to writing by his agent at his dictation are admissible as his statements. (*Knowlton v. Moseley*, 105 Mass. 136.)

SEC. 5088—For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute—April 4, 1800, ch. 19, § 24, 2 Stat. 28.

The examination of the wife of the bankrupt is not a matter of right, and where an application for such an examination is made merely for delay, it may be refused. (*In re Selig*, 1 B. R. 186.)

An examination of the bankrupt's wife will only be ordered when a *prima facie* case is made out by affidavit; and such a case is not made out by showing that the bankrupt has committed frauds of which the wife is probably cognizant. It is not the intention of the statute to destroy the usual and proper confidence between husband and wife any more than between attorney and clients. The cases in which the wife may be examined are, where she is, on reasonable grounds, suspected of having, or of having had, property in her possession which should have been surrendered to the assignee, or to have participated actively in other frauds upon the statute. In that case, conversations may be of the *res gestæ*, and may be inquired into. She is a party to a fraud, and may be fully examined concerning it. When she professes to be a creditor of her husband's estate, and offers her debt for proof, she can be fully examined in regard to it, like any other person under similar circumstances. (*In re Gilbert*, 3 B. R. 152; s. c. *Lowell*, 340.)

The wife of the bankrupt is entitled to witness fees for attendance and travel, the same as any other witness. (*In re Wm. Griffen*, 1 B. R. 371; s. c. 2 Ben. 209.)

The wife of the bankrupt is not bound to appear unless the fees are paid or tendered to her at the time of the service of the summons. (*In re Van Tuyl*, 2 B. R. 70.)

The order for the bankrupt's wife to appear for examination may, in certain cases, be served on the bankrupt himself, and when she fails to attend, the bankrupt is not entitled to a discharge, unless he can prove that he was unable to procure her attendance. (*In re Van Tuyl*, 2 B. R. 579; s. c. 3 Ben. 237.)

The wife of the bankrupt must attend and submit to an examination, the same as any other witness. If she does not attend on being summoned, her attendance may be compelled by a warrant to the marshal, under which she may be brought before the register and detained until her examination is concluded. If, when she comes, or is brought before the register, she refuses to answer, she may be punished for contempt. (*In re Woolford*, 3 B. R. 444; s. c. 4 Ben. 9.)

When the reasons assigned for the non-attendance of the bankrupt's wife relate to the legal right of the court, under the circumstance of the case, to compel her to attend, the proper proceeding to enforce attendance is to pass an order to show cause why a warrant should not issue. (*In re Belis & Milligan*, 3 B. R. 270; s. c. 38 How. Pr. 88.)

The bankrupt's wife is not entitled to the aid of counsel on her examination. (*In re J. A. Schonberg*, 7 Ben. 211.)



The counsel for the bankrupt is not entitled to advise the wife of the bankrupt while on examination. (*In re J. A. Schonberg*, 7 Ben. 211.)

When the bankrupt's wife alleges the advice of counsel as her only reason for refusing to produce a letter, she should produce it if it pertains to a transaction between her and the bankrupt. (*In re J. A. Schonberg*, 7 Ben. 211.)

If the bankrupt contracted for a house, but took the title in his wife's name, she may be examined fully concerning all the facts and circumstances of the transaction, and concerning the money used to pay for the house. (*In re J. A. Schonberg*, 7 Ben. 211.)

The bankrupt's wife must answer questions in regard to her property when it is shown that her husband may possibly have an interest in it. (*In re D. Craig*, 3 B. R. 100; s. c. 4 B. R. quarto, 50, 52; s. c. 3 Ben. 353.)

SEC. 5089.—If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute—April 4, 1800, ch. 19, § 18, 2 Stat. 26.

SEC. 5090.—If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Statute Revised—March 2, 1867, ch. 176, § 12, 14 Stat. 522. Prior Statute—April 4, 1800, ch. 19, § 45, 2 Stat. 33.

The word "proceedings" does not include a discharge, unless there is a compliance with the requirements of section 5113, in regard to the application for the discharge and the oath. No discharge can be granted where the debtor dies before these requirements are complied with. This clause must be taken as applying to such proceeding as may be taken by the assignee or other parties in settling the estate. (*In re O'Farrell et al.* 2 B. R. 484; s. c. 3 Ben. 191; s. c. 1 L. T. B. 159; *in re Quinike*, 4 B. R. 92; s. c. 2 Biss. 354.)

The decease of one partner prior to any adjudication upon the question in bankruptcy under an involuntary petition, is not a legal cause for a dismissal of the petition as against the surviving partners. (*Hunt v. Pooke*, 5 B. R. 161.)

If the debtor in a case of involuntary bankruptcy dies after the issuing of the order to show cause, and before trial, the proceedings abate. Proceedings in involuntary bankruptcy are analogous to actions at law for torts, which abate on the death of the party. (*In re John V. McDonald*, 8 B. R. 237; s. c. 30 Leg. Int. 332; s. c. 20 Pitts. L. J. 185; s. c. 5 C. L. N. 504; s. c. 6 Pac. L. R. 94.)

Proceedings in involuntary bankruptcy do not abate by the death of the bankrupt after the entry of the order of adjudication, but before the actual issuing of the warrant. The warrant is required to be issued forthwith. It is, in judgment of law, issued simultaneously with the entry of the order of adjudication. Whenever it is actually issued, it relates back, for the purposes of this section, to the entry of the order of adjudication. This section contemplates the issuing of the warrant in a voluntary case simultaneously with the entry of an order of adjudication, and the same intent exists in regard to an involuntary case. (*In re E. C. Litchfield*, 9 B. R. 506; s. c. 7 Ben. 259.)

There is no party to a creditor's petition, except the petitioning creditor and the bankrupt. A person who does not claim any right or interest in the property of the debtor, or seek to assert any claim to any specific property in the hands of the assignee, can not, merely because an injunction has been issued against him, move to vacate the adjudication on the ground of the death of the debtor prior to the adjudication. (*Karr v. Whitaker*, 5 B. R. 123.)

SEC. 5091.—All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, *pro rata*, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

Statute Revised—March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statutes—April 4, 1800, ch. 19, § 31, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This section simply provides that when the creditors who are entitled to share in the distribution are determined they shall take *pro rata*. (*In re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499.)

The State laws in relation to the distribution of the estates of decedents do not govern in the distribution of the estate of a bankrupt. The bankrupt's assets must be divided in accordance with the provisions of the bankrupt act. (*In re Erwin & Hardy*, 3 B. R. 580.)

The claim of a trustee of a bankrupt corporation who has rendered himself individually liable to the creditors, can not be postponed until the other creditors are paid in full. (*Bristol v. Sanford*, 13 B. R. 78; s. c. 12 Blatch. 341.)

SEC. 5092.—At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which,

by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

Statute Revised—March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statutes—April 4, 1800, ch. 19, § 29, 2 Stat. 29; Aug. 19, 1841, ch. 9, § 10, 5 Stat. 447.

It is not essential that the second and third meetings should be held at any particular time, but only that they should be held at the expiration of certain months, &c.; and unless this means on the very day that the month runs out, there is no day on which it can be said that it is too late to hold these meetings, unless, possibly, it may be said that the second meeting should be called before the end of six months. (*In re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 L. T. B. 164.)

No second meeting of creditors under section 5092, and no third or other meeting under section 5093, ought to be called unless the assignee has in his hands some money out of which a dividend can be made. (*In re Son*, 1 B. R. 310; s. c. 2 Ben. 153; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

But they can not be dispensed with except by an order of court predicated upon a report of the assignee showing that there are no assets. (*In re A. Alexander*, 3 B. R. quarto, 20.)

Where the assignee, at the expiration of three months from the date of the adjudication of bankruptcy requests the court so to do, a second general meeting of the creditors must be called. (*In re Louis H. Rosey*, 6 Ben. 137.)

When the register states at the meeting that the accounts of the assignee will be filed, and that they can be examined thereafter by any of the creditors who desire to examine the same, and that they will not be audited or passed until the final meeting of creditors, and thereupon makes an entry to that effect without objection from any one, an order allowing the credits claimed by the assignee may be postponed to the final meeting of creditors. (*In re Clark & Binninger*, 6 B. R. 204; *in re Abraham B. Clark*, 9 B. R. 67.)

The register has the power, and it is his duty, to audit and pass any accounts reported and exhibited at the second meeting. Creditors must be prepared to object, if they desire, to such accounts as the assignee shall report and exhibit. In order to arrive at the net sum to be divided, the outstanding claims not disputed or objected to, must be ascertained, and their amount deducted. If they are not disputed, it is the duty of the register to direct their payment as part of the business of auditing and passing the accounts, even though they have not been actually paid by the assignee. They may properly come under the head of "other expenses," the amount of which is to be retained by the assignee, such retention being specifically authorized by the meeting and the register, to meet the specific items as expenses. (*In re Clark & Binninger*, 6 B. R. 197; s. c. 5 Ben. 389.)

It is proper to take the views of the creditors in regard to the fees and charges of the assignee, whether a majority is present or not, but their views are not necessarily binding. (*In re Merchants' Ins. Co.* 6 Biss. 252.)

The allowance of a reasonable compensation is no part of the duty of the creditors' meeting, nor of the register, but is to be made by the court in the exercise of a judicial discretion in view of the nature of the duties performed, and the degree of compensation received from the regular fees. The proper practice is to apply to the court for the allowance previous to the final meeting. (*In re Merchants' Ins. Co.* 6 Biss. 252.)

The assignee's account may be submitted to the creditors' meeting for examination, discussion, explanation, and approval before it is audited. (*In re Merchants' Ins. Co.* 6 Biss. 252.)

Ample opportunity should be given all creditors to examine and object to the assignee's account, but the meeting may, on motion, dispense with the reading of the account and vouchers in detail. (*In re Merchants' Ins. Co.* 6 Biss. 252.)

It is the duty of the register to examine and regulate the charges of the assignee, whether any creditor objects to the account or not. (*In re Jas. M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470; *in re Colwell*, 15 B. R. 92.)

If the assignee employs an attorney who renders legal services for him, the bill of the attorney therefor should be presented by the assignee as part of his accounts, at the meeting of creditors where the assignee's accounts are required to be presented. The intention is that the disbursements of the assignee in administering the estate, whether only incurred and not yet paid, or whether incurred and paid, shall be submitted to the creditors at a general meeting, and be audited by the register as a part of the business of auditing the accounts of the assignee. (*In re Hubbell & Chappel*, 9 B. R. 523; s. c. 19 I. R. R. 150.)

Under special circumstances the court may properly, on due notice to all creditors who have proved their debts, institute an inquiry into the services rendered to an assignee by an attorney, with a view to payment of them prior to the holding of any second general meeting of creditors, but the practice is one not to be encouraged. (*In re Hubbell & Chappel*, 9 B. R. 523; s. c. 19 I. R. R. 150.)

At the second meeting the creditors may dispose of the funds to those who have proved their claims, without leaving in the hands of the assignee a sum sufficient to pay a similar percentage upon the claims set forth in the schedules, but which have not been proved. The whole fund in the hands of the assignee, less such sum as may be retained for expenses and contingencies, should be distributed, unless good cause to the contrary is shown. (*In re William Mills*, 11 B. R. 117; s. c. 7 Ben. 452.)

It is the duty of the register to deduct and retain in the hands of the assignee a sum sufficient to provide for undetermined claims when in controversy, and for unproven claims when it shall be made to appear probable that, by reason of the distance or for any other good cause they have not been proved, for it is the duty of the court and not of the creditors to guard the rights of the absent. (*In re William Mills*, 11 B. R. 117; s. c. 7 Ben. 452.)

When a receiver has been appointed in a suit pending between the assignee and trustees claiming under a deed of trust for the benefit of creditors, the dividend ought to be made directly to such creditors by the special receiver, as part of the proceedings in such suit, and not by the assignee in bankruptcy as part of the proceedings in bankruptcy, after a transfer to him by the special receiver of the proper sum to be divided. There must be a reference to a master to ascertain and report the proper sum to be divided, and to prepare a schedule of the distributees, and of the amounts of their debts which ought to share in the dividend, and of the rate of dividend, and of the amount to be paid to each creditor. The rate of dividend should not exceed the rate that would be allowed in case all the creditors named in the schedule annexed to the deed of trust had proved their debts in bankruptcy, in addition to such debts proved in bankruptcy as do not appear in such schedule. (*Sedgwick v. Place et al.* 3 B. R. 302.)

SEC. 5093.—Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final

dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute—April 4, 1800, ch. 19, § 30, 2 Stat. 29.

The court of bankruptcy, for all purposes of the auditing, settlement, and adjustment of the assignee's account, and of distribution, is held provisionally by the register, whose acts are, of course, subject to exception. Full opportunity for exception at the public meeting, or at an adjourned meeting, should be afforded to all parties interested. The assignee should see that proper special notice be given to creditors who have, and to those who have not, proved their debts; and the register should see that this moral and legal duty of the assignee has not been neglected. A bankrupt who allows omissions to occur in these respects may, through neglect of his duty to creditors, lose the right to a discharge. After all due precautions have been thus adopted, exceptions must be taken before the register, and certified by him to the court with his report. Exceptions, unless upon special cause shown, are not afterward received by the court. If no exception is certified, the acts of the register are, in themselves, acts of the court without any formal judgment of confirmation. In all cases, the register should so report as to show particularly how notices and opportunity for exception have been given. (*In re Bushey*, 3 B. R. 685.)

Rule V makes it the duty of the register to "take proceedings for the declaration and payment of dividends." When the assignee makes an application for a third meeting, the register has the power to make an order requiring the assignee to furnish information in regard to the funds for distribution. It is the duty of the register to ascertain for what purpose the meeting is to be called, and whether there are any funds for distribution. Without such information the register can not be called upon to exercise the discretion devolved upon him by the act upon such an application. When creditors make a request for a meeting, it is the practice to order the assignee to file an account, or otherwise inform the register in regard to the funds in his hands. When this is ascertained, the register exercises a discretion calling or not calling a meeting, as the facts may warrant. (*In re Binninger*, 6 B. R. 193.)

The court may restrain the register and the assignee from taking any further steps toward making or paying dividends, with a view to give an opportunity to any person interested to apply to the court on proper papers and on proper notice, to vacate the order of dividend. (*In re N. Y. Mail Steamship Co.* 3 B. R. 280.)

SEC. 5094.—The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

Statute Revised—March 2, 1867, ch. 176, § 17, 14 Stat. 524.

The notice to be given by mail is not confined to creditors who have proved their debts. Notice must be sent by mail to all known creditors. Creditors who have proved their debts may not be all the known creditors. (*In re William Mills*, 11 B. R. 117; s. c. 7 Ben. 452.)

If notice is not sent to a creditor whose name is on the schedule, the meeting must be adjourned and a proper notice sent to him, although he has not proved his debt. (*In re William Mills*, 11 B. R. 117; s. c. 7 Ben. 452.)

SEC. 5095.—Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

Statute Revised—March 2, 1867, ch. 176, § 23, 14 Stat. 528. Prior Statute—April 4, 1800, ch. 19, § 6, 2 Stat. 23.

In order to vote for an assignee, the attorney must be an attorney in fact and must be appointed by a power of attorney. (*In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19.)

One member of a firm may execute a power of attorney authorizing a person to vote for assignee in the name of the firm, and bind all the other members thereby. It is often inconvenient to bring together all the members of a firm to execute a deed of this character. If such was not the law great injury might result to a firm in prosecuting their claims against a debtor, when it is important to proceed without delay. (*In re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.)

When an agent executes a power of attorney in the name of the principal, he must produce legal evidence that he is duly authorized to execute the power of attorney. The certificate of the register before whom the power of attorney was executed, as to the identity of the agent, does not supply the place of such proof. (*In re Knoepfel*, 1 B. R. 23; s. c. 1 Ben. 330.)

A power of attorney, made before the passage of the bankrupt act, may authorize an agent to represent his principal in proceedings under it, if its terms are broad enough. A power of attorney authorizing an agent to sign the name of the principal to any paper necessary for the purpose of collecting or receiving any debt due to the principal, authorizes the agent to execute a power of attorney according to Form No. 14. (*In re Knoepfel*, 1 B. R. 70; s. c. 1 Ben. 398.)

There is no law which requires powers of attorney of this sort to be acknowledged. It is true that the foot note to Form No. 26 provides that they may be acknowledged, but the supreme court would have prescribed some rule upon the subject, if they had intended to make such action obligatory. The forms are largely advisory. Any duly executed writing which expresses the essential fact of the appointment of the attorney, and the powers confided to him, must be respected by the judge or register. If the supreme court ordered the foot note to be appended to Form No. 26, it must have been in anticipation that some question of acknowledgement might arise under the municipal law of some particular State; and it is, therefore, pointed out that, in case of acknowledgement, it may be before certain officers. The foot-note is not a rule that the letter appointing such an attorney must be acknowledged, nor even that it must be a deed. (*In re H. F. Barnes*, Lowell, 560; *in re Powell*, 2 B. R. 45.)

The power of attorney does not require a stamp. (*In re Myrick*, 3 B. R. 154; *contra*, see 6 I. R. R. 68.)

Where the authority is joint, it must be exercised by all to whom it is given, but forms Nos. 14 and 26 do not confer a joint authority. (*In re Phelps, Caldwell & Co.* 1 B. R. 525; s. c. 2 L. T. B. 25.)

When a letter of attorney addressed to a firm does not authorize either of the partners to act separately, one partner can not act alone and without the co-operation of his copartner. (*In re Frank*, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.)

A power of attorney, not containing a power of substitution, does not confer

any authority upon any other than the person duly constituted agent thereby to act for the creditor, nor can any one else sign the name of such agent to a paper on behalf of the creditor. (*In re C. N. Palmer*, 3 B. R. 301.)

Only the bankrupt or a creditor can appear by attorney, unless where a witness is made a party to a new collateral proceeding by being cited to answer for an alleged contempt. (*In re Fredenburg*, 1 B. R. 268; s. c. 2 Ben. 133; *in re Feinberg et al.* 2 B. R. 475; s. c. 3 Ben. 162.)

The register can not, at the instance of the bankrupt, inquire into the authority given to an attorney at law who has been admitted to practice in the circuit or district court. (*In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321.)

The statement of an attorney in regard to his authority must be taken as conclusive, unless some proof to the contrary is shown. (*Alabama R. R. Co. v. Jones*, 5 B. R. 97.)

An attorney who has appeared for a defendant can not withdraw his appearance so as to divest the court of jurisdiction, without the consent of the court or prosecuting party. When an appearance is entered by mistake, if the mistake is one of law, the party making it must abide by its consequences. If it is one of fact, the court must pass upon the existence and pertinence of the fact, and allow or refuse the withdrawal upon notice to the prosecuting party. (*In re Ulrich et al.* 3 B. R. 133; s. c. 3 Ben. 355.)

When an attorney unreasonably refuses to proceed, the case must proceed without him. (*In re Hyman*, 2 B. R. 333; s. c. 36 How. Pr. 282; s. c. 3 Ben. 28.)

SEC. 5096.—Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530.

Where no assets have come to the hands of the assignee, Form No. 35 is the account. Where assets have come to the hands of the assignee, Forms Nos. 37 and 38 constitute the account. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.)

The return is a deposition, and the register is entitled to charge for it as such. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

If the assignee has been discharged without being substituted as a party plaintiff to an action pending at the time of the filing of the petition, the suit may be prosecuted in the name of the bankrupt for the use of whoever may be entitled to the proceeds. (*Conner v. Southern Express Co.* 9 B. R. 138; s. c. 42 Geo. 37.)

Where a discharge of an assignee is inadvertently put on file, the district

court may order that it stand for naught and direct the assignee to proceed in the discharge of his duties. (*Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. [N. S.] 21.)

When the assignee is discharged, the property that remains undistributed reverts to the bankrupt without a reassignment. (*Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.)

SEC. 5097.—No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute—Aug. 19, 1841, ch. 9, § 10, 5 Stat. 447.

SEC. 5098.—If, by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530.

SEC. 5099.—The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute—April 4, 1800, ch. 19, § 29, 2 Stat. 29.

### Application for Allowance.

The assignee is not entitled to compensation beyond his commission without an order of the court. (*In re Jas. M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

This allowance is in the discretion of the court, and can be made only upon a specific application to the court, and a showing that the disbursements and services for which such allowance is asked were necessary and are reasonable in amount. It is preferable that the hearing should be had before the register, because, having the proceedings all before him, he is better able to judge of the exigencies upon which the necessity for the disbursements and services, and the reasonableness of the amount charged depend. (*In re B. B. Noyes*, 6 B. R. 277; *in re Colwell*, 15 B. R. 92.)

This allowance can not be made until after the services have been rendered, because, until the court is advised what the services have been, it can not determine whether any particular amount of compensation is or is not reasonable. If there is any money in the hands of the assignee, the allowance may be retained out of the money. If there is no money in the hands of the assignee, the allowance may be secured by withholding the discharge until the bankrupt pays it, on the ground that until then he has not in all things conformed to his duty under the act. (*In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)



The court will determine whether or not the disbursements are necessary. (*In re Noakes*, 1 B. R. 592.)

The assignee is not at liberty to charge the assets of the estate in his hands for professional and clerical services rendered him in the execution of his trust until the same shall have been first duly allowed by the court. (*In re B. B. Noyes*, 6 B. R. 277.)

The assignee may apply to the court, in the first instance, for authority to employ professional or clerical assistance, but in such case the court could do but little more than grant such authority in general terms, leaving the instances in and to which such assistance may be employed largely to the discretion of the assignee, as emergencies may arise making such assistance necessary. Such authority the assignee already possesses under his general powers, subject, however, to the control of the court. Such power must be used by him cautiously, and in the exercise of a sound discretion, and with the understanding that any abuse of it will be corrected by the court when applied to for authority to charge the estate for such assistance. (*In re B. B. Noyes*, 6 B. R. 277.)

It would be difficult and impracticable to prescribe any general rule defining the circumstances under which and the extent to which an assignee is at liberty to charge the assets of the estate in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies. (*In re B. B. Noyes*, 6 B. R. 277.)

When the assignee desires to pay for any professional or clerical assistance out of funds in his hands belonging to the estate, before submitting his final account, he should apply to court for the allowance of the same, or the person rendering the service may himself apply. In either case the assignee would be at liberty to charge the amount allowed to the estate at once, on payment of the same. If no such application is made, or if he has incurred liabilities, or made disbursements for such assistance, or otherwise, in regard to which no allowance has been made, or if he makes a claim other than his commissions for services, then the assignee must accompany his final account with a separate and distinct application for an allowance of the same, and submit to such examination, and furnish such proofs as may be required touching the necessity of such disbursements and services, and the reasonableness of the amounts charged. (*In re B. B. Noyes*, 6 B. R. 277.)

The application for an allowance for professional or clerical assistance, or disbursements, or personal services, should contain a brief statement of the circumstances out of which the necessity for the disbursements, and the professional or clerical assistance, and the assignee's own services arose, and from which the reasonableness of the amounts claimed therefor may appear, and should be verified by the assignee. (*In re B. B. Noyes*, 6 B. R. 277.)

If the assignee in asking for authority to employ an attorney to prosecute a pending action omits to disclose to the court the fact that an attorney was already employed by the bankrupt to prosecute it upon a contingent fee, the employment of an attorney who knows this fact is not binding upon the court, and such attorney is only entitled to a reasonable compensation. (*Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. [N. S.] 21.)

When the assignee intends to claim a compensation beyond the fees allowed to him, he should give notice thereof in the notices for the meeting at which the account is to be considered. (*In re Colwell*, 15 B. R. 92.)

If the application accompanies the final account, it will be laid before the creditors at the same time, and if they assent, or fail to object to the same, and the items and amounts appear to be just and reasonable, all further inquiry may be dispensed with. (*In re B. B. Noyes*, 6 B. R. 277.)

**What may be Allowed.**

An allowance by the day is a convenient mode of getting at a proper allowance for the services of an assignee, but it is hardly a fair mode where the time charged for is very large, and the estate very small. Five dollars is the maximum, but this should not be allowed where the time charged for is unusually large and the estate small. The assignee should also be held to the exercise of a reasonable judgment as to the amount of time to be devoted to the execution of the trust. (*In re Jones*, 9 B. R. 491.)

The following decisions have been made in regard to fees and expenses of assignees. The abbreviations used are as follows: *a*, allowed; *d*, disallowed; *r*, reduced:

Drafting certificates of exempted property.....	\$5 00	} r to \$5 00
Drafting acceptance and notice of appointment....	8 00	
Drafting petition for sale of property.....	5 00	
Publishing notice of appointment.....	6 00	<i>a</i>
Advertising sale of property.....	1 50	<i>a</i>
Recording assignment.....	1 25	<i>a</i>
Stationery, postage, etc.....	1 50	<i>a</i>
Writing and delivering deed to purchaser.....	5 00	<i>d</i>
Commission at the rate of five per cent.....	66 56	<i>a</i>
For each day employed in selling property, collecting accounts, examining papers, and preparing advertisements.....	7 00	<i>r</i> to proper comp.
Services of auctioneer.....	2 00	<i>d</i>
Attorney's fees.....		proper compensation.

(*In re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136; *in re Pegues*, 3 B. R. 80; s. c. 2 L. T. B. 136; *in re Tulley*, 3 B. R. 82; s. c. 2 L. T. B. 137.)

The computation of the amount due to printers for advertising a sale of real estate should be in accordance with the following rates:

Each square of eight lines, first time.....	\$1 00
Each subsequent insertion, per square.....	50

(*In re Wm. Downing*, 3 B. R. 741, 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207.)

The assignee can not employ an auctioneer without first obtaining an order authorizing such employment. (*In re Pegues*, 3 B. R. 80; s. c. 2 L. T. B. 136; *in re Tulley*, 3 B. R. 82; s. c. 2 L. T. B. 137.)

The assignee must make the necessity for the aid of an auctioneer and the reasonableness of the amount paid therefor to appear before he can have a charge for such services allowed. (*In re Sweet et al.* 9 B. R. 48; *in re Pegues*, 3 B. R. 80; s. c. 2 L. T. B. 136; *in re Tulley*, 3 B. R. 82; s. c. 2 L. T. B. 137.)

Fees for the assistance of an attorney will not be allowed without the most satisfactory evidence going to show the necessity for legal aid on the part of the assignee, and the actual rendition of the services charged for. (*In re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136; *in re Pegues*, 3 B. R. 80; s. c. 2 L. T. B. 136; *in re Tulley*, 3 B. R. 82; s. c. 2 L. T. B. 137; *in re Warshing*, 5 B. R. 350; *in re Colwell*, 15 B. R. 92.)

The compensation of the assignee's attorney must be reasonable and proportioned to the value of the estate. (*In re Priscilla G. Drake*, 14 B. R. 150.)

As a general rule, no charge for professional services of counsel can be allowed against the assets in the hands of the assignee for payment in full, and as expenses of the assignee in the administration of his trust, which were rendered prior to the appointment of the assignee. Under special circumstances, services may be included which are rendered as far back as the adjudication of bankruptcy. (*In re New York Mail Steamship Co.* 2 B. R. 554.)

The assignee should pay all reasonable and necessary expenses incurred after the date of the filing of the petition, because his title relates to that time, and he is the debtor by relation for all such expenses. The bankrupt is bound to see that his estate is kept together, and preserved for the assignee, and all the necessary charges for the fulfillment of his duty must be allowed him. (*In re Fortune*, 2 B. R. 662; s. c. Lowell, 306.)

Assignees, except in cases of fraud, are affected with all the equities which would affect the bankrupt, if he were asserting his rights and interests in the property. But this principle can only operate on the title as it stood when the property passed from the bankrupt to the assignee, and not to any rights attempted to be obtained subsequently. Advances and expenditures made to discharge liens, and preserve and benefit the estate after the commencement of proceedings in bankruptcy, by a party whose relation to the property justified such advances and expenditures, are an equitable claim and lien upon the estate. (*In re T. B. Gregg*, 3 B. R. 529; s. c. 1 L. T. B. 298.)

The bankrupt court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed, and not protected by any absolute lien. Equitably considered, the assignee receives the benefit, and should sustain the burden. (*In re Fortune*, 2 B. R. 662; s. c. Lowell, 306.)

A party who is employed in the prosecution of a claim for the debtor, after the filing of an involuntary petition, and before the filing of the voluntary petition under which the proceedings are held, is entitled to priority out of the proceeds of such claim, when such employment was made with the consent of the creditors. (*In re Nounnan & Co.* 6 R. R. 579; s. c. 4 L. T. B. 228; s. c. 1 Utah Ter. 44.)

The claim of a referee rests in contract between himself and the parties before him. If he decides in favor of the defendant, who was declared bankrupt after the taking of the testimony, but prior to the rendering of the decision, his claim for fees is a debt which may be proved in bankruptcy. Such claim is not entitled to priority, if the assignee has not become a party to the suit. Perhaps the assignee might be justified in taking up the report and docketing judgment. And in such case, the payment of the referee's fees might be allowed as a necessary disbursement. (*In re Louis Rosey*, 43 How. Pr. 471.)

The estate is liable for the keeping of cattle from the institution of bankruptcy proceedings. (*In re J. C. Mitchell*, 8 B. R. 47; s. c. 5 C. L. N. 271; *Moran v. Bogart*, 14 B. R. 393; s. c. 10 N. Y. 603; s. c. 16 Abb. Pr. [N. S.] 303.)

The sheriff has no claim for services rendered under executions issued after the filing of the petition in bankruptcy. (*Platt v. Stewart*, 11 B. R. 191.)

The sheriff may be allowed a compensation, not exceeding his legal fees, for services rendered under an execution issued prior to the filing of the petition in bankruptcy, although the judgment and execution is not a lien. (*Platt v. Stewart*, 11 B. R. 191.)

If the bankrupt was interested in the defense of a suit, and agreed to pay one-half of the expense, although his share was only one-tenth, and the assignee with knowledge of the contract appears and continues the defense, he will be assumed to have acquiesced in the terms, and the estate will be charged with that proportion of the expense. (*In re Samuel H. Babcock*, 1 W. & M. 26.)

The usual and ordinary expenditures made in the delivery of the cargo of a vessel owned by the bankrupt in order to enable her to free herself from liability on her existing contract of affreightment, and to collect her freight, are entitled to priority out of the freight and the proceeds of the vessel coming into the hands of the assignee. (*The Trimountain*, 5 Ben. 246.)

The assignee may allow the bankrupt a reasonable sum for taking charge of the property prior to his appointment. (*In re Benjamin B. Grant*, 2 Story, 312.)

The liability of the assignee for rent depends on whether he has accepted the lease or not. Mere neglect by the assignee is of no importance, for in the absence of a positive acceptance he is not liable. (*In re Washburn*, 11 B. R. 66.)

Rent for the use of premises to store goods of the bankrupt, from the time of the commencement of proceedings in bankruptcy to the date of surrender, should be paid by the assignee and charged as a part of his expenses. (*In re Walton*, 1 B. R. 557; *in re Appold*, note, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; *in re Merrifield*, 3 B. R. 98; *in re Laurie et al.* 4 B. R. 32; s. c. Lowell, 404; *Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220; *contra*, *McGrath & Hunt*, 5 B. R. 254; s. c. 5 Ben. 183.)

As soon as the marshal takes possession, it is the duty of the landlord to apply to the court to have the goods removed and the premises vacated by the marshal. (*In re McGrath & Hunt*, 5 B. R. 254; s. c. 5 Ben. 183.)

Where the assignee occupies the premises after the commencement of the proceedings in bankruptcy, the landlord is entitled to be paid out of the proceeds of the goods on the premises, whether they are sufficient to pay the other expenses of the proceedings or not. (*Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220.)

Compensation to the bankrupt for extraordinary services rendered in order to make the property available can only be allowed as a matter of grace by the creditors. (*Barnes Brothers & Herron*, 1 W. N. 21.)

Expenses incurred by the assignee in putting property into a salable condition may be allowed. (*Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 813.)

Courts deal with assignees as the representatives of the bankrupt's estate from the commencement of proceedings in bankruptcy, and in the settlement it is their duty to look after the payment of all proper expenses incurred subsequent to that date. Before they consent to a dividend to the creditors, they should retain under their own control a sufficient sum of the assets to cover expenses and costs, and their failure so to do—such failure being of their own wrong, or the result of their own neglect—can not be made the basis of an appeal to the court to relieve them from the consequences. If they do not pay such expenses, an order may be passed requiring the payment of them, even after a dividend of all the assets has been declared and paid. (*In re Dunham & Hawks*, 7 Phila. 611.)

When the sheriff, by an amicable arrangement, is allowed to remain in possession of goods duly attached after the dissolution of the attachment, the expenses so incurred should be allowed and paid in full as incident to the settlement of the estate. (*In re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374.)

No expenditure by a third party can be allowed unless it is shown that it was necessary, or resulted in a benefit to the estate. (*In re George S. Ward*, 9 B. R. 349.)

A State court has no jurisdiction to direct that a judgment in an action against the assignee shall be paid in full out of the estate. (*In re Central Bank of Brooklyn*, 12 B. R. 286; s. c. 7 C. L. N. 871.)

An agreement by the creditors to pay a person a certain sum in addition to his legal fees if he will act as assignee is illegal and void. (*Cowing v. Altman*, 1 T. & C. 494; s. c. 12 N. Y. Supr. 556.)

No State can tax the funds belonging to a bankrupt's estate in the hands of the assignee. (*In re John K. Booth*, 14 B. R. 232.)

SEC. 5100.—In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall

be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 430.)

This clause does not conflict with the provision in the preceding section, except so far, perhaps, as to limit the allowance for receiving and paying out money to a certain *per centum*, graduated by the amount. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

The commission of five per cent. can only be allowed on the amount of debt canceled, and not on the amount of debt proved. (*In re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.)

When the assignee resigns, he may be allowed his commissions on the moneys received and paid, or to be paid. But it would not be just or reasonable to allow him commissions based upon the speculative idea that possibly, if continued in office and permitted, for the mere purpose of earning commissions, to litigate the validity of a mortgage against the will of all who are interested in that question, he might establish its invalidity. The bankrupt law was not enacted for the purpose of enabling an assignee to earn fees by unnecessary litigation, where no interest of the parties to be affected thereby requires it, and where, on the contrary, every beneficial interest involved therein forbids it. (*In re Sacchi*, 6 B. R. 497; s. c. 43 How. Pr. 250.)

When the register takes possession of property and sell it under a special order of court, he may receive a commission similar to that allowed to assignees under this section. (*In re Loder Brothers*, 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.)

The necessary funds for the performance of a duty are to be advanced by the party for whom the services are to be performed. (*In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.)

SEC. 5101.—In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:

First. The fees, costs, (a) and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due (b) to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State (c) in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages (d) due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor per-

formed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons (e) who, by the laws of the United States, are, or may be, entitled to a priority in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Statute Revised—March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statutes—April 4, 1800, ch. 19, § 62, 2 Stat. 36; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

### Costs and Expenses in Voluntary Bankruptcy.

(a) The fees, costs, and expenses named in the first of the five subdivisions are those incurred by and due to the register, clerk, assignee, and marshal, and not those incurred by the bankrupt, or due to his attorney in the proceedings for services or disbursements in connection with such proceedings in voluntary bankruptcy. (*In re Heirschberg*, 1 B. R. 642; s. c. 2 Ben. 466; *in re New Lamp Chimney Co.* 2 A. L. J. 343; *in re Hale & Wiggins*, 5 Law Rep. 403; *in re R. Frederick Gies*, 12 B. R. 179; s. c. 7 C. L. N. 379; *contra*, *Kennedy et al.* 20 Pitts. L. J. 193.)

Money advanced as security for the fees of the register, marshal, and clerk is not to be refunded to the bankrupt. It is part of the bankrupt's estate, and should be credited to the assignee. (Anon. 1 B. R. 123.)

The bankrupt's attorney may be allowed the money advanced to pay the marshal for his fees in giving the notices required by law. (*In re R. Frederick Gies*, 12 B. R. 179; s. c. 7 C. L. N. 379.)

An application by the attorney for the bankrupt to have certain sums advanced as costs in the case refunded to him out of the estate, should be by petition. (*In re Myron Rosenberg*, 3 B. R. 73.)

In cases of voluntary bankruptcy, the docket fee of \$20 to the attorney of the successful party is not allowable. (*Gordon McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749.)

An attorney is a general creditor in respect to services rendered in the preparation of the petition and schedules, and consultation therefor, and must prove his debt in the usual form, and take his dividend in concurrence with the other creditors of the bankrupt. (*In re Jaycox & Green*, 7 B. R. 140.)

In order to justify an order that the assignee pay the claim of an attorney for services rendered to the bankrupt after the adjudication, it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate of the bankrupt in the interest of the general creditors, and not in the interest of any creditor or class of creditors. It is the duty of the bankrupt to see that his property is preserved until the appointment of an assignee, and if it is necessary that other persons should render similar services, the extent and value and necessity of such services should be clearly shown. (*In re Jaycox & Green*, 7 B. R. 140.)

If there is no satisfactory proof upon which the court can fix and allow any specific sum for services rendered by an attorney after the adjudication, the petition may be dismissed, without prejudice to any subsequent application for payment for services necessarily rendered in protecting the estate of the bankrupt. (*In re Jaycox & Green*, 7 B. R. 140.)

All the costs of the whole proceedings in bankruptcy are not to be paid before the proceeds of the sale of property subject to a lien can be applied toward

the payment of the lien. The only costs that are entitled to priority out of that fund are the costs incurred in enforcing the lien. (*In re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; *in re Whitehead*, 2 B. R. 599; *in re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.)

No fee can be allowed out of the fund to the counsel of a lien creditor for services rendered in supporting the lien against the assignee. (*In re Hope Mining Co.* 2 Saw. 351.)

### Costs and Expenses in Involuntary Bankruptcy.

The reasonable expenses incurred by the petitioning creditor in the prosecution of the petition may be allowed out of the fund. (*In re Mittedorfer*, 3 B. R. 1; s. c. Chase, 288; *in re Schwab*, 2 B. R. 488; s. c. 3 Ben. 231; s. c. 2 L. T. B. 106; *in re Geo. Chandler*, 2 Mich. Law, 8.)

In involuntary proceedings, counsel fees for the attorneys of the petitioning creditors may be allowed out of the estate. The creditors who seek to share in the estate must bear their due proportion of the costs. Section 824 is only intended to reach taxable costs, and may have its full effect without being construed to take away the power from the court to allow counsel fees to successful creditors in appropriate cases out of funds that have been gained by their diligence. Even since the passage of that statute, counsel fees for all parties have, in some cases, been allowed out of the fund. Without such an allowance, there can not be such a due distribution of the assets as is provided for by the statute. (*In re Daniel Williams*, 2 B. R. 83; *in re O'Hara*, 1 L. T. B. 123; s. c. 8 A. L. Reg. 113; s. c. 16 Pitts. L. J. 134; *in re Waite & Crocker*, 2 B. R. 452; s. c. Lowell, 321; s. c. 2 L. T. B. 77; *in re Schwab*, 2 B. R. 488; s. c. 3 Ben. 231; s. c. 2 L. T. B. 106; *in re Mittedorfer et al.* 3 B. R. 1; s. c. Chase, 288; *in re New York Mail Steamship Co.* 2 B. R. 554; s. c. 3 B. R. 627; s. c. 7 Blatch. 178; *in re Eugene Comstock*, 9 B. R. 88; *in re John G. King*, 4 Biss. 319; *in re Geo. Chandler*, 2 Mich. Law, 8.)

What are reasonable expenses must depend upon the circumstances of each case. The expression has reference to necessary disbursements made in connection with the steps proper to be taken by the petitioning creditor preliminary to, and attendant upon, the adjudication of bankruptcy. No allowance can be made to the petitioning creditor for his time and services. (*In re Mead & Co.* 8 Phila. 174; *in re John G. King*, 4 Biss. 319.)

Allowance for counsel fees should be guarded by the most cautious regard for the rights and interests of the creditors at large, lest, under the form of necessary expenses, undue liberality to counsel should be sanctioned in reduction of the fund. (*In re New York Mail Steamship Co.* 3 B. R. 627; s. c. 7 Blatch. 178; *Triplett v. Hanley*, 1 Dillon, 217.)

Where the estate is small, charges for services, whether professional or otherwise, will be limited to what the court considers a bare compensation. (*In re Jones*, 9 B. R. 491.)

Fifty dollars may be allowed to the attorney for the petitioning creditor, and twenty-five dollars for the necessary preliminary investigations. (*In re Jones*, 9 B. R. 491.)

The allowance should only be for services rendered by the attorney in proceedings for the common benefit of all the creditors. Where the petitioning creditor attempts, after adjudication, to exclude other creditors from participating either in the choice of assignee, or in the assets of the estate, and fails, the allowance will be refused. The question is not whether the attorney has acted with a proper sense of delicacy and honor, but whether the petitioning creditor has incurred a liability in instituting proceedings for the pecuniary advantage of the other creditors. A reasonable fee for filing the petition and obtaining the order of adjudication should be allowed. When there is no denial and no con-

test, sixty dollars is a reasonable compensation for such services. (*In re Mead & Co.* 8 Phila. 174.)

One thousand dollars has been considered too extravagant, and the allowance refused, unless the assignee and the bankrupt, and all the creditors who had proved their debts, would assent thereto in writing. (*In re Sanger & Scott*, 5 B. R. 54.)

After adjudication the petitioning creditor has no preference over any other creditor as to the allowance of expenses incurred by him in connection with the proceedings. (*In re Eugene Comstock et al.* 9 B. R. 88.)

The expenses of a creditor in attending meetings of creditors to vote for assignee or otherwise are not allowed as charges against the estate. (*In re Geo.* S. Ward. 9 B. R. 349.)

The register can not entertain an application for such an allowance. There must be a petition to the court by the party, setting out the facts and asking the relief desired. (*In re Dibblee et al.* 3 B. R. 754; s. c. 4 Ben. 137.)

The petition may be filed with the register, and upon proper notice to the assignee, the register may take such testimony as may be offered on both sides, and then, if desired by either party, may certify the whole matter to the judge for decision. The register has the power to take the testimony without a special order from the judge. (*In re Julius A. Robinson*, 43 How. Pr. 25.)

An opportunity should be allowed to the assignee to examine and contest the claim or any items thereof. (*In re Mittleddorfer et al.* 3 B. R. 1; s. c. Chase, 288; *in re Henry B. Montgomery*, 3 B. R. 426; s. c. 3 Ben. 364; *in re Hale & Wiggin*, 5 Law Rep. 403.)

Only the fees for two counsels can generally be allowed. (*In re Waite & Crocker*, 2 B. R. 452; s. c. Lowell, 321; s. c. 2 L. T. B. 77; *in re New York Mail Steamship Co.* 2 B. R. 554.)

The court can not allow the repayment of the gross sum advanced by the petitioning creditor to secure the fees of the register, marshal, and clerk, but it may direct the assignee to pay those fees out of the estate, but they must be regular bills of legal fees properly taxed, and not the gross sum advanced. (*In re J. P. & J. Smith*, 2 Ben. 122.)

The amount which the bankrupt gets by exemption is in most cases trifling, and in no case is it so much but that he and his family are dependent for support on his personal efforts and earnings. Thus the law takes the bankrupt's property, and leaves him in no condition to pay an attorney for services rendered in contesting any doubtful questions as to the acts of bankruptcy charged in the petition, and yet the same law gives to the debtor the right to oppose before a judge or jury the petition for adjudication. When the debtor is given the right to appear and defend, and when the exercise of that right depends on the right to have enough of his property appropriated to pay the expenses incident to appearing and defending, the court has the power, and of right ought to allow such expenses as may be just and proper, to be paid from the assets in the hands of the assignee. Before allowing anything, the court should be satisfied that the defense was fairly justified, and should scrutinize the charges made for such defense. Twenty-five dollars may be allowed for resisting the adjudication. For services in securing the allowance of an exemption refused by the assignee, the sum of twenty-five dollars has been allowed. (*In re Comstock & Young*, 5 B. R. 191; s. c. 2 L. T. B. 186; *in re Portsmouth Savings Fund Society*, 11 B. R. 303; *in re John Mansfield*, 6 Ben. 284.)

The payment of \$1,500 by the debtor to his attorney after the filing of the petition is excessive, when the attorney knows that it is useless to oppose the proceeding, and the amount may be recovered by the assignee. An allowance of \$200 may be made for all necessary advice, expenditures, and services. (*Triplett v. Hanley*, 1 Dillon, 217.)



Services rendered by counsel for the bankrupt in opposing the petition in involuntary proceedings are rendered prior to the adjudication of bankruptcy, and the claim for them is provable like an ordinary debt. The services were not rendered to the assignees. (*In re New York Mail Steamship Co.* 2 B. R. 74.)

In order to obtain an allowance out of the fund, it must be shown that the efforts of counsel were not directed towards obtaining delay or hindering the bankruptcy proceedings. (*In re John Mansfield*, 6 Ben. 284.)

When it is shown that the services rendered by the counsel for the bankrupt saved the estate considerable expense, and expedited the conversion of the same into money, the counsel may be allowed compensation for such services out of the funds in the hands of the assignee. (*In re Henry B. Montgomery*, 3 B. R. 426; s. c. 3 Ben. 364; *in re Abraham B. Clark*, 43 How. Pr. 70; *in re John Mansfield*, 6 Ben. 284.)

A bill by counsel for the bankrupt, for services in attending on the return of the order to show cause, and resisting the grounds on which the adjudication was sought, and also for services in preparing the inventories and schedules, is not chargeable against the estate of the bankrupt in the hands of the assignee. (*In re Bigelow et al.* 2 B. R. 371; s. c. 3 Ben. 146; s. c. 2 L. T. B. 41.)

Where a firm is in bankruptcy, \$100 may be allowed to an attorney as compensation for preparing the individual and partnership schedules. (*In re Andrews & Jones*, 11 B. R. 59; s. c. 22 Pitts. L. J. 41.)

### Claims Entitled to Priority.

(b) No expense for litigation can be allowed until the debts entitled to priority are paid in full. (*In re Jas. M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

The priority allowed by section 3466 attaches to a penalty incurred in selling matches without stamps. (*In re Louis H. Rosey*, 8 B. R. 509; s. c. 6 Ben. 137; *U. S. v. Fisher*, 2 Cranch, 358.)

The right to priority is not waived by proving the debt. This section introduced an exception from the general rule, and leaves to the United States the right to full satisfaction of their debts, to the exclusion of other creditors. (*Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.)

An assignment which was made under circumstances that make it void under the bankrupt law, is no bar to the claim of the United States to priority. (*Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.)

Where the United States holds a claim against a firm of which some of the partners are aliens, it may claim priority of payment out of the estate of the resident individual partners without first resorting to the partnership effects. (*Lewis v. U. S.* 14 B. R. 64; s. c. 13 B. R. 33; s. c. 2 W. N. 31; s. c. 32 Leg. Int. 371.)

The United States is entitled to priority of payment without regard to the form of the indebtedness. (*Lewis v. U. S.* 13 B. R. 33; 14 B. R. 64; s. c. 92 U. S. 618.)

The United States need not exhaust collaterals held by it before claiming priority of payment out of a bankrupt estate. (*Lewis v. U. S.* 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.)

The United States is entitled to priority, although it does not prove its claims. (*Lewis v. U. S.* 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.)

If a party purchases an imported article, duty free, and is subsequently compelled to pay the duty in order to get possession of the article, he is entitled to be subrogated to the priority of the United States. (*In re Kirkland, Chase & Co.* 14 B. R. 139.)

A party who purchased an imported article, duty free, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured. (*In re Kirkland, Chase & Co.* 14 B. R. 157; s. c. 22 Pitts. L. J. 207; s. c. 8 C. L. N. 410.)

(c) A State may come into the bankrupt court and claim taxes due to it, but it can not be compelled to do so. (*Stokes v. State*, 9 B. R. 191; s. c. 46 Geo. 412.)

In West Virginia, the State has a prior lien on all realty for taxes, and the undoubted right to enforce it to the prejudice of any claim due to a citizen, although such lien may be subsequent in point of time. If the lien is for a debt other than taxes, the State is not entitled to any preference over other creditors of the same class. (*In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.)

The failure of the bankrupt to comply with his covenant to pay the taxes assessed upon the demised premises, does not give the lessor a right to claim a priority upon the payment thereof. (*In re Parker & Peck*, 6 Ben. 286.)

Although a warden who has given bond for the performance of his official duties deposits money received from the State in his official character, yet the State is not entitled to priority of payment out of the estate of the bankrupt bank. (*In re Corn Exchange Bank*, 15 B. R. 216; s. c. 9 C. L. N. 431.)

(d) This section does not refer to any part of the estate derived from the sale of property on which creditors may have a specific lien. Operatives can not therefore claim a priority over lien creditors in the distribution of such a fund. (*In re William McConnell*, 9 B. R. 387; s. c. 31 Leg. Int. 61.)

Where the fund derived from the sale of property in a manufactory is not sufficient to pay both the landlord and the operatives, they will, under the laws of New Jersey, be allowed to share *pro rata*. (*In re William McConnell*, 9 B. R. 387; s. c. 31 Leg. Int. 61.)

Laborers employed by a brickmaker are entitled to a priority under this section. A party who has taken an assignment of the claims of several laborers, as security for money advanced by him to them, is entitled to demand this priority on each claim so held by him, and the balance that remains after the payment of his advances will be paid to the laborers. (*In re S. Brown*, 3 B. R. 720; s. c. 4 Ben. 142.)

A claim by a father for services rendered by his minor son as an operative to the bankrupt is entitled to priority to the amount of fifty dollars. (*In re Harthorn*, 4 B. R. 103.)

A surveyor of wood is not entitled to a preference as an operative for his services. (*In re Blackman Bros.* 6 C. L. N. 18.)

If the claim arises under an entire contract for the labor of the claimant and the services of his team, it can not be apportioned, and the claimant is not entitled to a preference as an operative. (*In re Blackman Bros.* 6 C. L. N. 18.)

The claim of an apprentice for work done beyond the time fixed by the master as reasonable, under an agreement for a specific compensation, is entitled to priority as the claim of an operative. (*In re Steiner*, 1 Penn. L. J. 368.)

The claim of an attorney for services rendered in defending a suit prior to the commencement of the proceedings in bankruptcy is not entitled to priority. (*In re Richard Handell*, 15 B. R. 71.)

The claim of an attorney for services rendered in preparing the petition and schedules, and filing the same, is not entitled to priority. (*In re Richard Handell*, 15 B. R. 71.)

An accountant who is employed as an expert to examine and straighten the books of the bankrupt is entitled to priority. (*In re Taylor*, 15 B. R. 95.)

If the general creditors agree, the assignee may pay workmen as soon as the money comes to hand without requiring proof of their claims. (*In re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

(e) This is limited to priorities or preferences created by the laws of the United States. It does not extend to priorities or preferences created by the laws of a State. (*In re Stuyvesant Bank*, 9 B. R. 318; s. c. 10 B. R. 399; s. c. 49 How. Pr. 133; s. c. 12 Blatch. 179.)

An agreement that a creditor shall have priority of payment out of the assets, is contrary to the entire spirit and purpose of the statute, and is invalid. (*In re Stuyvesant Bank*, 9 B. R. 318; s. c. 10 B. R. 399; s. c. 49 How. Pr. 133; s. c. 12 Blatch. 179.)

The surety on a custom house bond is entitled to priority of payment out of the estate of the principal. (*Mott v. Maris*, 2 Wash. 196; *Champneys v. Lyle*, 1 Binn. 327.)

The surety on a custom house bond is entitled to priority, although he paid it after the commencement of proceedings in bankruptcy. (*Mott v. Maris*, 2 Wash. 196.)

If the trustee of the principal in a duty bond receives the funds of the principal and then mingles them with his own, the surety can not claim priority of payment out of the estate of the trustee in bankruptcy. (*Pollock v. Pratt*, 2 Wash. 490.)

A surety upon a custom house bond can not lay an attachment in the hands of the assignee, for Congress did not consider the same person in relation to the same property indifferently as the assignee holding the property adversely to the bankrupt, and as a trustee holding it under and for him. (*Oliver v. Smith*, 5 Mass. 183.)

Taxes, whether Federal or State, may be collected in the ordinary way, but if not collected, and the property passes to and is administered by the assignee, the taxes are then entitled to priority and preference under this section. (*U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. [N. S.] 274.)

SEC. 5102.—Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

Statute Revised—March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statutes—April 4, 1800, ch. 19, § 29, 2 Stat. 29.

The list is the list shown by Forms Nos. 32 and 33. (Anon. 1 B. R. 219; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

There is no warrant in the statute for paying dividends to creditors who have not proved their claims; on the contrary, all sections on the subject expressly or by necessary intendment refer to creditors who have verified their debts in the mode required by law. (*In re A. W. Hoyt*, 3 B. R. 55.)

The passing of the order of dividend is the period that fixes the rights of creditors in respect to that particular dividend. Creditors who prove their claims after that time can not participate in the dividend, although the proofs

are made previous to the payment of the money out of the hands of the assignee. This construction is the only one that can give consistency to the proceedings. If additional debts may be brought into the computation, no *pro rata* can ever be fixed, as it would be subject to incessant fluctuations and renewals. (*In re Edmund H. Miller*, 1 N. Y. Leg. Obs. 180.)

A dividend duly made and filed in court can not be disturbed except for some error committed by the register, apparent from his memoranda and papers on file, existing at the time of or prior to the making of the dividend. (*In re B. K. Smith*, 15 B. R. 97.)

A register has no power to vacate or reopen a dividend for the purpose of paying a claim which was not proved and filed or presented prior to the dividend meeting. (*In re B. K. Smith*, 15 B. R. 97.)

A register has no power to vacate or reopen a dividend for the purpose of paying a claim for services rendered to the assignee, which was not presented at the dividend meeting. (*In re B. K. Smith*, 15 B. R. 97.)

Every creditor who proves his debt is entitled to a dividend, whether he is an individual creditor or a creditor of a firm of which the bankrupt was a member. (*Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419.)

If a writ of error is pending, and a bond has been filed to stay execution, no dividend can be paid on the judgment until the writ of error is determined, when the debt will be ordered to be paid or expunged, or further suspended, as shall be indicated by the exigencies of the judgment on the writ of error. (*In re Daniel Sheehan*, 8 B. R. 345.)

Where only one creditor has proved his claim, he is entitled to be paid in full, if there is enough for that purpose; if there is not enough, he takes the whole. (*In re Haynes*, 2 B. R. 227; s. c. 1 L. T. B. 121; *in re James*, 2 B. R. 227; s. c. 1 L. T. B. 121.)

If there is a surplus fund after payment of all the debts of a bankrupt bank, the holders of its bills may be allowed interest from the date of the adjudication. (*In re Bank of North Carolina*, 10 B. R. 289; s. c. 12 B. R. 129.)

If the assets are more than sufficient to pay all the claims in full that have been proved against the estate, interest may be allowed up to the day of the payment of the claims respectively. (*In re Edward Hagan*, 10 B. R. 383; *in re R. M. & S. R. Town*, 8 B. R. 40.)

After a dividend has been declared, an attachment of the sum due to a creditor may be laid in the hands of the assignee. (*Decoster v. Livermore*, 4 Mass. 101; *contra*, *in re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; *Jackson v. Miller*, 9 B. R. 143; s. c. 6 L. T. B. 95.)

The assignee in an action to recover a dividend can not deny the authority of the court to declare the dividend. (*Gulick v. McIver*, 3 Cranch C. C. 650.)

Unclaimed dividends can not be turned over to the bankrupt so long as any creditors remain unpaid and choose to insist upon payment. (*In re Peter Blight*, 1 Penn. L. J. 225.)

If dividends remain unclaimed, they will, after a certain time, fall into the general fund, and a new dividend may be made. (*In re Peter Blight*, 1 Penn. L. J. 225.)

If the holder of a note which is indorsed by two persons receives payment in full from the second indorser, and subsequently accepts a dividend from the estate of the second indorser, he must be considered as holding such dividend for the use of the second indorser. (*Selfridge v. Gill*, 4 Mass. 95.)

Where a balance remains in hand, after paying all the creditors who have proved their claims, it should be held for those who have failed to prove their

claims. (*In re Haynes*, 2 B. R. 227; s. c. 1 L. T. B. 121; *in re James*, 2 B. R. 227; s. c. 1 L. T. B. 121.)

After the debts are paid, the assignee is trustee for the bankrupt; and the debts are those which have been duly proved to be such. The balance that remains after such debts are paid may be given to the bankrupt. (*Steevens v. Earles*, 25 Mich. 40; *in re A. W. Hoyt*, 3 B. R. 55; *in re Lathrop et al.* 5 B. R. 43; s. c. 5 Ben. 199; *Steene v. Aylesworth*, 18 Conn. 244; *Cromwell v. Comegys*, 7 Ala. 498.)

An omission of property from the schedule will not estop the bankrupt or his heirs from claiming any title or interest in it. (*Steevens v. Earles*, 25 Mich. 40.)

It can make no special difference whether the rights of the assignee are regarded as powers or trusts. In most respects they are quite analogous to the former. Under the statute, the rights of the bankrupt to what remains to him as surplus is the same in either case, whether regarded as the residuum of a trust or as a title discharged of the burden of a power of disposal. The statute makes no provision for a reconveyance, and without it the title to land that remained undisposed of after the termination of the proceedings, and the payment of all expenses, and all the claims that have been proved, vests in the bankrupt, because the estate of a trustee who receives land for particular purposes terminates when they are fulfilled. (*Steevens v. Earles*, 25 Mich. 40; *Colie v. Jamison*, 13 B. R. 1; s. c. 6 N. Y. Supr. 566; s. c. 11 N. Y. Supr. 284.)

The bankrupt should file a petition, on oath, showing his reasons to believe that no other creditors desire to prove their claims, and asking to have the fund paid to him. Before such a payment is made it should be shown that the creditors have had due notice of the proceedings, and an opportunity to prove their claims. (*In re A. W. Hoyt*, 3 B. R. 55; *in re Lathrop et al.* 5 B. R. 43; s. c. 5 Ben. 199.)

If the assignee resists, the bankrupt is not entitled to have the property turned over to him, although no debts have been proved against the estate, and a long time has elapsed since the filing of the petition. (*In re John S. Wright*, 6 Biss. 317.)

When the declaration of a dividend was on the face of the deposition unauthorized, the assignee may withhold its payment. (*In re Hugh T. Herrick*, 13 B. R. 312.)

SEC. 5103.—If, at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees according to the terms of such resolution,

the bankrupt, or if an assignee has been appointed, the assignee shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

Statute Revised—March 2, 1867, ch. 176, § 43, 14 Stat. 538.

The creditors may avail themselves of the provisions of this section either at the first meeting or at any time subsequent to the first meeting. (*In re Decatur Jones*, 2 B. R. 59.)

Parties desiring the confirmation of the resolution are the moving parties, and should serve papers in support of their motion on the opposing parties. The op-

posing parties may then, in turn, serve papers in opposition thereto. (*In re American Water Proof Cloth Co.* 3 B. R. 285; s. c. 1 Ben. 526.)

The bankrupt must make affidavit that creditors holding three-fourths of all the debts proven have signed the appointment of the trustees. It is an objection to the trustee that he is a relative of the bankrupt, and to a member of the committee that he has become a creditor by the purchase of claims. It is an insuperable objection that the trustee is one of the committee, which consists only of two. The action of the trustee would neutralize the opposition of the other member, and there is in substance no committee. (*In re Wm. Stillwell*, 2 B. R. 526.)

The mere fact of relationship in the ninth degree, or to a less degree, on the part of a proposed trustee, to the bankrupt, or to a creditor, even the largest in amount, of the bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee to such creditor or to the bankrupt, can not be regarded as a disqualification. Other facts may, however, concur with such relationship to make a confirmation improper. If the proposed member of the committee has a place of business in the district which he visits daily, the fact that he resides out of the district is immaterial. (*In re Zinn et al.* 4 B. R. 436; s. c. 4 Ben. 500; s. c. 40 How. Pr. 461; s. c. 43 How. Pr. 64.)

The court has the power to protect the interests of those who do not vote in favor of the resolution. The will of three-fourths in value of the creditors whose claims have been proved, is not to control in respect to the claims of those who do not vote for the resolution, unless the court sees that the interests of the latter will be promoted by carrying the resolution into effect. A trustee who has obligated himself by a private agreement to wind up the estate for his own benefit and that of the signing creditors, to the exclusion of the non-signing creditors, will not be approved. (*In re Theodore H. Vetterlein*, 6 B. R. 518.)

A person who has been appointed a receiver in a proceeding in a State court, which is voidable under the bankrupt law, can not be a trustee. If he is to account to the bankrupt court at all, he must account to the trustee or assignee to be appointed by that court. It is not proper that he should as trustee be plaintiff, and as receiver be defendant. This is a positive incompatibility which the court can not permit one of its officers to occupy. If he is to be trustee, he must look to the bankrupt court alone as the source of his authority. If he is to hold and administer as receiver under the State laws the property which he received as receiver, he must so administer it without looking to the bankrupt court for any authority or direction. If he is to administer such property as trustee, he must so administer it without looking to the State court or any other court but the bankrupt court for authority or direction. (*In re Stuyvesant Bank*, 6 B. R. 272; *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.)

The action of the creditors in selecting a trustee and a committee is a unit, and the resolutions must be confirmed as a whole or not at all. If one of the proposed committee is the president of a corporation which claims a preference that is disputed by other creditors, the resolution will not be approved. (*In re Stuyvesant Bank*, 6 B. R. 272; *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.)

When the order of the court directs that a conveyance shall be executed by the bankrupt and the assignee to the trustee, subject to the approval of the court, the title will not pass until the conveyance is so approved. (*Potter v. Wright*, 1 W. N. 637.)

The title vested in a trustee chosen under this section is the same in all respects as the title vested in an assignee regularly appointed in proceedings in bankruptcy. (*In re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 118; s. c. 3 A. L. Rev. 374.)

When a trustee departs from his actual duty, and volunteers to do something outside of his duty for the benefit of the estate, he incurs a personal liability. (*Hallam v. Maxwell*, 2 Cin. 136.)

When a trustee acts *bona fide* in the discharge of a duty imposed upon him by law, he does not incur, at least, a primary personal liability. (*Hallam v. Maxwell*, 2 Cin. 136.)

The bankrupt may be examined by a creditor, although the proceedings have been superseded by the appointment of a trustee. (*In re Jay Cooke & Co.* 10 B. R. 126.)

The intent and effect of this section are that all the ordinary processes and proceedings under the act are for the time being absolutely superseded and suspended, excepting so far as such processes and proceedings are retained by express words or necessary implication. (*In re Trowbridge*, 9 B. R. 274.)

The power and jurisdiction of the court are retained over the proceeding, in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all parties concerned. The trustee and committee have full power to arrange, and by mutual agreement to adjust everything relating to the settlement and winding up of the estate, but they can not adjudicate or decide any disputed matter. They have no judicial powers. Those are all reserved to the court. (*In re Trowbridge*, 9 B. R. 274.)

A creditor who proves his claim before the selection of a trustee and committed, thereby establishes his right *prima facie* to participate in the distribution of assets under those proceedings. If, in such a case, the claim is disputed, the only way in which the dispute can be adjudicated is by an application to the court to expunge or abate the claim, in which application the trustee must, of course, be the moving party. (*In re Trowbridge*, 9 B. R. 274.)

The trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of bankruptcy, and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, &c., application therefor may be made to the judge or register. And, if made to the judge, he, on granting the same, will order the examination to be had before the register or otherwise. In other words, whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied, the demand should be proved before the register on notice to the trustees. They can dispose of assets and settle the estate without especial orders in each matter before them; keep their own accounts and records of their proceedings; have the aid of the register or judge when needed, and finally have their action ultimately closed by the formal decree of the court. The register should allow no claims except such as are disputed or are submitted to him for decision by the trustees. (*In re Darby*, 4 B. R. 211, 309; *in re Zinn et al.* 4 B. R. 436; s. c. 4 Ben. 500; s. c. 40 How. Pr. 461; s. c. 43 How. Pr. 64; *in re Trowbridge*, 9 B. R. 274; *contra, in re Bakewell*, 4 B. R. 619; s. c. 2 L. T. B. 212; s. c. 18 Pitts. L. J. 289.)

If a claim which was not proved before the selection and appointment of the trustee is disputed, the creditor should proceed by petition directly to the court, setting forth the fact, nature, and consideration of his claim, and praying for leave to prove the same and for its allowance. If the facts stated in the petition make out a *prima facie* case, the court will make an order requiring the trustee to answer the same. Upon the coming in of the answer, the court will proceed by reference to take proofs or otherwise to a final disposition or determination



of the matter as may be deemed most expedient. (*In re Trowbridge*, 9 B. R. 274.)

By providing that over the settlement and distribution the committee shall have the direction, the statute has withdrawn control over them from every other power, and to that extent has superseded the ordinary proceedings in bankruptcy. The ordinary proceedings are intended to be summary. Such hurried settlement of estates is sometimes prejudicial to the interests of the creditors; for this reason the power to administer the estate is given to certain representatives of the creditors. The district court, can not, therefore, direct the calling of a meeting for purposes of distribution. (*In re Jay Cooke & Co.* 11 B. R. 1; s. c. 31 Leg. Int. 357; s. c. 1 Cent. L. J. 580; s. c. 22 Pitts. L. J. 59; s. c. 1 W. N. 51.)

If the committee exercise their discretion *mala fide*, they may be controlled, but, in the absence of fraud, their direction to the trustee in regard to the settlement of the estate is conclusive. Certainly the discretion vested in them can not be controlled by any meeting of creditors called after their appointment. (*In re Jay Cooke & Co.* 11 B. R. 1; s. c. 31 Leg. Int. 357; s. c. 1 Cent. L. J. 580; s. c. 22 Pitts. L. J. 59; s. c. 1 W. N. 51.)

Where a creditor has been guilty of unreasonable delay in preparing his claim for proof, the court will not restrain the trustee from declaring a dividend. (*Gibson v. Lewis*, 11 B. R. 247; s. c. 32 Leg. Int. 22; s. c. 9 Pac. L. R. 75)

If a creditor, who has not proved his debt, has a lien on certain stock in the hands of the trustee, he may be restrained from disposing of that stock until the claim can be proved. (*Gibson v. Lewis*, 11 B. R. 247; s. c. 32 Leg. Int. 22; s. c. 9 Pac. L. R. 75.)

The committee are entitled to compensation for their services. (*In re Treat*, 10 B. R. 310.)

The compensation of the committee should be limited to such an amount as will afford a reasonable compensation for the services required and rendered to a person of ordinary standing and ability competent for such duties. (*In re Treat*, 10 B. R. 310.)

The estate in the hands of a trustee is not liable for the register's fees incident to a second general meeting of creditors. (*In re Richard H. Hinsdale*, 12 B. R. 480; s. c. 6 Ben. 231)

if 632 SEC. 5103A (22 June, 1874, ch. 390, § 17, 18 Stat. 182).— That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to

sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section can not, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

This section should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just so much on their claims as the debtor and the requisite majority see fit to resolve that all shall accept. Its provisions, therefore, should not be extended by construction to embrace more than the words clearly and manifestly import. (*In re* Shields, 15 B. R. 532; s. c. 4 Cent. L. J. 557; s. c. 24 Pitts. L. J. 190.)

A corporation as well as a natural person is entitled to the benefits of the provisions for a composition. (*In re* Weber Furniture Co. 13 B. R. 529; s. c. 13 B. R. 559.)

A case in bankruptcy must be pending to authorize proceedings for a composition. (*In re* Reiman & Friedlander, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

A meeting to consider a composition may be called in an involuntary case, although the petition is defective, for the defect does not affect the jurisdiction of the court. (*In re* Morris, 11 B. R. 443.)

When an application is filed, an order will be made directing the register to call a meeting and give the proper notices. (*In re* Michael H. Spades, 13 B. R. 72; s. c. 6 Biss. 448.)

An order referring a proposition of compromise to a register, should require him to report whether the resolution of composition is duly passed at the first meeting, whether it has been confirmed by the required signatures, and whether

he terms of the composition are for the best interests of all concerned. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If a firm is in bankruptcy, one member alone may make a proposition of compromise, for the word "debtor," means any one or more of the debtors. *Pool v. McDonald*, 15 B. R. 560; s. c. 9 C. L. N. 322; s. c. 2 C. L. B. 151.)

The register is an officer of the court, and must take judicial notice of its judgments and decrees. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The register should keep a docket and minutes, but need not send memoranda to the court, because the report includes them. (*In re Benjamin F. Spillman*, 13 B. R. 214.)

The course of proceedings pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions, and then they may not only accept or reject a proposition which was made and filed ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer. The creditors are to be notified of the time, place and purpose of the meeting, but not necessarily of the precise proposition to be made. (*In re Haskell*, 11 B. R. 164; s. c. 9 Pac. L. R. 36; s. c. 1 Cent. L. J. 531.)

Where the sworn schedules have been filed, they may be used as the written statement. (*In re Haskell*, 11 B. R. 164; s. c. 9 Pac. L. R. 36; s. c. 1 Cent. L. J. 531.)

The testimony of the debtor given at the meeting constitutes a part of his statement. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

The inquiry may be made by any person entitled to inquire, although the other creditors object. (*In re Morris*, 11 B. R. 443.)

The examination of the debtor is for the purpose of arriving at a true exhibit of his affairs, and the inquiries to be made must be only such as will be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

If any creditor desires a postponement of the vote until after the examination is completed, it should be postponed. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

If the debtor has kept books in his business, they must be produced on the demand of any inquiring creditor, and the debtor must answer all inquiries in reference to any entry in such books which bears upon the question of the exact condition of his affairs. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

The course of examination must be regulated by the sound discretion of the register. The taking of the vote may be postponed to a definite day in order to allow the examination to be completed. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

If it seems necessary that time shall be given to have the books examined by an expert, the register must regulate the matter of adjournment in his sound discretion. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

When the books have been previously examined by a committee of creditors, that circumstance is entitled to consideration on the question of granting time or a further examination of the books. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

The examination of the debtor should be conducted as the examination of

a witness is conducted in court, and he should answer the inquiries made of him by an examining creditor, and do no more until the examining creditor has closed, after which he may of his own volition, or in answer to inquiries by his own counsel, make such explanations as are relevant. The examination should be reduced to writing, and be signed and sworn to by him. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

The register has the power to regulate the form and order of proceedings at the meeting, and to decide questions that arise, subject to review by the court. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

The register must decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity and propriety in form of the proofs of debts and of letters of attorney. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.)

Creditors must prove their claims in order to vote on a resolution of composition. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

In involuntary proceedings the petitioning creditors on whose motion an order to show cause has been issued, need not prove their debts anew. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If the children of one partner who holds a firm note, as their guardian, are *sui juris*, they may prove the debt and vote thereon, although the note has not been indorsed to them. (*In re Bailey & Pond*, 2 Woods, 222.)

A married woman may vote for and sign a resolution if she has the authority of her husband, whether it is exhibited or not. (*In re Bailey & Pond*, 2 Woods, 222.)

If the husband subsequently files an affidavit stating that his wife had authority to vote for and sign the resolution, and that her act is approved by him, this ratifies and validates her act. (*In re Bailey & Pond*, 2 Woods, 222.)

A creditor who has bought up claims against the debtor may vote on them against the adoption of the resolution. (*In re Morris*, 12 B. R. 170.)

A secured creditor can be admitted to vote only on the excess of his debt above the value of the security. (*In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

A creditor who has personal security may vote as an unsecured creditor. (*In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

Where a partnership proposes a composition, all the creditors, both partnership and individual, may vote without any classification, if no objection is made, but if one of any class of creditors perceives that the other class is about to force an unjust composition upon him, he may demand a separate vote. (*In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

If the voting of all the creditors, both partnership and individual, works injustice, redress may be obtained at the hearing before the court for a ratification. (*In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

The word "creditor" means all who have debts provable in bankruptcy. (*In re Trafton*, 14 B. R. 507.)

If a claim is in dispute the district court may provide for its liquidation, either by permitting a pending action to be prosecuted to judgment in order to ascertain the amount, or by ordering an inquiry before the court itself. (*In re Trafton*, 14 B. R. 507.)

Where the letter of attorney especially authorizes the attorney to sign a compromise for a precise sum, and the attorney has but a ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor upon the record, and also as attorney in fact authorized to com-

promise for the sum named in the power of attorney itself. (*In re Weber Furniture Co.* 13 B. R. 529; s. c. 13 B. R. 559.)

When an attorney at law appears before a register to represent a person, he is to be accepted as such attorney unless some one puts him to proof, by a rule therefor, to show his authority. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If a person who is not an attorney at law, desires to represent another before a register, he must show a formal power of attorney. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If a telegram is produced revoking a power of attorney, the register, if the facts justify it, may, in his discretion, suspend action until proof of the revocation and new appointment can be presented to him. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The proceedings before the register must be recorded in writing as they take place in order to be in a shape to be reported. (*In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How Pr. 142.)

In the expressions "in calculating a majority," and "the majority in value," and "the majority in number," the word "majority" refers to and embraces everything previously spoken of in the section as a result to be arrived at by calculation. It embraces the "majority in number" of the creditors assembled at the first meeting; the "three-fourths in value" of such creditors; the "two-thirds in number" of all the creditors; and the "one-half in value" of all the creditors. (*In re John B. Gilday*, 11 B. R. 108; s. c. 7 Ben. 491.)

Creditors whose claims do not exceed fifty dollars are to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory paper. (*In re Wald & Aehle*, 12 B. R. 491; s. c. 7 C. L. N. 26; s. c. 1 Cent. L. J. 531; *in re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

The statute means that in making the calculation to see whether the two-thirds in number of all the creditors have signed the composition, the creditors whose debts do not exceed fifty dollars shall not be reckoned in any part of the process of calculating whether, as a part of the whole number of creditors, or as a part of the necessary two-thirds in number. (*In re John B. Gilday*, 11 B. R. 108; s. c. 7 Ben. 491.)

Where the assets are undoubtedly sufficient to pay workmen to the extent of fifty dollars each, they can not vote on the question whether a resolution of composition shall be adopted or not, except to the extent of their respective debts above fifty dollars. (*In re O'Neil*, 14 B. R. 210.)

Creditors who are not fully secured need not be reckoned in computing the proportion who must join in a composition. (*In re Aaron Van Auken*, 14 B. R. 425.)

A creditor who has an attachment issued within four months before the commencement of proceedings in bankruptcy, can not vote at a composition meeting. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

A claim for damages in closing up a store in order to force a settlement may be excluded from the estimate of the debts, of which the proper proportion must be obtained in order to make a composition valid, if the damages have never been assessed. (*In re Bailey & Pond*, 2 Woods, 222.)

After the resolution has been adopted it must be confirmed. This provision was designed to protect the creditors from the effect of a resolution adopted by a small number of creditors at the meeting. A reasonable time may be given to secure such additional signatures as may be required to confirm it. (*In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.)

The confirmation of a resolution of composition need not be made at the meeting or presented to the register. The debtor may procure it within any reasonable time after the meeting. (*In re Benjamin F. Spillman*, 13 B. R. 214.)

No second meeting of creditors as such, need be held to confirm the resolution of composition. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The statute does not contemplate that the confirmatory signatures must necessarily be attached at the first meeting. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The confirmatory signatures must be attached at or before the hearing for a ratification. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The court has a discretion to accept or reject the composition, as may be for "the best interests of all concerned." This means the best interest at the time being, all things considered. (*In re Haskell*, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.)

At the hearing for the ratification of the resolution, objections can be presented as to the due passing of the resolution, as to the confirmatory signatures, and as to what is for the best interest of all concerned. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

None but unsecured creditors can object to the ratification of a resolution. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The debtor is not required to appear at the hearing for a ratification or submit any statements. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

Where no evidence outside of the statement and resolution is presented, the resolution, as a nearly universal rule, should be recorded. The only exception is where it manifestly appears there was some fraud, accident or mistake. Such a contingency as would incline the court in any other case of ordinary practice to refuse *ex mero motu* to proceed, and upon notice to all parties concerned, require the exceptional and suspicious circumstances to be explained. (*In re Weber Furniture Co.* 13 B. R. 529; s. c. 13 B. R. 559.)

Where no fraud appears, the duty is cast upon the objecting creditors to show affirmatively that the resolution is unwarranted, and the court should record it, unless upon notice and hearing it inquires into the testimony which shows that it ought to be rejected. (*In re Weber Furniture Co.* 13 B. R. 559.)

The presumption is in favor of the resolution, and the burden rests upon the objecting creditors to produce the testimony to show that it ought not to be recorded. (*In re Weber Furniture Co.* 13 B. R. 529; s. c. 13 B. R. 559.)

In deciding a motion to confirm a resolution of composition, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution, as compared with those who dissent. (*In re Weber Furniture Co.* 13 B. R. 529; s. c. 13 B. R. 559.)

Whether a great or small number of creditors assented to the resolution is only a circumstance which may be taken into consideration in connection with others in a doubtful case where fraud or gross inadequacy appears. (*In re Weber Furniture Co.* 13 B. R. 529; s. c. 13 B. R. 559.)

A resolution can not be defeated on the mere ground that by the defeat some peculiar benefit may accrue to the objecting creditor. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

An advance in the percentage is demonstrative of the fact that the original proposition is not for the best interest of all concerned. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If the requisite proportion signed a resolution, whether the claim of the bankrupt's brother be counted or not, the resolution will be ratified, although that claim consists of debts purchased by him openly and without concealment. (*In re Blaney T. Walshe*, 2 Woods, 225.)

If there is a concealment of assets or a failure to name all the creditors, this does not necessarily render all the proceedings void; but the question is for the determination of the court. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

The making of an assignment prior to the commencement of the proceedings in bankruptcy does not preclude the confirmation of the composition, for the composition will discharge the debts, and the creditors will then have no claim on the assigned property under a trust which is terminated. (*Pool v. McDonald*, 15 B. R. 560; s. c. 9 C. L. N. 322; s. c. 2 C. L. B. 151.)

Where there is no fraud or concealment, the omission to include an asset in the statement is no ground for refusing to confirm the resolution, if the creditors were fully informed concerning it, and its value was such as would not reasonably require an alteration of the terms of the composition. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

A resolution can not be recorded where the statement of assets and of debts shows that the requisite proportion of creditors have not confirmed it, although the statement is inaccurate. (*In re B. C. Asten*, 14 B. R. 7.)

If a creditor is induced to vote or sign by any unfair means, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors, and makes the composition voidable by any of them. (*In re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

If a vote is influenced by the expectation of advantage, though without any positive promise, this can not be considered an unbiassed vote. (*In re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

Knowledge that the opposition of a creditor to a composition has been bought off must be imputed to the debtor, unless there is clear and undoubted evidence against it. (*In re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.)

The omission of the court in a voluntary case to adjudicate the debtor a bankrupt, does not defeat a composition made before such adjudication. (*In re Aaron Van Anken*, 14 B. R. 425.)

Where a composition is made before adjudication, the mere fact that the debtor retains the possession of his assets is no ground for refusing to ratify it. (*In re Aaron Van Anken*, 14 B. R. 425.)

A provision that the debtor may retain his assets does not defeat a composition, for it is surplusage, and on the application of a creditor a warrant may be issued, notwithstanding the terms of the provision. (*In re Aaron Van Anken*, 14 B. R. 425.)

The fact that the debtor has preferred a creditor does not necessarily prevent the ratification of the resolution. (*In re Haskell*, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.)

If the debtor does not substantially appropriate all his property to pay his creditors *pro rata* by offering a composition which will pay at least as much as such property can pay, or can reasonably be expected to pay, then the composition is not for the best interest of all concerned, and can not proceed without injustice to the creditors, and will not be confirmed. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

In the absence of fraud and concealment, the question for the court seems to



be not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy. (*In re Morris*, 11 B. R. 443; *in re Whipple*, 11 B. R. 524.)

The statute does not intend that no debtor can compound with his creditors under this section, who would not be able to obtain a discharge. The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. (*In re Haskell*, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.)

A composition providing for a payment or satisfaction in "money," is placed in contradistinction to one for payment or satisfaction in property. It does not prevent the payment of the money in instalments. A composition may well provide for successive payments in money at stated future times, but if so there can be no good reason why the stated payments may not be evidenced by notes, to be indorsed if desired, the notes being payable in money. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. Blatch. 562; *in re Langdon*, 13 B. R. 60.)

A composition which provides for a payment in indorsed notes is defective and will not be ratified. (*In re Langdon*, 13 B. R. 60.)

Although a resolution provides literally for payment in indorsed notes, yet it will be ratified if it can be construed to mean a payment in cash. (*In re James T. Hurst*, 13 B. R. 455; s. c. 8 C. L. N. 147; s. c. 3 Cent. L. J. 78.)

When the notes for the deferred payments are to be indorsed, the resolution should provide for ascertaining the satisfactory character of the indorser, either by naming him or by providing for his being definitely named. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 1 Ben. 455; s. c. 12 Blatch. 562.)

A resolution which provides that the payment of the composition shall be secured by a satisfactory bond to three persons who are styled a committee of the creditors is sufficient. (*In re Solomon Louis*, 14 B. R. 144; s. c. 7 Ben. 481.)

A resolution of composition may be confirmed although it does not provide for the expenses of an attachment, if there has been no first meeting of creditors, and no appointment of an assignee. (*In re W. D. Clapp & Co.* 14 B. R. 191.)

When the case is before the court for hearing, the court may refer the matter back to the register for inquiry as to any particular fact. (*In re Blaney T. Walshe*, 2 Woods, 225.)

When a debtor has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. (*In re McDowell & Co.* 10 B. R. 439; s. c. 6 Biss. 193.)

The court should afford all proper facilities for correcting mistakes or enabling the parties most interested to carry out their wishes. Where the failure to accept the offer arose from a failure to properly instruct the attorneys, a new meeting may be called. (*In re McDowell & Co.* 10 B. R. 439; s. c. 6 Biss. 193.)

A defect in the resolution can only be cured by an additional resolution passed in the same way as the original resolution. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562; *in re B. C. Asten*, 14 B. R. 7.)

A second resolution varying the provisions of a previous resolution can not be recorded until a meeting on notice to all the creditors is called in the same manner as on the original resolution to inquire whether such second resolution has been passed in the manner directed by the statute. (*In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

No further recording of the resolution is necessary than to record the decree containing the resolution. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

Where there has been a composition in an involuntary case before adjudication, it does not necessarily follow that there must be a discontinuance upon the request of the petitioning creditors, after the composition has been confirmed. The matter must be regarded with reference to the status of the property in each case, and the terms of the resolution. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

If the resolution does not provide for a surrender of the property to the debtor, the property will not be surrendered, if there has been an adjudication of bankruptcy, until the terms of the composition have been complied with. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

If a composition is accepted in an involuntary case prior to an adjudication, the proceedings may be discontinued upon the consent of the debtor and the petitioning creditors, without notice to other creditors. (*In re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.)

The meeting for the purpose of adding to or varying the original proposition is one to follow the confirmation and recording thereof. (*In re Scott, Collins & Co.* 15 B. R. 73; s. c. 4 Cent. L. J. 29.)

If a resolution of composition has been duly ratified, it confines the secured creditor to his security and discharges the debtor from personal liability for the secured debt. (*In re J. L. Lytle & Co.* 14 B. R. 457; s. c. 24 Pitts. L. J. 14; s. c. 33 Leg. Int. 349.)

If a composition is entered into for cash payments secured by a mortgage on real estate, the district court has no jurisdiction to restrain a creditor from levying an execution on personal property, although the name of such creditor was properly placed on the list of creditors. (*In re J. L. Lytle & Co.* 14 B. R. 457; s. c. 24 Pitts. L. J. 14; s. c. 33 Leg. Int. 349.)

If a debtor after the adoption of a resolution of composition omits to plead it, he is not entitled to relief against the judgment so obtained by an injunction from the district court. (*In re Samuel B. Tooker*, 14 B. R. 35.)

A composition discharges the debts of those creditors whose names, addresses, and debts are placed on the statement, and no other discharge is needed, for the composition is a substitute for the ordinary proceedings and discharge. (*In re Alphonse Bechet*, 12 B. R. 201; s. c. 2 Woods, 173; *in re Knight*, 2 W. N. 479.)

If the name and debt of a creditor was placed on the list, the composition will bar the debt, although there was an error in stating the amount. (*Beebe v. Pyle*, 1 Abb. N. C. 412.)

A composition will not be effective to discharge a debtor, unless the amount agreed upon is actually paid. (James T. Hurst, 13 B. R. 455; s. c. 8 C. L. N. 147; 3 Cent. L. J. 78; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.)

Where there is no defect in the proceedings for a composition, the admission of a discharge in evidence does not prejudice the adverse party. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

A decision that a proper proportion of the creditors have confirmed a resolution can not be impeached in a collateral action. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

A decision that a resolution which provides for payment in notes is valid, is conclusive in a collateral action. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

If the jurisdiction of the bankrupt court is shown to have attached, the subsequent proceedings are presumed to be regular, and its decisions, whether correct

or otherwise, upon every question properly arising in the case, are binding and conclusive in a collateral action. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

If the notice to creditors of the meeting to consider a proposition of compromise was properly given, the omission to give a proper and sufficient notice to the creditors of the hearing to determine whether the resolution has been properly passed, does not render the order ratifying the resolution void in a collateral action. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

A resolution of composition will be deemed valid in a collateral action, although the signatures of the bankrupt and the creditors in confirmation of the resolution were attached to a separate paper, and not to the resolution itself. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

Where the decree requires the statement of debts and assets to be filed, the presumption in a collateral action is that it was done as directed. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

Where the district court determines that a statement of debts sufficiently states the address of a creditor, the decision is conclusive in a collateral action. (*Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.)

The ratification of the compromise and the acceptance of payment thereunder do not satisfy the debts in the sense of an absolute extinguishment for all purposes, but release the debtor himself from all further liability thereon, while the remedy against partners, indorsers, and sureties is preserved. (*Mason & Hamlin Organ Co. v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295.)

## CHAPTER FIVE.

### PROTECTION AND DISCHARGE OF BANKRUPTS.

SEC.	SEC.
5104.—Bankrupt subject to orders of court.	5112A.—Not required of involuntary bankrupts.
5105.—Waiver of suit by proof of debt.	5113.—Final oath of bankrupt.
5106.—Stay of suits.	5114.—Court to grant discharge.
5107.—Exemption from arrest.	5115.—Form of certificate of discharge.
5108.—Application for discharge.	5116.—Second bankruptcy.
5109.—Notice to creditors.	5117.—Debts not released.
5110.—Grounds for opposing discharge.	5118.—Liability of other persons not released.
5111.—Specification of grounds of opposition.	5119.—Effect of discharge.
5112.—Assets equal to thirty per cent. required.	5120.—Application to annul discharge.

SEC. 5104.—The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statutes—April 4, 1800, ch. 19, §§ 21, 33, 2 Stat. 27, 30.

If the bankrupt on examination admits the possession of property, he must clearly account for the same to the satisfaction of the court, otherwise he will be held to still have it in his possession and to be able to hand it over to his assignee, and on failing or refusing to account in a reasonable manner for the disposition of the assets which are traced to him, he may be committed for contempt. (*In re Salkey & Gerson*, 11 B. R. 423, 516; s. c. 6 Biss. 269, 280.)

The subjection of the bankrupt and of his property to the court is not for the purpose of punishment in any sense, but to enable the court to enforce a distribution of the bankrupt's estate according to the provisions of the act, and, as a matter of necessity, the law makes the bankrupt, from and after the first preliminary and *ex parte* adjudication upon the petition, subject to any and all

orders that may be deemed necessary under the act to secure such distribution to the creditors. (*In re Bromley & Co.* 3 B. R. 686.)

Before a bankrupt can be committed for failing to account for property received by him, it must appear that a reasonable man would not be able to give credit to his evidence, but would be satisfied of its substantial untruth. (*In re Joseph Mooney*, 15 B. R. 456.)

An uncontested order of the register is an order of the court, and a violation of such order may be punished by commitment for contempt. (*In re Horatio N. Allen*, 13 Blatch. 271.)

When the contempt is not committed in the presence of the court, the bankrupt may be committed until the further order of the court. (*In re Horatio N. Allen*, 13 Blatch. 271.)

If the bankrupt is arrested under a warrant of commitment out of the district, he is entitled to be discharged. (*In re Horatio N. Allen*, 13 Blatch. 271.)

An application for an order to direct the bankrupt to execute certain deeds must be made to the court. The register has no power to pass such an order. (*In re Anon.* 3 B. R. quarto, 58.)

Under the provisions of this clause the court may direct the bankrupt to execute and deliver to the assignee the proper papers to enable him to be admitted to prosecute, in his own name, an action pending in a State court to which the bankrupt is a party, in the same manner and with the like effect as it might have been prosecuted by the bankrupt, and may order the bankrupt to refrain from prosecuting said action, or from applying for any order or decree therein. (*In re Clark et al.* 3 B. R. 491; s. c. 4 Ben. 88.)

Where the bankrupt has used due diligence to comply with the orders of the court, he is not guilty of contempt. (*In re Carpenter*, 1 B. R. 299.)

SEC. 5105.—No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.\* But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.

Statutes Revised—March 2, 1867, ch. 176, § 21, 14 Stat. 526. Prior Statute—Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This provision does not interfere with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security *pro tanto*, if he elects to do so, or with the right of the assignee to redeem the same. (*In re William Christy*, 3 How. 292.)

This clause meets and provides for two distinct cases. 1st. For that where the creditor has proved his debt before a suit is commenced. The proving the debt alone is a bar to any suit at law or in equity for the recovery of the debt so proved. 2d. Where the suit has been commenced before the proof of the debt in bankruptcy. In this case the proving of the debt operates as a surrender *ipso jure*, of the action, and is a bar to any further proceedings in the suit. (*Everett v. Derby*, 5 Law Rep. 225.)

\* So amended by act of 22 June, 1874, ch. 390, § 7, 18 Stat. 179.

As this section is a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same features of the general system, so that each and every other section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency. (*New Lamp Chimney Co. v. Ansonia Brass and Copper Co.* 13 B. R. 385; s. c. 10 B. R. 355; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

The provision in regard to debts proved must be construed in connection with the clause of section 5117. So much of this section as imposes a penalty for proving a debt, can not be construed as applying to a debt which, by section 5117, is not dischargeable. Such a debt is not surrendered or discharged by proof thereof. (*In re W. E. Robinson*, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18; *in re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509; *in re Migel*, 2 B. R. 481.)

The proof of the debt does not extinguish, but simply suspends, the right of action. (*Hoyt v. Freel*, 4 B. R. 131; s. c. 8 Abb. Pr. [N. S.] 220; s. c. 2 L. T. B. 144; *Smith v. Dispatch Co.* 37 N. J. 60; *Hamlin v. Hamlin*, 3 Jones Eq. 191; *Hartun v. Corse*, 4 Edw. Ch. 585; s. c. 2 Barb. Ch. 506; *Brandon Manuf. Co. v. Frazer*, 13 B. R. 362; s. c. 47 Vt. 88; *Cook v. Coyle*, 113 Mass. 252; *contra*, *Bennett v. Goldthwaite*, 109 Mass. 494; *Commercial Bank v. Buckner*, 20 How. 108; *Pray v. Torr*, 18 N. H. 188.)

The proof of a claim only prevents future proceedings against the bankrupt or his estate. (*Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.)

Creditors who have proved their claims are temporarily barred from pursuing their claims against the bankrupt in any other forum. By submitting themselves to the jurisdiction, and becoming parties to the proceedings, they preclude themselves from proceeding against the bankrupt in any other manner, without the leave of the court which has acquired jurisdiction of their claims. They must await the result of the bankrupt's application for his discharge. If it is refused, they are then free to pursue their claims by other means and in other tribunals. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere, without the permission of the court of bankruptcy. In such a case he must expedite the proceedings in bankruptcy or obtain leave of the bankrupt court to proceed to collect his debt by due course of law. (*Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phila. 196.)

If a judgment creditor who has proved his debt issues a *fi. fa.* on his judgment, without first obtaining leave of the bankrupt court, the *fi. fa.* will be set aside. (*Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phila. 196; *Frazier v. Banks*, 11 La. An. 31.)

If a creditor proves his claim and receives a dividend, a *fi. fa.* on a judgment subsequently obtained may be set aside if the proceedings in bankruptcy are still pending. (*Beckler v. Hambrecht*, 2 W. N. 353.)

If a creditor proves his debt, he can not institute an action in a State court while there are funds in the hands of the assignee and before the bankrupt has applied for a discharge. (*Wood v. Hazen*, 15 B. R. 491.)

If a creditor, who has proved his debt, proceeds subsequently in the State court to obtain an arrest of the debtor, the proceeding may be stayed without affecting the arrest or releasing the bankrupt therefrom. (*In re Isidor Goldstein*, 52 How. Pr. 426.)

The act of the creditor in proving his debt can not be pleaded in bar of a subsequent action to enforce the claim. (*Smith v. Dispatch Co.* 37 N. J. 60; *Buckner v. Calcote*, 28 Miss. 432; *contra*, *Wilson v. Capuro*, 4 B. R. 714; s. c. 41 Cal. 545.)

The proof of a debt against a corporation does not bar a subsequent action thereon in a State court. (*Ansonia Co. v. New Lamp Chimney Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656; *Chamberlain v. Huguenot Manuf. Co.* 118 Mass. 532.)

The power of the State courts to proceed with pending suits in cases where creditors have provable debts, but which they do not prove under the proceedings in bankruptcy, is, under certain prescribed limitations, recognized by the bankrupt act. The jurisdiction of the State courts is not extinguished except in those cases where a creditor proves his debt. Actions pending therein, which were brought by creditors who do not prove their debts, are under the authority of the State courts. They have jurisdiction of the parties and subject-matters, and must determine all questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by the State tribunals. In no other way can their decisions be reversed or revised. The district court has no control over such suits. (*Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.)

There is a distinction between persons and corporations and members thereof, because no discharge can be granted to any corporation or joint stock company, or any person or officer or other member thereof. The proof of a debt, therefore, does not, *per se*, prevent the continuance of an action against it. The effect of granting a stay upon an action against a corporation before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, would be to discharge "a person or officer or member thereof," where such liability must be predicated of a judgment and execution returned unsatisfied, and thus indirectly accomplish what the bankrupt act declares shall not be attained. (*Allen v. Soldiers' Business Messenger and Dispatch Co.* 4 B. R. 537; s. c. 2 L. T. B. 158; *Shellington v. Howland*, 53 N. Y. 371; *Ansonia Co. v. New Lamp Chimney Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

The proof of the debt against the corporation does not bar an action against a stockholder upon his contingent liability. (*Shellington v. Howland*, 53 N. Y. 371; *Allen v. Ward*, 36 N. Y. Sup. 296.)

The proof of the debt against the corporation is partially equivalent to the commencement and prosecution of an action, and a proximate compliance with such a condition imposed by statute to the liability of the stockholder, if not a substitute for a literal compliance with such condition. (*Shellington v. Howland*, 53 N. Y. 371.)

When a firm has proved their debt, the resident members may be restrained from further prosecution of a suit in a foreign country. (*In re Schepeler & Co.* 4 Ben. 68.)

The court may allow a proof of a debt provisionally, and authorize the continuance of a pending suit for the purpose of liquidation, although the question involved is whether the bankrupt is liable at all upon the contract alleged to have been broken. (*In re Jay Cooke & Co.* 1 W. N. 30.)

SEC. 5106.—No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dis-

pute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

Statute Revised—March 2, 1867, ch. 176, § 21, 14 Stat. 526.

The object of this section is to prevent a race of diligence between creditors, and to prevent the bankrupt from being harassed with suits while he is proceeding in good faith to obtain his discharge, and until the question of his discharge is determined, and he either obtains it or is refused it. It applies to all cases where the personal liability of the debtor is sought to be fixed or ascertained by a final judgment, pending the determination of the question of his discharge. (*In re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78.)

An action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or one that will not be discharged. There is no good reason why the bankrupt court should enter into the inquiry whether a discharge will operate to discharge any particular debt. The inquiry is one properly to be made only by the court in which a direct suit on the debt is pending, and whose determination will be a binding judgment on the question between the parties. (*In re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re Migel*, 2 B. R. 481; *in re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; *in re W. B. Duncan*, 14 B. R. 18; *in re Henry Schwarz*, 15 B. R. 330; s. c. 52 How. Pr. 513.)

Whether a discharge will release a particular debt is a question that can only be determined properly when the discharge is pleaded in an action brought to enforce it. The attempt to determine in advance what the effect will be, when as yet it is not known whether any discharge will be granted, is premature and unnecessary. The act does not in terms prohibit the commencement of a suit to enforce a provable debt. Whenever it appears that the suit is one to which a discharge would be no bar, and that, if not commenced forthwith, the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, the court may permit the suit to commence for the purpose of saving the statute, effecting a service, or securing testimony. When these objects are attained, the suit can be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor. But in order to obtain such permission, the creditor must show special reasons; and leave to prosecute will be granted only so far as may be absolutely necessary to secure his rights. (*In re Ghiradelli & Co.* 4 B. R. 164; s. c. 1 Saw. 343; s. c. 2 L. T. B. 135.)

When a creditor applies for leave to institute suit against the bankrupt, the court will direct personal service of notice of the application on the bankrupt. (*In re George R. Magee*, 1 W. N. 21.)

Where there is an unreasonable delay in obtaining a discharge, the court may allow a creditor to institute a suit against the bankrupt, provided that no execution is levied upon any property which belonged to the bankrupt at the commencement of the proceedings in bankruptcy. (*In re Chester M. Whiting*, 1 W. N. 30; *in re Samuel S. Scott*, 1 W. N. 80.)

The granting of leave to institute a suit by the bankrupt court is conclusive evidence in a State court that the bankrupt has lost his immunity from suit by misconduct or delay. (*Williams v. Whiting*, 1 W. N. 94.)

The provisions of this section and the preceding section are addressed quite as much to the State courts as to the bankrupt tribunals, and are to be applied and enforced by the former quite as much as by the latter. (*In re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re Metcalf & Duncan*, 1 B. R. 201; s. c.



2. Ben. 78; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Delavergue v. Farland*, 1 Mich. N. P. 90; *Nat'l Bank v. Taylor*, 120 Mass. 124; *contra*, *Garrett v. Carow*, 3 Houst. 352; *Givens v. Robbins*, 5 Ala. 676.)

The discharge when granted relates back to the commencement of the proceedings in bankruptcy, and protects all the subsequent acquisitions from coercive appropriation to the satisfaction of antecedent debts. The State courts may therefore grant an injunction to protect the bankrupt's property until he can obtain a discharge. (*Turner v. Gatewood*, 8 B. Mon. 613; *Mosby v. Steele* 7 Ala. 299.)

If a creditor obtains a judgment after the commencement of the proceedings in bankruptcy, the bankrupt may obtain an injunction restraining proceedings under an execution issued thereon until the question in relation to a discharge is determined. (*Keeting v. Arthur*, 27 La. An. 570.)

In cases of voluntary bankruptcy, an application for a stay may be made as soon as the petition is filed; but no application can be made in cases of involuntary bankruptcy until the order of adjudication is passed. (*Maxwell v. Faxton*, 4 B. R. 210; s. c. 18 Pitts. L. J. 107; *contra*, *in re Bromley & Co.* 3 B. R. 686.)

The objects and purposes of this section are: 1st. That the already acquired property of the bankrupt shall not be subjected to the payment of his debts by means of a judgment recovered after the filing of the petition, or of proceedings had on such judgment. 2d. That the bankrupt shall not be needlessly subjected to actions and suits. 3d. And, perhaps, to enable the bankrupt to claim protection as against such actions and suits through his discharge, if he obtains it. These are the only purposes and objects which the provisions for a stay can, by any possibility, be supposed designed to carry out. But such provisions must be construed in connection with the clause in section 5117, which provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Since it is necessary, in cases of partners and joint contractors, that an action shall be brought against all the partners and all the joint contractors to proceed against them all, and that the judgment to be rendered shall be a joint judgment against all, unless one or more of them shall have died, or been discharged from the obligation of the contract or indebtedness by operation of law, an action against the bankrupt and certain other parties, upon a joint contract made by them, will not be stayed, but may be prosecuted to judgment, and an order entered staying all proceedings against the bankrupt upon the judgment. This course does not interfere with the attainment of the objects sought by the bankrupt law. Nor will a stay of the proceedings against the other joint defendants be granted, since the filing of the petition in bankruptcy can not have a greater effect than the discharge. (*Hoyt v. Fredl*, 4 B. R. 131; s. c. 8 Abb. Pr. [N.S.] 220; s. c. 2 L. T. B. 144; *Givens v. Robbins*, 5 Ala. 676; *contra*, *Tinkum v. O'Neale*, 5 Nev. 93.)

If one of two partners become bankrupt while an action for the conversion of property is pending, the suit may be prosecuted against the other partner, although it is stayed as to the bankrupt. (*Hogendobler v. Lyon*, 12 Kans. 276.)

Where one partner is bankrupt, the proceedings may be stayed as to him, and a judgment may be entered against the other partner, to be enforced against the partnership property and the property of the solvent partner. (*Loume v. Kintzing*, 1 Mont. 290.)

This clause contemplates application by the debtor for a stay under its provision, unless the creditor proves his debt, which operates as a stay, and in strictness he should apply for such a stay. But where he has omitted to apply for such a stay, and judgment has been rendered against him, he may, nevertheless, interpose his discharge, and obtain a stay of proceedings for an examination supplementary to the judgment founded upon a debt from which he is

released by his discharge, on the payment of the costs that accrued in the suit subsequent to the filing of his petition in bankruptcy, and the costs of the motion for such a stay. (*World Company v. Brooks*, 3 B. R. 588; s. c. 7 Abb. Pr. [N. S.] 212.)

A stay may be granted although the name of the creditor does not appear upon the proceedings, and no notice thereof has been served upon him. (*In re Wm. Archenbraun*, 11 B. R. 149; s. c. 7 C. L. N. 99.)

*Quære.* Do the words "any such suit or proceeding" include something more than any suit at law or in equity? And will they cover any legal mode of enforcing payment of a provable debt? Would a creditor who should undertake to prosecute a proceeding in admiralty, or to seize on execution after-acquired property of the bankrupt, be within the scope, as he clearly would be within the mischief, of this section? If this be so, no creditor holding a provable debt can prosecute any proceedings for its recovery pending the bankruptcy. (*Minon v. Van Nostrand*, 4 B. R. 108; s. c. Lowell, 458; s. c. 1 Holmes, 251.)

The district court can not stay proceedings upon charges filed with a magistrate, before whom the bankrupt had, prior to the filing of his petition, given his recognizance to appear for examination, under the laws for the relief of poor debtors, in order to release himself from arrest. The bankrupt having before his bankruptcy, given a recognizance to take the poor debtor's oath, or surrender, and the arrest not being avoided by the bankruptcy, the district court has no right to avoid it indirectly by requiring the proceedings under it and which are instituted at the debtor's instance to be conducted in any particular manner, or to be stayed in part for his further advantage. The filing of the charges does not appear to be a suit or proceeding for the recovery of the debt more than would be a renewal of the execution, or the charging in execution, or any other matter incidental to the lawful arrest. (*Minon v. Van Nostrand*, 4 B. R. 108; s. c. Lowell, 458; s. c. 1 Holmes, 251.)

A claim in *tort* for a personal injury can not be stayed, for it is not provable until final judgment is obtained. (*In re Hennocksburg & Block*, 7 B. R. 37; s. c. 6 Ben. 150.)

If a verdict is rendered in an action for a personal tort prior to the commencement of the proceedings in bankruptcy, the proceedings for the entry of a judgment on the verdict will not be stayed. (*Zimmer v. Schleeauf*, 11 B. R. 313; s. c. 115 Mass. 52.)

A suit against a corporation will not be stayed. (*Meyer v. Aurora Ins. Co.* 7 B. R. 191.)

A proceeding to revive a judgment so that it may operate as a lien on real estate is a proceeding that may be stayed. (*Bratton v. Anderson*, 14 B. R. 99; s. c. 5 Rich. [N. S.] 504.)

A judgment entered after a motion for a stay of proceedings is erroneous, although it provides that no execution shall issue without a further order of the court. (*McKay v. Funk*, 13 B. R. 334; s. c. 37 Iowa, 661.)

If a motion is made for a stay of the proceedings in an action to foreclose a mortgage, that portion thereof looking to a personal judgment against the mortgagor should be stayed. (*McKay v. Funk*, 13 B. R. 334; s. c. 37 Iowa, 661.)

Where an attachment was issued more than four months before the commencement of the proceedings in bankruptcy, the proceedings for a judgment *in rem* against the property will not be stayed. (*Mason v. Wurthens*, 14 B. R. 341; s. c. 7 W. Va. 532.)

A proceeding on an attachment issued more than four months before the commencement of the proceedings in bankruptcy may be stayed. (*Ray v. Wight*, 14 B. R. 563; s. c. 119 Mass. 426.)

If the creditor institutes his suit within the time limited by the State law, in order to render a stockholder liable for his debt, but is prevented from obtaining a judgment by an injunction issued from the district court at the instance of the stockholders, the latter can not, in a suit against him, object that no judgment has been obtained. (*Shellington v. Howland*, 53 N. Y. 371.)

The suggestion of bankruptcy is one to be made by the bankrupt. The continuance by the bankrupt law is to be granted "upon the application of the bankrupt." The plea of a discharge in bankruptcy is a personal one, which the defendant may make, or not, at his own election. If the defendant declines relying upon the privilege granted by the statute, the cause proceeds to trial. If judgment is rendered against him, it is a valid judgment, and is unaffected by his discharge. The plaintiff has no more right to suggest the bankruptcy of the defendant than he has to plead his certificate of discharge, if he obtains one. He can no more file one plea for him than another. The defendant is the judge of his own defense. The suggestion of bankruptcy is not like the suggestion of the death of a party; in that case no valid judgment can be rendered against the deceased. But notwithstanding the defendant's bankruptcy, a valid judgment can be rendered against him, unless he avails himself of the proceedings in bankruptcy. (*Palmer v. Merrill*, 57 Me. 26; *in re Leibenstein et al.* 4 C. L. N. 309.)

In Maine it was the intention of the legislature in enacting the act of 1868, c. 157, that a defendant, whether alone or one of many defendants, taking advantage of his bankruptcy, should not recover costs if the plaintiff should elect to strike his name from the writ. The striking of the defendant's name from the writ is a discontinuance. It is not necessary that the technical term discontinuance should be used. (*Severy v. Bartlett*, 57 Me. 416.)

It is not the duty of the court to stay proceedings upon being advised that the debtor has filed his petition in bankruptcy, whether asked to do so or not. Courts seldom act as counsel for parties, or trust legal rights upon them. It is the duty of counsel to present the causes of their clients, and of the courts to pass upon such matters as are presented. (*Stone v. Nat'l Bank*, 39 Ind. 284.)

Where the creditor has not proved his claim in bankruptcy, the pendency of the proceedings in bankruptcy can not be pleaded in bar of an action to recover the claim before the debtor's final discharge. (*Stone v. Nat'l Bank*, 39 Ind. 284.)

An affidavit of defense that the defendant has been adjudged bankrupt is sufficient to prevent the entry of a judgment against him until he has a reasonable time to apply for a discharge. (*Frostman v. Hicks*, 15 B. R. 41; s. c. 3 W. N. 202; s. c. 24 Pitts. L. J. 80.)

A suggestion of the bankruptcy of the appellee on the information and belief of the appellant is not such evidence as will justify any action on the part of the appellate court. (*Booker v. Adkins*, 48 Ala. 529.)

The motion for a continuance must be properly presented, and an adjudication obtained thereon, before the entry of a judgment. A motion which is not served upon the plaintiff nor brought to the notice of the court is not sufficient. (*Dunbar v. Baker*, 104 Mass. 211.)

When it appears from the record in the appellate court that a cause against several defendants was continued as to some of them, on their plea of bankruptcy, the appellate court will presume that sufficient evidence of the truth of the plea was shown to the court, unless the contrary is made to appear. (*Melvin v. Clark*, 45 Ala. 285.)

The suggestion of the defendant's bankruptcy operates as an injunction against the further prosecution of the suit, and such further proceeding must be deemed void while the injunction continues. (*Penny v. Taylor*, 10 R. R. 200.)

This provision is especially addressed to the bankrupt court, and the stay

provided for is to be, and is in practice, granted by that court. The option to endeavor to obtain a discharge, and failing in that, to defend all undetermined personal actions, is a right given to a debtor by the bankrupt act under the constitution of the United States, and he is entitled to be protected in that right by the bankrupt court. (*In re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78; *in re Horatio Reed*, 1 B. R. 1; *in re Jacoby*, 1 B. R. 118; *in re Louis Mayers*, 1 B. R. 581; s. c. 2 Ben. 424; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Stinson v. McMurray*, 6 Humph. 339.)

This provision was intended for the protection of the debtor. Still it is obvious that the district court has the power to stay creditors from proceeding at all in a State court until the question of discharge is determined. The assignee may apply for the stay, but the granting of the same is a matter resting in the discretion of the court, and will be refused when it would lead to embarrassment and delay. (*Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.)

The stay is temporary. The object of the stay is to give time for putting into action the permanent bar to the debt. If the discharge is refused, the stay ceases; its object having been accomplished, and the bankrupt having had an opportunity, unharassed by suits, to endeavor to obtain his discharge. If the discharge is granted, the stay ceases. The bankrupt is then able to plead his discharge in any suit. When the discharge is pleaded, the question of the extent of its operation upon the debts of the bankrupt comes up for determination by the court in which it is pleaded. (*In re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14.)

The language of the injunction should be in accordance with the statute. The injunction only continues in force until the question of discharge can be determined. The effect of the discharge is to terminate the injunction. No motion for a dissolution is needed. No order to show the termination is required. The bankrupt must use his discharge as his protection in cases thereby affected. (*In re Veder G. Thomas*, 3 B. R. 38.)

If a motion was made for a continuance upon a suggestion of the defendant's bankruptcy before judgment, a discharge may be pleaded on the allowance of a writ of review. (*Todd v. Burton*, 13 B. R. 197; s. c. 117 Mass. 291.)

If the court is satisfied that the refusal of a continuance on the suggestion of the bankruptcy of the defendant has worked injustice to him, it may in its discretion grant him a review. (*Todd v. Burton*, 13 B. R. 197; s. c. 117 Mass. 291.)

An affirmance of a judgment by an appellate court, where no suggestion of the bankruptcy of the appellant is made, is valid although the proceedings are then pending. (*Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.)

If the defendant is adjudged bankrupt after the rendition of a judgment against him in an action of ejectment, this is no ground for staying proceedings in an appellate court. (*Alston v. Wingfield*, 53 Geo. 18.)

An action pending in the court of appeals of the State, to which an appeal was taken by the bankrupt prior to the commencement of proceedings in bankruptcy, may be stayed. In such a case there is no final judgment within the meaning of the bankrupt act. A motion for further security in such a suit on the part of the creditor is a proceeding against the bankrupt. (*In re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78; *in re Leszynski*, 3 Ben. 487.)

A judgment in a subordinate court, from which an appeal is taken, is final in the sense of this section. It is not the purpose of the statute to suspend the right of a plaintiff to maintain in the appellate court the correctness and validity of a judgment from which the bankrupt may choose to take an appeal, until the determination of the question of his discharge. Proceedings in the appellate court will not be stayed when the defendant appeals and then becomes bankrupt. (*Merritt v. Glidden*, 5 B. R. 157; s. c. 39 Cal. 559.)

If the appellee becomes bankrupt after the submission of the case in the appellate court, the judgment will be rendered as of the date of the submission. (*Booker v. Adkins*, 48 Ala. 529.)

If the sheriff, acting under an execution issued upon a judgment rendered after the commencement of the proceedings in bankruptcy, proceeds to sell the property after he is served with an injunction from the district court, he may be held liable in an action of trespass for the damages. (*Stinson v. McMurray*, 6 Humph. 339; *Turner v. Gatewood*, 8 B. Mon. 613.)

Where the action of the creditor does not tend to enforce any demand against the bankrupt, nor deprive the assignee of any property or right, the stay is not violated. (*In re Hirsch*, 2 B. R. 8; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.)

The power conferred upon the district court by this section, of granting injunctions to stay suits and proceedings to recover debts from a bankrupt, is not granted to any other court than the "court in bankruptcy," which means the court where the proceedings in bankruptcy are pending. When the bankrupt applies for the benefit of the bankrupt act in one district, the district court of another district has no power to grant an injunction to stay suits brought by creditors against him. (*In re H. Richardson et al.* 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20.)

When the amount of the debt is in dispute, the suit should be allowed to proceed to judgment. (*In re Rundle & Jones*, 2 B. R. 113; *in re H. Richardson et al.* 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.)

So long as the adjudication of bankruptcy stands unrevoked, all inquiry as to the validity or existence of the debt claimed to be due to the petitioning creditor in involuntary proceedings is precluded. The debt due to such creditor was established for the purposes of the adjudication, and neither the debt nor the adjudication can be attacked upon a motion to vacate an order staying proceedings in a State court. (*In re Fallon*, 2 B. R. 277.)

The order staying proceedings will be vacated when there is unreasonable delay in procuring a discharge. (*In re W. Belden*, 6 B. R. 443; s. c. 5 Ben. 476.)

A creditor who has not proved his debt has no status in the court of bankruptcy. He does not submit himself to its jurisdiction, and his right to proceed is no farther affected than it is affected by the restraining words of the statute. But this restraint is by the very terms of the statute subject to a condition, and that condition is that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. But the suit can only be stayed by the court in which it is pending. There is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay, the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed, which has not been surrendered by any act of his, and which the law has not taken away from him. In such a case the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditor's action is pending. (*Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phila. 196.)

SEC. 5107.—No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

Statute Revised—March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute—April 4, 1800, ch. 19, §§ 22, 38, 60, 2 Stat. 27, 32, 35.

The district courts are competent to relieve the bankrupt from arrest on process from a State court, provided the arrest was founded upon a debt from which a discharge in bankruptcy would release him. (*In re* L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re* Boyst, 2 B. R. 171; *State v. Rollins*, 13 Mo. 179; *U. S. v. Dobbins*, 1 Penn. L. J. 91; s. c. 5 Law Rep. 81; *in re* Mifflin, 1 Penn. L. J. 146; *in re* Grenville T. Winthrop, 5 Law Rep. 24; *in re* Samuel T. Taylor, 16 B. R. 40; *vide in re* Edson Comstock, 22 Vt. 642; *Robb v. Powers*, 7 Ala. 658.)

The district courts must necessarily inquire into that question and decide it for themselves. The question is one of fact, which can not be decided on *ex parte* testimony. (*In re* L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re* Boyst, 2 B. R. 171.)

The proper course is to issue a writ of *habeas corpus*, and on the hearing to discharge the bankrupt from arrest. (*In re* Williams & McPheeters, 11 B. R. 145; s. c. 6 Biss. 233.)

The bankrupt should apply in the first instance to the State court, for that will avoid a conflict of jurisdiction. (*In re* Michael O'Mara, 4 Biss. 506.)

Evidence can not be introduced to show that the averments in the declaration upon which the arrest is founded are false. (*In re* Devoe, 2 B. R. 27; s. c. Lowell, 251; s. c. 1 L. T. B. 90; *in re* J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292.)

When it appears from the face of the proceedings that the debt is one from which a discharge will not release the debtor, he can not be relieved. It is not necessary that this should appear from the declaration. It is sufficient if it appear from the affidavit and order of arrest, even though these are *ex parte*. Their verity can not be called in question in the bankrupt court. They are entitled to as much credit as more formal and specific proceedings. (*In re* J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *in re* W. E. Robinson, 2 B. R. 342; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; s. c. 2 L. T. B. 18; *in re* Migel, 2 B. R. 481; *in re* Leibenstein *et al.* 4 C. L. N. 309; *contra, in re* Williams & McPheeters, 11 B. R. 145; s. c. 6 Biss. 233.)

The necessity for an examination by the district court of the papers on which the arrest is founded, is not to determine whether the bankrupt was liable by the State law to arrest, or whether he was arrested on a debt which is in fact not dischargeable, in bankruptcy, but solely to determine whether the State court intended, in ordering the arrest, to found it on a debt or claim which would not be discharged by a discharge in bankruptcy. The distinction is a plain one. If the bankrupt claims that, on the merits, the facts on which the State court acted in ordering his arrest did not exist, he must try that question in the State court. The district court can not go into such an inquiry. It can not try that question on affidavits or by proofs. (*In re* Valk *et al.* 3 B. R. 278; s. c. 3 Ben. 431.)

The bankrupt should move for a discharge in the State court, and controvert the facts on that motion. (*In re* Migel, 2 B. R. 481.)

A judgment rendered upon a complaint setting forth all the facts that make up the fraud is conclusive evidence of the fraud. (*In re* Patterson, 1 B. R. 307; s. c. 2 Ben. 155; *in re* Seymour, 1 B. R. 29; s. c. 1 Ben. 348; *in re* Pettis, 2 B. R. 44; s. c. 7 A. L. Reg. 695.)

A judgment rendered in an action for deceit does not so merge the original cause of action as to make the demand dischargeable. The record of the action in which the execution issues may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. (*In re* Whitehouse, 4 B. R. 63; s. c. Lowell, 429.)

But where the debt is one from which a discharge in bankruptcy will not release the bankrupt, he can not be relieved. (*In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re Patterson*, 1 B. R. 307; s. c. 2 Ben. 155; *in re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; *in re Pettis*, 2 B. R. 44; s. c. 7 A. L. Reg. 695; *in re G. W. Kimball*, 1 B. R. 193; s. c. 2 Ben. 38; *in re Devoe*, 2 B. R. 27; s. c. Lowell, 251; s. c. 1 L. T. B. 90; *Horter v. Harlan*, 7 B. R. 238; s. c. 9 Phila. 63.)

Though the State court would probably release the debtor, it is the duty of the district court to see that he is released, and to protect him. (*In re Simpson*, 2 B. R. 47; *in re Wiggers*, 2 Biss. 71.)

The refusal of a previous application by the State court is not final and binding. (*In re Wiggers*, 2 Biss. 71.)

It was obviously the object of the law to bring the bankrupt at all times within the control and disposition of the district court, and the State courts can not have control over the bankrupt in a manner different from that authorized by the law. (*In re Wiggers*, 2 Biss. 71; *Bishop v. Loewen*, 2 Penn. L. J. 364.)

There is no distinction between an arrest on *mesne* and final process. So far as the arrest is concerned the object and intent of this clause are the same. (*In re Wiggers*, 2 Biss. 71; *re in Miffin*, 1 Penn. L. J. 146.)

The district court has the power to require a citizen within its jurisdiction to release a person held in custody beyond its jurisdiction. (*Hazleton v. Valentine*, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105.)

Rule XXVII applies only to the court in which the proceedings in bankruptcy are pending. (*In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.)

The authority of the district court to release a bankrupt from imprisonment applies only to cases where the arrest is made after the commencement of proceedings in bankruptcy. (*In re W. A. Walker*, 1 B. R. 318; s. c. Lowell, 222; *Hazleton v. Valentine*, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105; *Minn v. Van Nostrand*, 4 B. R. 108; s. c. Lowell, 458; s. c. 1 Holmes, 251; *in re Hoskins*, Crabbe, 466; *Shulz v. Fleisher*, 1 Penn. L. J. 11; *in re Rank*, Crabbe, 493; *in re Jonathan H. Cheney*, 5 Law Rep. 19.)

The arrest contemplated is manifestly a new arrest for the benefit of the creditor. The fact that the debtor was not found guilty by the magistrate in the proceedings before him under the act relating to poor debtors, and was therefore permitted to go at large pending the appeal, does not make the taking of his body on execution, in case of his ultimate conviction, a new arrest. So far as the creditor is concerned, it is a restoring of the debtor to the confinement from which he had obtained a temporary relief pending the appeal. It is not an arrest within the contemplation of this clause. (*Stochwell v. Silloway*, 100 Mass. 287.)

A prisoner out on bail is theoretically and practically in arrest, substantially, to all intents and purposes, the same as if he had not been released on bail. (*Hazleton v. Valentine*, 2 B. R. 31; s. c. Lowell, 270; s. c. 1 L. T. B. 105; *in re Rank*, Crabbe, 493; *in re Jonathan H. Cheney*, 5 Law Rep. 19; *vide Fozzall v. Levi*, 1 Cranch C. C. 139; *Lingan v. Bayley*, 1 Cranch C. C. 112.)

The proceeding to discharge a debtor from arrest is very limited in its scope. The action of the district court is confined, in point of time, to the pendency of the proceedings in bankruptcy. They are pending, so far as the debtor is entitled to relief by virtue of the provisions of this section, only until the termination of proceedings for the discharge of the bankrupt. (*In re J. H. Kimball*, 2 B. R. 204; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *in re Nataniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.)

Where a debtor files his petition in one district, the district court of another district may, in a proper case, release him from arrest under the provisions of section 753. (*In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.)

Proceedings in voluntary bankruptcy by an imprisoned debtor is a fraud upon the State laws, and will prevent his obtaining a discharge under them. An account of his property, which only includes what remains after the assignment in bankruptcy, is defective and insufficient. (*People v. Brooks*, 40 How. Pr. 165.)

If, prior to being charged in execution, a debtor makes a valid assignment of his property, by filing his petition in bankruptcy, the fact of his having done so will not bar his discharge under the State laws; nor can he be required to assign more than his contingent interest in such property, in the event of its being more than sufficient to pay his debts, or of the bankruptcy proceedings being dismissed or discontinued. (*Roswig v. Seymour*, 7 Robt. 427.)

The State court will release the party from arrest as well as the district court. (*Jones v. Emerson*, 1 Caines, 487.)

After the bankrupt has received his discharge, the State court will, on a proper application, release him from arrest. (*Comstock v. Grout*, 17 Vt. 512.)

A creditor who holds the bankrupt under arrest, upon process issued before the commencement of the proceedings in bankruptcy, will not be permitted to prove his debt, unless he consents to discharge the bankrupt from custody. (*In re Jonathan H. Cheney*, 5 Law Rep. 19.)

SEC. 5108.\*—At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or, if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.

Statute Revised—March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute—Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

A bankrupt must apply for his discharge before the final disposition of the administration of the estate. (*In re Wm. C. Brightman*, 15 B. R. 213.)

The law allows the bankrupt to apply for his discharge after the expiration of sixty days from the adjudication, and within six months, either when no debts have been proved, or when no assets have come to the hands of the assignee. It is only when both debts have been proved and assets have come to the hands of the assignee, that the discharge can not be applied for until after the expiration of six months. (*In re B. W. & J. H. Woolums*, 1 B. R. 496.)

Where, up to the time of the application for the discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one where no assets have come to his hands, even though he may have reason to believe that he will thereafter receive money on account of the estate as the proceeds out of the assets thereof. (*In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347; *in re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.)

Certificates of stocks or claims against debtors of the bankrupt, which up to the time of the application of the bankrupt for a discharge have not actually produced anything, and for which the only offer made is the offer of a small sum of money, while there is strong evidence that these stocks and claims are absolutely worthless, may very justly be said not to be assets at the time of the application for a discharge, whatever they may be, or may become afterward. (*In re Solis*, 3 B. R. 761; s. c. 4 Ben. 143.)

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\* So amended by Act of July 26, 1876, ch. 234, § 1, 19 Stat. 102.



Notes, accounts, and claims against others, on which no money has been received, are not considered as assets. (*In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347; *in re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.)

The interpretation given to the term "no assets" by the justices of the Supreme Court, in Form No. 35, is, that the assignee has not received or paid out any money on account of the estate. (*In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347.)

It is not necessary, on presenting a petition for discharge to produce the assignee's return, nor any certificate from the assignee that no assets have come to his hands, nor any other evidence than the mere statement in the petition that no debts have been proved, or that no assets have come to the hands of the assignee. Of course, upon the return of the order to show cause made upon the bankrupt's application for his discharge, the court will not grant the discharge without satisfactory evidence that no debts have been proved, or that no assets have come to the hands of the assignee. The highest evidence as to debts, and the highest evidence as to assets, are in the hands of the assignee. The evidence, therefore, must come from him. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.)

The assignee, when requested by the bankrupt, should make his return on Form No. 35, when he has not in fact received or paid out any money on account of the estate, even though he may have reason to believe that he will, at some future time, receive moneys on account of the same. (*In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.)

The register has the power to pass an order requiring the assignee to make a return. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.)

When debts have been proved, and assets have come to the hands of the assignee, an application for a discharge can not be filed before the expiration of six months from the adjudication of bankruptcy. The six months is to be computed from the date of adjudication—not from the date of filing the original petition. (*In re Bodenheim & Adler*, 2 B. R. 419; s. c. 2 L. T. B. 64; *in re D. K. Holmes*, 14 B. R. 209.)

When no debts have been proved and no assets have come to the hands of the assignee, the bankrupt may apply for a discharge even after the expiration of six months. (*In re Cannaday*, 3 B. R. 1; s. c. 2 Biss. 75; *in re Vorbeck*, 1 Pac. L. R. 100; *in re Donaldson*, 11 B. R. 460; s. c. 2 Dillon, 346; *in re Wm. H. Pierson*, 10 B. R. 107; *contra, in re Wilmott*, 2 B. R. 214; *in re Franklin A. Sloan*, 12 B. R. 59; s. c. 13 Blatch. 67; *in re Anson Martin*, 2 B. R. 548; *in re Gallison et al.* 5 B. R. 353; s. c. 2 L. T. B. 195; *in re Schenck*, 5 B. R. 93; *in re Farrell*, 5 B. R. 125; *in re Barrett*, 11 B. R. 527; s. c. 1 Cent. L. J. 556; *in re Greenfield*, 2 B. R. 298, 311; s. c. 6 Blatch. 287; *in re Watson & Reynolds*, 1 W. N. 86, 334; s. c. 2 W. N. 356; *in re Lowenstein*, 13 B. B. 479; s. c. 3 Dillon, 145.)

The fact that the debtor is an involuntary bankrupt does not of itself alone prevent his discharge. If sections 5110 and 5112 do not prevent it, he is entitled to a discharge. (*In re S. D. Clark*, 3 B. R. 16; s. c. 2 Biss. 73; *in re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *in re Bunster*, 5 B. R. 82; s. c. 41 How. Pr. 406; s. c. 5 Ben. 242.)

The bankrupt is not required to pray for a discharge from his partnership debts in precise words. If he prays to be discharged from all his provable debts, he virtually prays to be discharged from his partnership debts. (*In re Wm. H. Pierson*, 10 B. R. 107.)

SEC. 5109.—Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard

being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

Statute Revised—March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute—Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

The register may pass the order to give notice to the creditors to appear and show cause against the discharge of the bankrupt. (*In re Gettleson*, 1 B. R. 604.) *Contra*; but he may, if the court authorizes him to do so. (*In re Bellamy*, 1 B. R. 64, 96, 113; s. c. 1 Ben. 390, 426, 474; s. c. 1 L. T. B. 22.)

The order in Form No. 51, although the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court. It may be made returnable before the court at the office of the register. It should name the newspapers in which the notice is to be published. The selection of the newspapers is to be made with due regard to the requirements of this section, and from among the newspapers named in the rules of the court in bankruptcy. (*In re Bellamy*, 1 B. R. 64, 113; s. c. 1 Ben. 426, 474.)

If the bankrupt does not apply for his discharge within three months, the notice need not say anything about the second and third meetings of creditors. (Anon. 1 B. R. 219.)

The notices are to be sent only to the creditors who have proved their debts. (*In re McIntyre*, 1 B. R. 151; s. c. 1 Ben. 543; *Morse v. Presby*, 25 N. H. 299.)

If no creditors have proved their debts, the publication is the only notice required by the law. (Anon. 1 B. R. 123.)

The notices are to be sent by the clerk. The clerk's certificate that the notices have been duly mailed is sufficient evidence of the fact. (*In re Bellamy*, 1 B. R. 64, 113; s. c. 1 Ben. 426, 474; *in re Townsend*, 1 B. R. 216; s. c. 2 Ben. 62; s. c. 1 L. T. B. 2.)

A formal judicial process and return is not necessary. The service may be by letter. (*Linton v. Stanton*, 4 La. An. 401; *Beach v. Miller*, 15 La. An. 601.)

The register should transmit to the clerk a list of all the proofs of debts which have been furnished to the register or the assignee, containing the names, residences and post office addresses of the creditors with sufficient particularity to enable the notices to be served properly. (*In re Bellamy*, 1 B. R. 113; s. c. 1 Ben. 474.)

If the assignee refuses to give a certificate of the names of the creditors who have proved their debts, the register upon the application of the bankrupt, has the power to pass an order directing the assignee to furnish such certificate, and it is the duty of the assignee to comply with it. (*In re Blaisdell et al.* 6 B. R. 78; s. c. 42 How. Pr. 274; s. c. 5 Ben. 420.)

The proof of publication may be by the usual affidavit of the printer. (*In re Bellamy*, 1 B. R. 96; s. c. 1 Ben. 426.)

The allegation in the record that due proofs of the publication of the notices were given, can not be impeached in a collateral action. (*Linton v. Stanton*, 4 La. An. 401.)

SEC. 5110.—No discharge (a) shall be granted, or, if granted shall be valid in any of the following cases:

First. If the bankrupt has willfully (b) sworn falsely in his

affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceeding in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed (*c*) any part of his estate or effects, or any books or writings relating thereto; or has been guilty of any fraud or negligence in the care, custody, (*d*) or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money or chattels to be attached, (*e*) sequestered, or seized on execution.

Fourth. If, at any time after (*f*) the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, (*g*) or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed (*h*) or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent (*i*) preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent (*j*) payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, (*k*) or has admitted (*l*) a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books (*m*) of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent (*n*) of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation (*o*) of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

Statute Revised—March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statutes—April 4, 1800, ch. 19, §§ 36, 37, 2 Stat. 31; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

### Grounds for Withholding a Discharge.

(a) The acts enumerated in this section are not in the nature of offenses, created and defined by the bankrupt law, the penalty for the commission of which by the bankrupt is the forfeiture of his right to a discharge. The bankrupt act was intended to operate, and has been uniformly held to operate upon and provide for the discharge of debts created before as well as after its passage, and in respect to debts contracted before its passage, it is clearly a retrospective and retroactive law so far as it authorizes the discharge of such prior debts. Prior to the passage of the act, the debtor had no right to a discharge from such debts, and he now has no right to such discharge except in the cases provided for, and upon the conditions prescribed in the act. These provisions create no offenses, and there is no forfeiture of an existing right denounced as the penalty for a newly created offense, for the simple and obvious reason that a right to a discharge in the cases provided for did not exist when the act was passed, and therefore the provisions are not retroactive or retrospective in the proper sense of those terms. The act gives a debtor a right to a discharge, provided he fully complies with its provisions, and is not brought within the limitations, exceptions, or prohibitory provisions of the act, and, as this right only exists by virtue of the bankrupt act, the provisions of this section are only exceptions in restriction or limitation of the grant of power to the bankruptcy court, under which grant alone a debtor can, in any case not excepted from its operation, assert a right to a discharge. (*In re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137.)

Congress has an undoubted right to annex such conditions as it chooses to the grant of a discharge. Such a condition is not a punishment nor retroactive. It is simply a condition precedent. (*In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.)

The question of withholding a discharge for any of the reasons specified in this section, when the bankrupt has taken the required oath, and has conformed to all the modal requirements of the bankrupt act, is one wherein the creditors are the attacking party. If they do not enter an appearance, and file specifications, they are regarded as not opposing the discharge, and as assenting to it, and the grounds for withholding a discharge specified in this section are regarded as not existing in respect to the particular bankrupt. (*In re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85; *in re Rosenfield*, 2 B. R. 117; s. c. 8 A. L. Reg. 44; s. c. 1 L. T. B. 100.)

If the formal requirements of the bankrupt act have been complied with, a discharge is only to be refused for some grounds set forth in this section. The fact that the debt of the creditor is a fiduciary debt, is no ground for withholding a discharge. (*In re Elliott*, 2 B. R. 110; *in re Tracy et al.* 2 B. R. 298; *Chapman v. Forsyth*, 2 How. 262; *in re George Brown*, 5 Law Rep. 258; *in re John C. Tebbetts*, 5 Law Rep. 259; *in re Levi H. Young*, 5 Law Rep. 128; *vide in re Parker et al.* 1 Penn. L. J. 370; *in re John Hardison*, 5 Law Rep. 255; *in re Hezekiah Cease*, 5 Law Rep. 408.)

Fraud in the creation of a debt is no ground for withholding a discharge. (*In re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; *in re Rosenfield*, 1 B. R. 575; s. c. 1 L. T. B. 100; *in re Wright et al.* 2 B. R. 41; s. c. 15 Pitts. L. J. 553; *in re Bashford*, 2 B. R. 73; *in re Clarke*, 2 B. R. 110; *in re Doody*, 2 B. R. 201; *in re Stokes*, 2 B. R. 212.)

Neither the purchase of goods when the bankrupt knew that he could not pay for them, nor the fraudulent purchase of a piano, are within the act. The frauds

which prevent a discharge are, nearly all, such as tend to the injury of creditors generally. One who has been induced, by fraudulent representations, to sell goods to the bankrupt, finds his remedy in the right to receive a dividend, and to hold the remainder of his debt undischarged by the certificate. Any fraud on the act may be given in evidence, including all that are mentioned in section 5182. (*In re W. M. Rogers*, 3 B. R. 564; s. c. *Lowell*, 423.)

The fact that the assignee, by inadvertence or mistake, has set apart to the bankrupt certain property as exempt, which is not exempt by law, and which should be subject to his creditors, is no ground for opposing the discharge. The propriety of the assignee's action in this respect should have been contested at the proper time, and in the proper manner. (*In re Eidom*, 3 B. R. 106.)

The question of the residence or place of business of the bankrupt may be made the ground for opposing the discharge. The question whether the petition is filed in the proper district is a question of jurisdiction. If the court does not have jurisdiction, it can not grant a discharge. (*In re Little*, 2 B. R. 294; s. c. 3 Ben. 25; *in re Penn et al.* 3 B. R. 582; s. c. 4 Ben. 99; *in re Leighton*, 5 B. R. 95.)

*Contra.* It should be charged that the bankrupt has willfully sworn falsely in relation thereto. The false oath may be made the ground for withholding the discharge. (*In re Burk*, 3 B. R. 296; s. c. 1 Dedy, 425; s. c. 2 L. T. B. 45.)

An averment that the bankrupt has not resided or carried on business in the district where the petition is filed for six months next preceeding the filing of the petition, is too broad. It may be true, and yet the bankrupt may be entitled to his discharge. It is only necessary that he should have been in the district for the longest period during that six months. (*In re Burk*, 3 B. R. 296; s. c. 1 Dedy, 425; s. c. 2 L. T. B. 45.)

A specification which alleges that the bankrupt's assets are not equal to thirty per cent. of the claims proved against his estate upon which he is liable as principal debtor, without alleging that the consent of one-fourth in number and one-third in value of the creditors holding such debts, was not filed before or at the hearing upon the order to show cause, is insufficient. The question, however, may be presented by the opposing creditor, or any other creditor, upon the hearing before the register on the reference of the general question, whether the bankrupt is entitled to the discharge. (*In re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137.)

### Willful Perjury.

(b) The specification must aver that the false oath was willful. Omissions in the schedules must be alleged to have been intentional. A false oath on examination must be alleged to have been willful, and in regard to a material fact. (*In re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; *in re Beardsley*, 1 B. R. 304; *in re Wyatt*, 2 B. R. 288; *in re Sidle*, 2 B. R. 220; *in re Robinson et al.* 3 B. R. 70; *in re Wm. H. Pierson*, 10 B. R. 107; *in re John C. Tebbetts*, 5 Law Rep. 259; *in re Robert H. Shoemaker*, 4 Biss. 245; *in re Wm. Archenbraun*, 12 B. R. 17; s. c. 7 C. L. N. 231.)

An allegation that the bankrupt willfully omitted property from his schedule is entirely insufficient, for the reason that it does not allege that the bankrupt willfully swore falsely in his affidavit annexed to his schedule or inventory. (*In re Keefer*, 4 B. R. 389; s. c. 3 C. L. N. 125.)

The causes for withholding a discharge are some act omitted which was required to be done, or some act done which was forbidden, and these acts must have been in fraud of the law. Mere oversight or mistake is not sufficient; these are infirmities to which all are liable, and for the correction of which ample remedy is afforded to all parties. (*In re McVey*, 2 B. R. 257; *in re Smith & Bickford*, 5 B. R. 20.)

If the bankrupt has willfully sworn falsely in omitting the name of a cred-

itor from his schedules, the discharge will be refused. It is questionable, however, whether the act ought not to be so construed that this objection can only be made by a creditor who is interested in the debt, which is the subject of the misconduct of the bankrupt, or who is or may be injured by the omission or falsehood concerning it. (*In re Kallish*, 1 Deady, 575.)

The omission of the name of a creditor from the schedule with his consent can not be availed of by other creditors whom it has not injured as a willful falsehood. It is not a willful and fraudulent omission if made with the assent of the creditor, express or implied, antecedent or subsequent. This does not apply to a case where fraud or injury is proved. (*In re Needham*, 2 B. R. 387; s. c. Lowell, 309; s. c. 2 L. T. B. 39.)

It must be proved that the taking of a false oath was intentional. The omission to place upon the schedules property in which it can not be positively determined whether the bankrupt has any interest or not, is no ground for withholding the discharge. (*In re Wyatt*, 2 B. R. 288; *in re Penn et al.* 5 B. R. 288; s. c. 2 L. T. B. 193; *in re Smith*, 13 B. R. 256; s. c. 1 Woods, 478.)

Where a bankrupt is informed that a certain debt exists, by his partner, who had exclusive management of the business to which that debt relates, he has the right to believe the statement to be true, and to place it upon his schedules. (*In re Schofield et al.* 3 B. R. 551.)

Transactions entered into in blind confidence may be explained by the manifest presence of good faith. (*In re Beatty et al.* 2 B. R. 582; s. c. 3 Ben. 233.)

There is a distinction between willfully swearing false and the crime of perjury. Perjury is the willfully and corruptly swearing false. Corruption is an element of crime. The advice of counsel may shield a client from corrupt intent, but can not relieve him from the fact that he actually intended what he did. (*In re Rainsford*, 5 B. R. 381.)

### Concealment of Property.

(c) The specification should state with some particularity what property has been concealed. (*In re Mawson*, 1 B. R. 437; s. c. 2 Ben. 332; *in re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; *in re Beardsley*, 1 B. R. 304; *in re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245.)

A mere allegation in general terms that the bankrupt failed to file a full schedule of the notes and accounts held by him, without specifying which were omitted, is insufficient. (*Stewart v. Hargrove*, 23 Ala. 429.)

An allegation of concealment should state how and in what manner the concealment was effected. (*Brereton v. Hull*, 1 Denio, 75.)

An allegation of a concealment of an interest in a firm should show that the bankrupt had an interest in the firm assets, and that there was something due to him. (*Dresser v. Brooks*, 3 Barb. 429.)

An allegation of concealment which describes certain property, and charges the concealment of other property without any description whatever, either as to kind or quality, is bad, but will not vitiate the whole specifications. The bankrupt should not demur, but on the trial should object to any evidence that may be offered under the general words. (*Brereton v. Hull*, 1 Denio, 75.)

The term "concealment" implies something willful, intentional. One can not be said to conceal property, unless he not only knows that he owns it, but unless he also intentionally, not inadvertently, conceals the same from his assignees or creditors. The act of concealment must be shown to be intentional. (*In re Wyatt*, 2 B. R. 288; *in re George Wilson*, 6 Law Rep. 272; *in re Mark Banks*, 1 N. Y. Leg. Obs. 274; *Dresser v. Brooks*, 3 Barb. 429.)

The language of the law means to hide, to secrete. Where a man owns property of which he has no knowledge, the fact that he did not put it on his schedules will not prevent his discharge. (*In re Renslow S. Parker*, 4 Biss. 501.)

A mere failure on the part of the bankrupt to render in property possessed by him, on his schedules, is not made a ground by the act for refusing his discharge. The act does make the concealment of the same a ground for such action; but then it must be averred and proved that it was willful. The allegation of the time when the bankrupt had possession of the property should be definite. (*In re Eidom*, 3 B. R. 106; *in re Connell*, 3 B. R. 443; *in re Smith*, 13 B. R. 256; s. c. 1 Woods, 478.)

An omission of property by accident or mistake will not prevent a discharge. (*Loud v. Pierce*, 25 Me. 233; *Suydam v. Walker*, 16 Ohio, 122; *Crooker v. Trevett*, 28 Me. 271.)

A bankrupt can not be held to be guilty of a willful concealment of property, by omitting to specify in his schedule a mass of obsolete and worthless demands, upon which no action whatever can be maintained. (*In re Alonzo Pearce*, 21 Vt. 611.)

A concealment of property from a person entitled to its possession is not the less a concealment because he knows that it is concealed, if he does not also know where it is concealed. (*In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.)

The concealment denounced by this section embraces a concealment of title to property, as well as the hiding from view of property itself. What matters it to the creditors that the property may be seen by all men, if the debtor's right to it is concealed? Undoubtedly, concealment of property may be effected by the literal hiding of it. But the most dangerous sort of concealment is when the debtor places the title to property in the hands of another person to hold for his benefit, and conceals his beneficial right to it. Either kind of concealment will preclude the granting of a discharge. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *Edwards v. Gibbs*, 39 Miss. 166.)

It is concealment to leave out of the schedule property that has been conveyed by the bankrupt in fraud of creditors. It is wholly immaterial that the title, as between vendor and vendee, is vested in the vendee. As to creditors, the conveyance was void, and the title remained in the vendor. Concealment is a continuous act. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *in re Rathbone*, 1 B. R. 536; 2 B. R. 260; s. c. 3 Ben. 50; s. c. 1 L. T. B. 70, 114; *in re W. D. Hill*, 1 B. R. 431; s. c. 2 Ben. 349; s. c. 1 L. T. B. 56; *in re Goodbridge*, 2 B. R. 324; *in re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69; *Peterson v. Speir*, 29 Penn. 478; *King v. Deitz*, 12 Penn. 156; *contra*, *State v. Bethune*, 8 Ired. 139; *Porter v. Duglass*, 27 Miss. 379; *in re David H. Robertson*, 1 N. Y. Leg. Obs. 20; *in re John Q. McCarty*, 5 Law Rep. 322.)

A fraudulent conveyance made by a debtor anterior to the passage of the act will not of itself preclude his discharge, but in such case he should not conceal nor attempt to conceal the fraud when he seeks the benefit of the statute. He must come into court with clean hands, or at least with a clear conscience, and disclose fully all property and rights of property which the creditors may appropriate in satisfaction of their claims. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *in re Rainsford*, 5 B. R. 381.)

If property which had been conveyed to defraud creditors was sold in good faith, and the purchase money paid to the bankrupt or his creditors before the commencement of proceedings in bankruptcy, there is no concealment of assets by omitting it from the schedules. (*In re J. H. C. Lutgens*, 7 Pac. L. R. 89.)

When property is, in fact concealed, *in specie*, or where the title is concealed by a colorable conveyance, the discharge can not be granted; but there are

many doubtful cases, in which justice seems to demand that the assignee should be entitled to try his rights, but in which unfairness on the debtor's part can not be made out. An open and notorious conveyance of property from the bankrupt to his wife, made long before the commencement of proceedings in bankruptcy, and at a time when he is alleged to have been solvent, is no ground for withholding a discharge. Such a conveyance does not stand on the footing of a mere voluntary conveyance to a stranger, or of one made on a secret trust for the grantor. No doubt the debtor has always had, and always will have, some advantage from it, but it would be a perversion of terms to say that there was any concealment about it. Whether the conveyance can be avoided by the assignee is a different question. (*In re Murdock*, 3 B. R. 146; s. c. *Lowell*, 362; s. c. 2 L. T. B. 97.)

A transfer of property from the bankrupt to his wife, at the time when he was insolvent, but believed himself to be solvent, may be a good ground for refusing a discharge. If he surrenders the property as soon as the mistake is discovered, he will stand in a favorable condition; but if he does not do so, nor make any attempt to repair the error, it will be difficult to believe that the transfer was a mere mistake. (*In re R. A. Adams*, 3 B. R. 561.)

The keeping of books from the assignee involves the question of intent. If the books were accidentally lost before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the bankrupt, and not given up on demand, with intent to prevent the assignee from obtaining them, but their existence denied, the charge of concealment is sustained. It is not necessary that they should have been put in any unusual or out-of-the-way place. (*Hammond & Coolidge*, 3 B. R. 273; s. c. *Lowell*, 381.)

A judgment rendered in a suit instituted in a State court to which the opposing creditors and the bankrupt were parties, and in which the fraudulent character of the conveyance was litigated and determined, is conclusive. (*In re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.)

Concealment of property involves not only the charge of gross fraud, but also the crime of false swearing, and it ought to be substantiated either by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken to be true upon any slight or ambiguous presumptions, nor upon any state of facts which do not clearly, and indeed almost necessarily, call for such an inference. (*Rugely v. Robinson*, 19 Ala. 404; *State v. Bethune*, 8 Ired. 139; *in re Alonzo Pearce*, 21 Vt. 611; *Loud v. Pierce*, 25 Me. 233; *Carey v. Esty*, 29 Me. 154; *in re John Q. McCarty*, 5 Law Rep. 322; *in re Chas. H. Delavan*, 5 Law Rep. 370.)

Fraud by concealing assets is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. Of course, those who would commit a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by bides and *indicia* of fraud, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, there will not be found in their testimony any badges and *indicia* of fraud sufficient to overbear such positive testimony. (*In re Goodridge*, 2 B. R. 324; *in re Rathbone*, 1 B. R. 536; 2 B. R. 260; s. c. 3 Ben. 50; s. c. 1 L. T. B. 70, 114; *in re W. D. Hill*, 1 B. R. 431; s. c. 2 Ben. 349; s. c. 1 L. T. B. 56; *in re Philip A. Doyle*, 3 B. R. 782; *in re Wm. H. Long*, 3 B. R. quarto, 66; *Preston v. Speer*, 29 Penn. 478; *City Bank v. Banks*, 1 La. An. 418; *in re Daniel J. Perley*, 4 N. Y. Leg. Obs. 254.)

The mere omission of property from the schedule is not sufficient evidence of a willful concealment of it. (*Steele v. Aylesworth*, 18 Conn. 244.)



An omission to place property upon the schedule, because the bankrupt concludes in good faith that it does not pass to the assignee, is not a willful concealment of it, where the law by which it may be deemed to vest in him is doubtful and uncertain. (*Rugely v. Robinson*, 19 Ala. 404.)

The circumstances to establish concealment must depend more or less on the circumstances of each particular case. (*Petty v. Walker*, 10 Ala. 379; *Hargroves v. Cloud*, 8 Ala. 173.)

The magnitude of a note is evidence of an intentional concealment. (*Cutter v. Taylor*, 1 Sandf. 593.)

Proof that the debts owing to the bankrupt, and included in his schedules, were against insolvent and irresponsible persons is admissible, for the value of his assets has a material bearing on the question whether he has honestly surrendered all his property. (*Cook v. Moore*, 65 Mass. 213.)

Whenever the intent of a party forms a part of the matter in issue upon the pleadings, evidence may be given of other acts not in issue, provided they tend to establish the intent of the party in doing the acts in question. (*Cook v. Moore*, 65 Mass. 213.)

Where the specification refers to the property alleged to have been concealed as described in a certain deed duly recorded, a copy from the records is not admissible without an attempt to produce or account for the original deed. (*Petty v. Walker*, 10 Ala. 379.)

The disclosure made by the bankrupt to his counsel who assisted and advised him in making up his inventory, and the advice of his counsel thereon, are admissible under a specification alleging a concealment of property. (*Robinson v. Wadsworth*, 49 Mass. 67; *Suydam v. Walker*, 16 Ohio, 122.)

It is not enough to show that the bankrupt may have made moneys which he has not accounted for. To prevent the granting of the discharge, the opposing creditor must prove that the bankrupt has willfully sworn falsely. (*In re Hummitsh*, 2 B. R. 12; s. c. 15 Pitts. L. J. 494; *in re Pomeroy*, 2 B. R. 14; *in re Sidle*, 2 B. R. 220.)

Mere proof of the ownership of property prior to the commencement of the proceedings in bankruptcy, does not devolve on the bankrupt the burden of showing that he was not the owner at that time. (*Powell v. Knox*, 16 Ala. 364.)

Testimony that a man possessed a capital at one time in property or money, is evidence conducive to show that he held it or some representative in value at any subsequent time, and if the two periods are brought into close proximity, and no known change of his affairs occurs, the evidence will raise a presumption next to positive proof that he continued to possess such means. As the periods compared recede in point of time the force of the presumption weakens. (*In re John Bailey*, 1 N. Y. Leg. Obs. 18; s. c. 5 Law Rep. 320.)

Proof of ownership of property prior to the commencement of the proceedings in bankruptcy, and of possession after that time, raises a presumption of ownership at that time, and makes it the duty of the bankrupt to show what disposition had been made of it. (*Powell v. Knox*, 16 Ala. 364; *Selby v. Gibson*, 3 La. An. 209.)

Whenever the possession of property is not referred to the time of the commencement of the proceedings in bankruptcy, or so recently afterwards that no business or industry could reasonably have created a fund by which the property might have been obtained, it rests on the creditor to create the presumption of fraud, by showing that the business or industry of the bankrupt could not reasonably furnish the means to acquire the property held by him as owner. (*Petty v. Walker*, 10 Ala. 379; *Powell v. Knox*, 16 Ala. 364.)

The possession of property by the bankrupt immediately after the commence-

ment of the proceedings in bankruptcy, which by industry he might reasonably have acquired, will not warrant the presumption that he did not make a full surrender of his estate. But where the value of it is so great as to make it improbable that it was earned by him since that time, it devolves upon him to show how he became the proprietor of such property, whether by inheritance, bequest or purchase. The burden of proof is thrown on him who is best acquainted with the origin and nature of his title. (*Hargroves v. Cloud*, 8 Ala. 173; *Ashley v. Robinson*, 29 Ala. 112; *Gilbert v. Bradford*, 15 Ala. 769.)

After the bankrupt has proved that he was engaged in a certain business during a certain period, he can not prove what another wholly disconnected from him may have lost while engaged in a similar business. (*Edgar v. McArn*, 22 Ala. 796.)

To rebut a presumption of the possession of funds, the bankrupt may prove that all the persons engaged in a similar business at a certain place, during a certain period, failed. (*Edgar v. McArn*, 22 Ala. 796.)

### **Custody of Property after Filing Petition.**

(d) Under the bankrupt act, the bankrupt, before the appointment of an assignee, is the custodian of the estate, and must act, if at all, in the interest of the creditors. (*March v. Heaton*, 2 B. R. 180; s. c. Lowell, 278; *in re Enoch Steadman*, 8 B. R. 319.)

This clause authorizes the bankrupt to file a petition in his own name for an injunction against execution creditors. (*Jones v. Leach*, 1 B. R. 595; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *in re Wallace*, 2 B. R. 134; s. c. 1 Dedy, 433.)

A specification alleging that the bankrupt permitted the destruction of certain property should state the time of such destruction, the amount destroyed, and aver that the bankrupt was in charge of the property at the time of its loss, or responsible for it. (*In re Eidom*, 3 B. R. 106.)

A specification that the bankrupt, prior to the commencement of proceedings in bankruptcy, caused and permitted loss, waste, and destruction of his estate and effects, and misspent and misused the same, can not be sustained. There is no such objection to a discharge to be found in the bankrupt act, unless the loss, etc., occurred after the filing of the petition. Every kind of fraud is carefully prohibited, but not extravagance or waste, except gaming. (*In re W. M. Rogers*, 3 B. R. 564; s. c. Lowell, 423; *in re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44.)

The neglect of the debtor to turn over certain books of account to the assignee is no ground for withholding the discharge, when they are useless, and the omission was without fraud on the part of the bankrupt. (*In re Wm. H. Pierson*, 10 B. R. 107.)

A bankrupt has the right to employ counsel for the purpose of preparing the petition and schedules, and to raise the money to pay him a reasonable compensation therefor, and such compensation is valid. (*In re James Thompson*, 13 B. R. 300.)

The collection of moneys after the commencement of proceedings in bankruptcy and applying them to his own use, is a ground for withholding a discharge. (*In re Micheal Finn*, 8 B. R. 525.)

The bankrupt must account to the assignee fairly for any money, etc., on hand, and credits outstanding at the commencement of the proceedings in bankruptcy, and for all subsequent profits. (*In re Wm. H. Long*, 3 B. R. 66.)

A bankrupt who fails to pay over to the assignee the money mentioned in his schedules as on hand at the time of the commencement of proceedings in bankruptcy, may, after being cited before court, under an order to show cause, be committed for contempt. (*In re Dresser*, 3 B. R. 557.)

### Attachment.

(e) When the property of the bankrupt has been attached without his knowledge or consent by a hostile creditor, the omission to dissolve an attachment by an application in bankruptcy can not by retrospective effect supply the intent to give a fraudulent preference, which is essential in order to prevent the bankrupt from obtaining a discharge. (*In re Francis C. Belden*, 2 B. R. 42; s. c. 2 A. L. Rev. 771; s. c. 15 Pitts. L. J. 547.)

### Limitation.

(f) The limitation as to time annexed to the sixth item was intended to apply to all the intervening items between that and the fourteenth, or these intervening items having no limitation as to time annexed to them must be construed with reference to the principle applicable to law generally, which is that they take effect from the time of their passage. (*In re Rosenfield*, 1 B. R. 575; 2 B. R. 117; s. c. 1 L. T. B. 81, 100; s. c. 8 A. L. Reg. 44; *in re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *in re Schofield*, 3 B. R. 551; *in re Hollenshade*, 2 B. R. 651; s. c. 2 Bond, 210; *in re J. H. C. Lutgens*, 7 Pac. L. R. 89; *contra*, *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.)

In regard to the first four of the clauses of this section, relating to the grounds for withholding a discharge, it may be conceded that the character of the acts therein described requires that they should have been committed after the passage of the bankrupt act. In the fifth clause there is an express limitation of time, which only requires that the act therein described should have been committed within four months before the commencement of proceedings in bankruptcy, and as a petition could have been filed at the end of three months after the passage of the act, it can hardly be said that the act referred to in this clause must have been committed after the passage of the bankrupt act, in order to bring the bankrupt within the prohibition of the section. The next clause by its express terms is limited to acts committed since the passage of the statute, and as the succeeding clauses—the seventh and the eighth—are only connected with it by the disjunctive “or,” the same may be said in regard to those clauses. The actual and distinct expression of a limitation to acts committed after the passing of the statute, would seem to evidence an intention on the part of the legislature, that the clauses in which there is no such limitation, either expressed or necessarily to be inferred, should not be so limited. In the next or ninth clause there is a change of phraseology, which was not necessary unless it was intended to disconnect its provisions from the limitations of time contained in the three next preceding clauses. If not so intended, the connection with the sixth, seventh, and eighth clauses would have been made by the use of the word “or,” alone, as in the seventh and eighth clauses; but the words “if he” are inserted apparently *ex industria* to so far disconnect this clause from those immediately preceding, so as to remove it from the limitation of time expressed in the sixth clause. The subsequent insertion in the thirteenth clause of the words “subsequently to the passage of this act,” is also a significant indication that the legislature intended no such or similar limitations to the clauses where no limitation was expressed, or necessarily to be implied from the nature or character of the acts described, and in the fourteenth and sixteenth clauses the words “if he” are inserted as indicating a partial but distinct separation of these clauses from the preceding ones, so as to disconnect them from any limitation of time contained in the preceding clauses. (*In re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137.)

### Mutilation of Books.

(g) A specification alleging that the bankrupt has destroyed, mutilated and falsified his documents, papers and writings, is defective, unless it avers that the act was done with intent to defraud his creditors. (*In re William H. Marston*, 5 Ben. 313.)

The mutilation of the books by third persons after the termination of the business does not bar a discharge. (*In re Wm. H. Pierson*, 10 B. R. 107.)

### Removal Beyond the District.

(h) A charge that the bankrupt, in contemplation of bankruptcy, and with intent to defraud the assignee, consigned certain goods to a party out of the district is good in substance—the bankrupt having waived objections of mere form; and if this removal was made with a view, at the time, of becoming bankrupt, and with intent to keep the property from the assignee, it is, in substance, a sufficient charge that the removal was to defraud creditors. But as all this is alleged, though the contemplation of bankruptcy was not necessary, it must be proved. (*In re Hammoud & Coolidge*, 3 B. R. 273; s. c. *Lowell*, 381.)

### Fraudulent Preferences.

(2) By the term "fraudulent preference" is meant a preference contrary to the provisions of this act. (*In re Rosenfield*, 1 B. R. 575; s. c. 2 B. R. 117; s. c. 1 L. T. B. 81, 100; s. c. 8 A. L. Reg. 44.)

A preference is an advantage or benefit which others do not enjoy. (*In re Aspinwall*, 3 Penn. L. J. 212.)

It is not necessary to allege that the persons to whom the payments were made were creditors of the bankrupt. The ordinary and obvious construction of the allegation is, that the preferences, or payments, or transfers, were made to the persons named as creditors, real or supposed, of the bankrupt, or as persons to whom he was or might become liable. (*In re Smith & Bickford*, 5 B. R. 20.)

The fair and reasonable construction of this section is, that it refuses a discharge on the ground of preference only when the act is brought within the definition of section 5110, or of section 5123 itself. Under the latter, it must be proved that bankruptcy was in contemplation, and, under the former, that the creditor was a party to the fraud. (*In re Locke*, 2 B. R. 382; s. c. *Lowell*, 293; *in re Burgess*, 3 B. R. 196; *in re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245; *in re S. P. Warner*, 5 B. R. 414; *in re John B. Harper*, 6 C. L. N. 279.)

In order to deprive a party of his discharge, the transfer or conveyance constituting the preference must be made by him in contemplation of bankruptcy or insolvency, or when he is in fact insolvent, and, in the latter case, the court must not only be satisfied that he was insolvent, but further, that he either had actual knowledge of his insolvency, or had good grounds for fearing and believing that he was insolvent, and acted on such belief in making the preference. In short, he must have designedly and intentionally given a preference, meaning to secure or pay that particular creditor, when he was not able to pay all his debts in the usual and ordinary course of business, at the time fearing and believing such to be the condition of his affairs. It is not necessary that the creditor receiving payment or security should, at the time, know of the insolvency, in order to defeat the discharge by the preference given to him. This fact can in no way affect the condition of the bankrupt himself. He must be held responsible for his own actions, and abide the consequences of his own fraudulent purposes and designs, and should not be permitted to derive any benefit from the fact that, in accomplishing his fraudulent purpose, he was shrewd enough to conceal from the other party his insolvent condition. (*In re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; *in re Adolph Lewis et al.* 2 B. R. 449; s. c. 3 Ben. 153; s. c. 2 L. T. B. 75; *in re Benjamin N. Foster*, 2 B. R. 232; s. c. 1 L. T. B. 127; *in re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *in re L. J. Doyle*, 3 B. R. 640; s. c. 1 Holmes, 61; *Eccerett v. Stone*, 3 Story, 446.)

It may be that the courts can fairly give a slightly different construction to the phrase "fraudulent preference" from that which obtains under the other section relating to the avoidance of the payment or security. (*In re Perry & Allen*, 20 Pitts. L. J. 184; s. c. 7 W. J. 379.)

No preference can be fraudulent, under the act, unless it is made within four months before the filing of the petition in bankruptcy. (*In re John B. Harper*, 6 C. L. N. 279; *in re Wm. H. Pierson*, 10 B. R. 107.)

An allegation of a preference should describe the property transferred either as to kind or quantity, and state to whom it was transferred. (*Brereton v. Hull*, 1<sup>st</sup> Denio, 75.)

An allegation that the bankrupt made payments or agreements, conveyances or transfers of property with intent to prefer, is bad, because it is in the alternative. (*Brereton v. Hull*, 1 Denio, 75.)

Where a preference has been fully condoned, so far as the preferred creditor is concerned, by a surrender, and the general creditors have been restored to the position they would have occupied if there had been no preference, the law does not intend the preference to be regarded as still subsisting against the bankrupt. The general creditors are not technically estopped, because they have no choice but to accept the surrender; but they will receive a dividend out of the very property, in accordance with the policy of the law, which condones the fault of the preferred creditor in consideration of his voluntary action; and the law does not intend to give him, who is usually the active party to the technical fraud, and the only one benefited by it, all the advantages of the repentance, and withhold them from the other party. The policy of the law appears to be to hold out a motive for the prompt settlement of all cases of this kind in favor of the general creditors, by forgiving mere preferences when voluntarily abandoned, even after bankruptcy. In this forgiveness the bankrupt may share, and he may lawfully reply to the specification that there was no preference, but only an attempted preference, abandoned before it was too late. (*In re Connor & Hart*, Lowell, 532; *contra*, *in re Michael Finn*, 8 B. R. 525.)

The English law has two conclusive presumptions. One is, that a trader who conveys his whole property to a pre-existing creditor must have contemplated a preference of that creditor; and the other is, that a debtor who pays an honest debt, with a part only of his assets, does not commit a technical fraud which will render the payment void, if the act was done in consequence of threats or demands on the part of the creditor. The bankrupt act adopts neither of these presumptions as conclusive. It defines a preference in the statute itself, or rather it has language which is inconsistent with the English definition. It makes the intent to prefer or give an advantage to one creditor the important thing, and this may evidently concur with pressure on the part of a creditor. A payment does not lose its character of preference by being made under pressure. Nor, on the other hand, will the fact that the conveyance was of all the property necessarily and in all cases show a preference. It is a very important circumstance, and almost decisive. But the presumption is still one of fact, and the question, in every case, is whether a preference was intended. It would be very difficult to explain so suspicious a fact. (*In re Batchelder*, 3 B. R. 150; s. c. Lowell, 373; *in re Connor & Hart*, Lowell, 532; *in re Ephraim Chase*, 22 Vt. 649.)

The payment of a debt through inadvertence, or under a mistaken sense of duty, and without any fraudulent intent, will not deprive a bankrupt of his discharge. (*In re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *in re Locke*, 2 B. R. 382; s. c. Lowell, 293; *in re Sidle*, 2 B. R. 220; *in re Burgess*, 3 B. R. 196.)

It is not sufficient to show that the bankrupt acted under legal advice in giving a preference, unless it is made to appear that he did so in good faith, believing that he had a legal right to do what he did. (*In re Michael Finn*, 8 B. R. 525.)

The mere making of payments in the course of his business, with the *bona fide*, though mistaken, expectation that he can keep along without going into bankruptcy, there being no actual design to favor or prefer, will not deprive a party of his discharge, although he was insolvent when the payments were so made.

(*In re Brent*, 8 B. R. 444; s. c. 2 Dillon, 129; *in re Geo. M. Garwood*, Crabbe, 516; *in re Alonzo Pearce*, 21 Vt. 611.)

A preference made by an alien, when he was a resident of a foreign country, is a ground for opposing the discharge, for he must show that he has complied with the conditions imposed by law, although he was not aware of them, or was not subject to the law when he did the act. In coming here for the benefits of a discharge from his debts, he adopts the law, and must take it as he finds it. There is no distinction between citizens and aliens in this respect. A citizen who owns property and carries on business in other countries can not do acts which are perfectly lawful there and still obtain the benefits of the statute if the acts are such as will be a bar to the discharge. (*In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.)

The application of money on deposit with a bank to pay a note held by it, is a preference, especially when the payment is made before the note becomes due. (*In re S. P. Warner*, 5 B. R. 414.)

An order by an insolvent debtor upon his consignee to pay a certain sum to a creditor, bars a discharge, although the transfer was inoperative through the omission of the consignee to carry it into effect. (*In re George M. Garwood*, Crabbe, 516)

The mere giving of a consent to a sale under a valid attachment is not a preference where the creditor only got what he would ultimately obtain in due course of law. (*In re Timothy Reed*, 21 Vt. 635.)

Suffering a judgment to be taken by default in an attachment suit after the commencement of the proceedings in bankruptcy, and making no objection to an assessment of the damages where the silent partner, who is a joint defendant, consents, is not a preference, for the security was gained by the attachment and not the judgment. (*In re Christopher C. Rowell*, 21 Vt. 620.)

An assignment exacting releases as a condition of receiving a dividend is a ground for refusing a discharge, because it is a preference. (*In re Aspinwall*, 3 Penn. L. J. 212; *contra*, *in re Charles W. Holmes*, 1 N. Y. Leg. Obs. 211.)

A mere preference given without contemplation of the proceedings in bankruptcy and more than six months before the filing of the petition, is no ground for withholding a discharge. (*In re Oliver L. Jones*, 13 B. R. 286.)

### Fraudulent Transfers.

(j) *Quære*. Does a specification which not only avers a fraudulent assignment, made in 1861, with the intent to enable the assignor to retain the control and disposition of a large amount of property pretended to be assigned, but goes further, and avers that this property has ever since been in the charge and custody, or under the control of the assignor; that no dividend or other distribution of this property has ever been made to the creditors under the assignment; that a partner now has in his hands, or under his control, a large amount of property and assets pretended to have been included in the assignment; and that this disposition, detention and custody of the property is with the knowledge, consent, and connivance of the bankrupt—set forth a state of facts which, if proved, would constitute a fraudulent transfer within the meaning of this clause? (*In re C. W. Moore*, 2 Ben. 325; *in re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137.)

An allegation that the bankrupt had made a fraudulent conveyance of his property, without stating the person to whom the conveyance was made or the property conveyed is insufficient. (*Stewart v. Hargrove*, 23 Ala. 429.)

A fraudulent conveyance made prior to the passage of the bankrupt law is ground for withholding a discharge. (*In re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137; *Peterson v. Speer*, 29 Penn. 478; *contra*, *in re Keefer*, 4 B. R. 389; s.

c. 3 C. L. N. 125; *in re* Charles P. Houghton, 4 Law Rep. 482; *in re* Charles H. Delavan, 5 Law Rep. 370; *Gove v. Lawrence*, 26 N. H. 484; *Porter v. Duglass*, 27 Miss. 379.)

A relative may purchase the property of the debtor at a public sale under an execution or mortgage, if he does not do so with the funds of the latter. The relationship merely serves to help out or give point to proofs of *mala fides* in the transaction. (*In re* John Bailey, 1 N. Y. Leg. Obs. 18; s. c. 5 Law Rep. 820)

When the least degree of concert or collusion is shown between the bankrupt and an alleged fraudulent grantee, the acts and declarations of the grantee may be given in evidence to affect the bankrupt. (*Peterson v. Speer*, 29 Penn. 478.)

If the bankrupt, shortly before the filing of the petition in bankruptcy, gave his wife a considerable sum of money to meet the family expenses, this was fraudulent. The amount allowed by law as exempt from the operation of the bankrupt law, is all the bankrupt had the right to retain. The money given to his wife belonged to his creditors, and should have been entered on his schedule of property and assets. (*In re* Jorey & Son, 2 B. R. 668; s. c. 2 Bond, 336)

Spending large sums of money in making permanent improvements upon property belonging to his wife, with intent to delay, hinder and defraud his creditors, is not a fraud of such a character as will bar a discharge. (*In re* John B. Harper, 6 C. L. N. 279.)

The fraudulent payment, gift, transfer, conveyance and assignment must be such as are denominated frauds by the terms of the bankrupt law, and particularly described in sections 5128 and 5129. (*In re* John B. Harper, 6 C. L. N. 279.)

A fraudulent conveyance made at a time so recent that it will effect any of the creditors who can come in under the bankruptcy, is a ground for withholding a discharge. (*In re* Oliver L. Jones, 13 B. R. 286.)

### Gaming.

(k) Property acquired in gaming is assets, and, if the bankrupt spend it in gaming, he loses his right to a discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property, once in the possession of the bankrupt has been spent in gaming, which, if not so spent, might be assets in bankruptcy, the case is made out. It is too late, after it is spent, to say that it was unlawfully acquired, or acquired in a particular way, or that creditors are no worse off on the whole. Such losses can not be distinguished from those which any other debtor might sustain in a similar way. Neither the knowledge of the creditors of the course of business of the debtor, nor any intent on his or their part, is material. The fact can only be inquired into. Nor does the law in the matter of discharge invest the court with discretion, as it does so largely in England. It is a mere question of legal right. (*In re* Marshall, 4 B. R. 106; s. c. Lowell, 462)

### Fictitious Debts.

(l) Setting forth a false and fictitious debt in the schedule, is an admission of it against the estate that will bar a discharge, but the burden of proof is on the creditors to show that the debt is false and fictitious. (*In re* Orcutt, 4 B. R. 588; s. c. 5 Ben. 19.)

The language of the statute does not embrace a claim admitted to be just in its origin, but against which the bankrupt insists upon rights of set-off, or asserts that it has been satisfied. The distinction is between fabricating a debt where

none exists in fact, and stating a debt unquestionably outstanding with the claim of defense to it. (*In re Mark Banks*, 1 N. Y. Leg. Obs. 274.)

A judgment confessed by the bankrupt without any valuable consideration, however fraudulent it may be as to creditors, is binding on him, and he may put the holder of the judgment on the list of his creditors. (*In re David H. Robertson*, 1 N. Y. Leg. Obs. 20.)

In order to bar the discharge the debt must be falsely admitted in proceedings under the act. Merely giving a preference to a fictitious debt in an assignment is not sufficient. (*In re Chas. H. Delavan*, 5 Law Rep. 370.)

The placing of a fictitious debt upon the schedules as just and owing is admitting the debt against the estate within the mischief and meaning of the statute. (*In re Chas. H. Delavan*, 5 Law Rep. 370.)

### Books of Account.

(*m*) The word "after" means at any time since the passage of the act, though the neglect may not cover the whole period. (*In re Rosenfield*, 1 B. R. 575; s. c. 1 L. T. B. 81.)

If the objection is that certain entries are wanting, or that there are irregularities in the mode of keeping proper books, they ought to be pointed out in the specifications; but where objection is, that a cash account is wholly wanting, a general specification is sufficient. (*In re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.)

A specification averring that the bankrupt has not kept proper books of account in his business, in that such books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no cash book whatever was kept for a period of time. (*In re Belis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 53; *in re Bound*, 4 B. R. 510.)

The law intends that a merchant's or trader's books and documents should be in such a condition as to show his business situation to his creditors as well as to himself. By keeping such books in a proper manner, a debtor can not but be aware of his standing, his property and effects, and his liabilities. On the other hand, his books should exhibit to his creditors his position, so that, when placed before them for investigation, they may at once ascertain his standing and property and the result of his business, and whether everything has been fair and honest on his part. (*In re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; *in re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; *in re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Keach*, 3 B. R. 13; s. c. Lowell, 335; s. c. 1 L. T. B. 167; *in re William Archenbraun*, 12 B. R. 17; s. c. 7 C. L. N. 231.)

The word "tradesman" has substantially the same meaning as shopkeeper. (*In re Cote*, 14 B. R.)

As the section is almost penal, the term "tradesman" should be confined to those who belong to that class with some degree of permanence. (*In re Cote*, 14 B. R.)

Persons who buy and sell in a small way merely by way of eking out their living, which is earned substantially in other ways, are not tradesmen. (*In re Cote*, 14 B. R.)

Manufacturers of and dealers in shoes are tradesmen. (*In re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336.)

A party whose only business is that of speculating in stocks is not a merchant or tradesman, if he keeps no office and buys and sells through brokers. (*In re William H. Marston*, 5 Ben. 313.)

A stair-builder is a merchant or tradesman. He is none the less a tradesman because he is also a manufacturer of the stairs, or because he does not resell the



umber and other materials in the same state in which he buys them, or because he does not buy and sell completed stairs. (*In re Edward Garrison*, 7 B. R. 287; c. 5 Ben. 430.)

A person buying and selling goods for the purpose of gain, though only occasionally, is a merchant and trader. (*In re O'Bannon*, 2 B. R. 15.)

The distinction taken in England, whether every one who buys and sells goods is *quoad hoc* a tradesman, may admit of question. And yet it is very difficult to draw any line founded solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief of the act. Though, where the buying and selling are a mere incident, as, if a farmer should buy stock or grain in addition to what he had raised, perhaps such a person could not be described as a tradesman. (*In re Tyler*, 4 B. R. 104.)

A person who bought goods which he could use, and did use, and which he sold when pressed for money, can not be deemed a trader. Isolated and separate acts, having no connection with each other, and showing no intention to set up any trade, do not make a person a tradesman. The deliberate purpose of buying goods to sell them again might be within the letter of the act. So might an amount of trading, however small, connected with an intent to deal generally. (*In re W. M. Rogers*, 3 B. R. 564; s. c. Lowell, 423.)

A person whose occupation is that of a baker, and who buys flour which he converts into bread, and then sells the bread to daily customers, is a tradesman. (*In re Cocks*, 3 Ben. 260.)

If a firm has not kept proper books of account, a partner can not obtain a discharge, although he was a junior member and not a keeper of the books. (*In re Wm. H. Pierson*, 10 B. R. 107.)

When the business has been wholly closed, so that no rights or interests can be subject to examination or decision in the bankrupt court, and there is nothing left outstanding in the way of assets or of debtors or of creditors, and the business was one which neither required nor received the use of any capital, so that there is nothing in it which can concern the assignee, or which the books could now him to his advantage, such past trading can not be considered as within the equity or letter of the statute, and in those transactions the bankrupt is not a merchant or tradesman within the fair construction of the bankrupt act. The books are not the only proper evidence that the business is thus wholly closed and past. This may be proved *abundante*. The schedules, proofs of debt, and all the proceedings in the case, may be admitted for that purpose, together with oral testimony. (*In re Keach*, 3 B. R. 13; s. c. Lowell, 335; s. c. 1 L. T. B. 167.)

The final winding up of a trader's business should be recorded, as well as its current course, and, unless the bankrupt can clearly show that everything has been so fully ended that no such account could affect his standing, or touch the interests of his creditors at the time of his bankruptcy, the omission to keep proper books, which, at the time of his trading, was an illegal act, will be an effectual bar to his discharge. (*In re Tyler*, 4 B. R. 104.)

If there was no continued trading, the bankrupt was not required to keep regular books. (*In re Mark Banks*, 1 N. Y. Leg. Obs. 274.)

The creditor must take the burden of proof and show that the bankrupt did not keep proper books of account. (*In re Mark Banks*, 1 N. Y. Leg. Obs. 74.)

This is a most important provision, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtor, to ascertain what has become of his property, what are the causes of his failure, and whether he has dealt fairly and equally with his creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of recording

them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, and in a position to know and to be able to carry out the law. (*In re George & Proctor*, Lowell, 409.)

The intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Such omission prevents a discharge, whether the intent was fraudulent or not. (*In re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; *in re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336; *in re Schumpert*, 8 B. R. 415; *in re William Archenbraun*, 2 B. R. 17; s. c. 7 C. L. N. 231.)

No excuse, however true, and no innocence of intention, will avail to supply the deficiency. (*In re George & Proctor*, Lowell, 409.)

Whether the books of account are properly kept is a question which must be decided in each case upon the facts as they appear, and not upon any strict rule that such and such books and such and such entries are essential in all cases. (*In re Perry & Allen*, 20 Pitts. L. J. 184; s. c. 7 W. J. 379.)

It is not necessary that these books be kept according to the forms taught in schools, or in ledgers and day-books bound in leather. In business of some kinds, any contemporaneous written memorials, formal or informal, of a tradesman's transactions, whether in a bound volume or in detached sheets, may answer the definition of proper books of account, if they have been preserved and so arranged as to present an intelligible and substantially complete exposition of his affairs. The question of what are proper books must be in each case a question of evidence. What would be proper and sufficient books in one case would be improper and insufficient in another. (*In re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; *in re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110; *in re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.)

It is not sufficient that the bankrupt employed a book-keeper whom he considered competent, and left the whole charge of the books to him. The law does not require traders to keep a book-keeper, but to keep books, and they are responsible to see that this is done. (*In re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.)

Entries upon numerous slips of paper, each entry being on a separate slip, is not a keeping of books under the law. This may do for a short time in the absence of the books, but not as a system or policy of a permanent character. If the books were lost, and there was no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupt to supply their place with others. (*In re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.)

A retail dealer who keeps the usual books and all his invoices keeps proper books of account, although he kept no invoice book. (*In re J. K. P. Reed*, 12 B. R. 390.)

There is no positive rule of law requiring the entries to be made daily (though they ought to be at or near the time of the transactions), or the balances to be made at any fixed periods, or the books to be kept in any particular mode. (*In re George & Proctor*, Lowell, 409.)

The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary to exhibit to a person of competent skill the true state of his dealings and affairs. (*In re Hammond & Coolidge*, 2 B. R. 273; s. c. Lowell, 381; *in re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336; *in re Mark Banks*, 1 N. Y. Leg. Obs. 274.)

It is a question of fact whether the books are such as will give to a competent person examining them knowledge of the true state of the bankrupt's affairs. The question is addressed to the good sense and knowledge of the jury,

aided by such explanations as may be offered by experts or other competent witnesses. (*In re George & Proctor*, Lowell, 409; *in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381; *in re Schumpert*, 8 B. R. 415; *in re J. K. P. Reed*, 12 B. R. 390.)

Where the day-book and the ledger taken together show all the transactions of the bankrupt, a discharge may be granted, although there are some meaningless mutilations in each. (*In re Wm. H. Pierson*, 10 B. R. 107.)

A cash account is necessary to an understanding of a trader's business, and when one has not been kept a discharge will be refused. (*In re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; *in re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *in re Belis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 53.)

The cash book should show, in an intelligible and proper manner, the nature and character of the receipts and disbursements of cash made by the bankrupt. (*In re Mackey et al.* 4 B. R. 66; s. c. 2 C. L. N. 393.)

The omission of an entire book or set of entries, necessary to the understanding of the business, prevents a discharge. (*In re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110.)

Careless omissions or mistakes, without fraud, in books themselves proper, may be overlooked. (*In re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110; *in re Burgess*, 3 B. R. 196.)

The question is, whether the bankrupt did all that a prudent business man, intending to keep his accounts accurately, would naturally do. A temporary omission, in good faith and for a reasonable time, to make the entries, would not be a failure to keep books. But a neglect to keep them on purpose for a reasonable time would be. (*In re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.)

Where one of the books has been mutilated, but all the outstanding accounts which it contained have been transferred to another book, a discharge will be granted when the evidence shows that no fraud was done to the creditors by the change, and that the accounts were all collected as far as collectible. (*In re Noonan & Connolly*, 3 B. R. 267.)

Persons who buy on credit, and sell again in such wise as to be merchants or tradesmen, must see to it, in order to be in a position when misfortune overtakes them to obtain the benefits of the bankrupt act, that they keep such books in relation to their business as will furnish an intelligible account to their creditors of the state and course of their business transactions, not leaving such accounts to be made up from memory, or from sources other than such books. (*In re Edward Garrison*, 7 B. R. 287; s. c. 5 Ben. 430.)

A discharge will not be refused to a bankrupt for not keeping proper books of account, without full evidence of the facts and of their bearing upon his business. The books themselves should be produced, and the parol statements should be definite. (*In re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.)

A canceled check is admissible in evidence in connection with the stump of the check book, to show how the book was kept. (*In re W. E. Brockway*, 7 B. R. 595.)

### Assent of Creditor to Discharge.

(n) A specification which avers that the bankrupt or some person in his behalf has procured the assent of certain creditors to his discharge and influenced their action by a pecuniary consideration is too vague to be triable. (*In re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245.)

The specification should aver that the bankrupt has procured the assent of a creditor to the discharge by a pecuniary consideration or obligation. The bank-

rupt is not forbidden to procure the assent of a creditor to his discharge, nor is he forbidden to influence the action of a creditor. The prohibition is against procuring such assent or influencing such action by any pecuniary consideration or obligation. (*In re Mawson*, 1 B. R. 437, 548; s. c. 2 Ben. 332, 412; *Fox v. Paine*, 10 Ala. 523; *Coates v. Blush*, 55 Mass. 564; *Chamberlin v. Griggs*, 3 Denio, 9.)

If a bankrupt obtains the consent of a creditor to a discharge by giving him his indorsed note for a part of the debt, his discharge will be refused, although he had previously procured the assent of a sufficient number to entitle him to a discharge. (*In re E. V. Palmer*, 14 B. R. 432.)

If a claim is purchased by a friend of the bankrupt with no conceivable motive but to benefit the bankrupt, and the assent of the creditor to a discharge is so placed on the paper that it may have influenced others, the presumption is that the purchase was made in behalf of the bankrupt, and the discharge will be refused. (*In re Whitney et al.* 14 B. R. 1; s. c. 8 C. L. N. 195.)

### Transfers in Contemplation of Becoming Bankrupt.

(c) An examination of the act, in connection with the Forms, shows that the expression, "becoming bankrupt," means committing an act of bankruptcy, and that the expression, "in contemplation of becoming bankrupt," means in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. A debtor may become bankrupt or commit an act of bankruptcy by filing a petition under section 5014, or by doing some one of the things which is declared by section 5021 to be the commission of an act of bankruptcy. It is not necessary, in order that he should have contemplated becoming bankrupt, that he should have contemplated having a petition filed against him, and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by section 5021 to be an act of bankruptcy, or filing a petition under section 5014. (*In re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379; *in re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245; *in re Lawson*, 2 B. R. 113; *in re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137; *in re J. H. C. Lutgens*, 7 Pac. L. R. 89; *in re Wm. H. Pierson*, 10 B. R. 107; *in re Alonzo Pearce*, 21 Vt. 611; *in re Christopher C. Rowell*, 21 Vt. 620; *Suan v. Littlefield*, 58 Mass. 574; *Caryl v. Russell*, 13 N. Y. 194; s. c. 18 Barb. 420; *North American Ins. Co. v. Graham*, 5 Sandf. 197; *vide in re Chas. W. Holmes*, 5 Law Rep. 360.)

A debtor may sell property for the purpose of procuring means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount. (*In re Keefer*, 4 B. R. 389; s. c. 3 C. L. N. 125; *Flournoy v. Newton*, 8 Geo. 306; *Lyon v. Marshall*, 11 Barb. 241.)

Where an insolvent debtor makes an assignment for the benefit of creditors three days before the filing of his petition in bankruptcy, his denial of any intention, at the time of making the assignment, to take the benefit of the bankrupt act, however positive, is not, in the absence of confirmatory circumstances, sufficient to repel the presumption arising from the facts, and a discharge must be refused. A system which would thus, in practice, permit a discharge of the debtor, without a simultaneous administration and distribution of the property among the creditors, would be a monstrosity. (*In re Broadhead*, 2 B. R. 278; s. c. 3 Ben. 106.)

An assignment for the benefit of creditors by a party in contemplation of becoming bankrupt is good ground for refusing a discharge in a case of voluntary bankruptcy. The fact that the assignment is one of all the debtor's property, and creates no preferences among his creditors, makes no difference. It is as repugnant to the act as if it had assigned only a part of his property, or had created preferences. It shows an intent and a purpose on the part of the bankrupt to

assume the distribution of his property in satisfaction of his debts through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the bankrupt act in satisfaction of the same debt. There could be no other purpose. (*In re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379; *contra*, *in re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; *in re John M. Quackenboss*, 1 N. Y. Leg. Obs. 146; *Smith v. Ely*, 10 B. R. 553.)

This clause does not include consignments which do not change the title, but are merely the employment of an agent. (*In re Hammond & Coolidge*, 3 B. R. 278; s. c. Lowell, 381.)

The filing of a bill in equity against a copartner, and procuring the appointment of a receiver is not such a transfer as is contemplated by this section. (*In re Robert H. Shoemaker*, 4 Biss. 245.)

SEC. 5111.—Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

Statute Revised—March 2, 1867, ch. 176, § 31, 14 Stat. 532. Prior Statute—Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

### Filing Specifications.

Any person who shows by affidavit or otherwise that he is a creditor, has the right to appear and oppose the discharge, without being in technical strictness a creditor who has proved his debt. To entitle him to oppose the discharge, he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown. (*In re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484; *in re Smith & Bickford*, 8 Blatch. 461; *in re Murdock*, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; *in re Boutelle*, 2 B. R. 129; s. c. 15 Pitts. L. J. 616; *in re Samuel Book*, 3 McLean, 317; *contra*, *in re Levy et al.* 1 B. R. 327; s. c. 2 Ben. 169; *in re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45; *in re C. N. Palmer*, 3 B. R. 301; *in re Brown King*, 1 N. Y. Leg. Obs. 22; s. c. 5 Law Rep. 220.)

A judgment obtained after the adjudication in bankruptcy, creates a new debt which can not be proved in bankruptcy, because the judgment is a merger, and creates a new debt, and the judgment creditor can not oppose the discharge, because he has no provable debt, and because the discharge will be no bar to the judgment. A creditor who proved his debts before obtaining judgment, may keep his proof and oppose the discharge if he will file a stipulation to release his judgment in case the final decision in bankruptcy shall grant the bankrupt his discharge. (*In re Gallison et al.* 5 B. R. 358; s. c. 2 L. T. B. 195.)

Where the bankrupt has acted as administrator, and the probate court has directed a dividend to be made among the creditors, any creditor of such an estate has an interest in the bankrupt's estate, and may oppose his discharge. (*In re John C. Tebbetts*, 5 Law Rep. 259.)

If a creditor who held the bankrupt's bond assigned it as a collateral to secure a debt, and then allowed a judgment to be recovered thereon in his name, has any surplus that would come to him after the payment of the debt, he may oppose the discharge. (*In re Traphagan*, 1 N. Y. Leg. Obs. 98; s. c. 5 Law Rep. 323.)

The appointment of a receiver and an assignment of the claim to him does not divest the creditor of his interest in the claim so but that he can oppose the discharge. (*In re Traphagan*, 1 N. Y. Leg. Obs. 98; s. c. 5 Law. Rep. 323.)

The specifications may be filed with the register. Form No. 53 contemplates that they may be addressed to him. (*In re Bellamy*, 1 B. R. 98; s. c. 1 Ben. 426.)

By section 4999, the register is forbidden to hear any questions as to the allowance of an order of discharge. Such questions are to be determined by the court after the bankrupt has applied for his discharge. If the specifications are filed, the case is then *ipso facto* removed from before the register and taken into court. (*In re Mawson*, 1 B. R. 265; s. c. 2 Ben. 122; *in re Puffer*, 2 B. R. 43.)

A creditor may file specifications at any time. Rule XXIV is enabling, and not prohibitory. A creditor who does not file specifications by the time specified in Rule XXIV, will lose his opportunity of doing so. But he has the right to file them at any stage of the proceedings before that time. (*In re Baum*, 1 B. R. 5; s. c. 1 Ben. 274.)

The orderly conduct of the proceedings requires that the trial of all questions so raised shall be postponed till the hearing of the petition for discharge. The register will proceed with the case, notwithstanding the specifications. (*In re Puffer*, 2 B. R. 43; *in re Brisco*, 2 B. R. 226; *in re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; *in re Paget*, 1 Penn. L. J. 367; *in re George Livermore*, 5 Law Rep. 370.)

The proceedings upon the order to show cause may be adjourned upon the return day thereof. (*In re Mawson*, 1 B. R. 271.)

Such an adjournment may be made without requiring the creditors to file an appearance under Rule XXIV. The rights of a creditor upon the adjourned day are the same in all respects as upon the return day. (*In re John Thompson*, 1 B. R. 323; s. c. 2 Ben. 166; *in re Tallman*, 1 B. R. 540; s. c. 2 Ben. 404; *in re James M. Seabury*, 10 B. R. 90; *in re S. S. Houghton*, 10 B. R. 337.)

On the entry of an appearance of a creditor to oppose a discharge, all proceedings upon the petition for a discharge are suspended until specifications shall be filed. On filing the specifications, the hearing upon the petition is at once transferred into court. There can not, therefore, be any examination of the bankrupt on the application for a discharge before the register. The proceeding for an examination must be taken under section 5086. (*In re Frizelle et al.* 5 B. R. 119.)

The time to file objections to a discharge may be kept open by adjourning any day which may be fixed for showing cause against a discharge until a full, reasonable opportunity is afforded for the examination of the bankrupt and his wife and other witnesses. (*In re Seckendorf*, 1 B. R. 626; s. c. 2 Ben. 462.)

The time for showing cause against the discharge may be extended from time to time upon the application of a creditor, even though a protest has been made against the allowance of his claim, until the examination of the bankrupt and other witnesses is concluded, the whole matter being subject to regulation by the register and the court as to the use of reasonable diligence. (*In re Belden & Hooker*, 4 Ben. 225.)

An adjournment *sine die* terminates the proceedings. The petition for discharge remains good, but nothing can be done under it unless a new order to show cause is issued. (*In re Seckendorf*, 1 B. R. 626; s. c. 2 Ben. 462.)

Any abuse by the register of the power to adjourn may be corrected by the district court, which has power to supervise the proceedings. (*In re W. E. Robinson*, 2 B. R. 342; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; s. c. 2 L. T. B. 18.)

Upon the day appointed to show cause, a creditor intending to oppose the application for a discharge must enter his appearance in opposition thereto. His appearance is entered with the clerk, as provided in Rule III. Until such appearance is entered, the creditor has no standing in court as to the petition

for a discharge, and therefore can not be heard in opposition thereto. (*In re Robert A. Sutherland*, 1 Deady, 573.)

On the day fixed to show cause, the creditor must appear by himself or counsel, and enter his opposition, which should either be in writing or verbally; but an entry of such opposition should be made on the docket, and suspend further proceedings until the filing of the specifications; and if the specifications are not filed within ten days, the cause progresses as though no opposition had been made, unless, for sufficient cause shown, the time for filing is extended. A request to have an appearance entered can not be made until after the petition for discharge is filed. (*In re McVey*, 2 B. R. 257; *in re James M. Seabury*, 10 B. R. 90.)

The appearance is not complete until the clerk enters the name of the attorney and his place of business upon the docket, with the date of entry. (*In re James M. Seabury*, 10 B. R. 90.)

An appearance entered after the return day must be disregarded. (*In re McVey*, 2 B. R. 257; *in re Smith & Bickford*, 5 B. R. 20; *Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166; *in re Robert A. Sutherland*, 1 Deady, 573; *in re James M. Seabury*, 10 B. R. 90; *in re Joseph Buxbaum*, 13 B. R. 477.)

If the creditor did not receive notice of the application for a discharge, he may be allowed to enter an appearance after the return day. (*In re Chauncey J. Filley*, 2 Cent. L. J. 419.)

The district court may, in its discretion, allow a creditor to enter his appearance and file specifications in opposition to a discharge, although the time for entering an appearance in opposition thereto has expired. (*In re Lewis Levin*, 14 B. R. 385.)

Specifications not filed within the prescribed time can not be entertained. (*In re McVey*, 2 B. R. 257.)

A specification not signed by an attorney legally authorized to act for the creditor is a nullity, and must be disregarded. A power of attorney not containing a power of substitution, does not authorize a person other than the party duly constituted agent thereby, to sign his own name or affix the name of such agent to specifications on behalf of a creditor. (*In re C. N. Palmer*, 3 B. R. 301; *Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166.)

When a creditor has regularly entered his appearance on the return day, but has failed, through inadvertence, to file specifications within the prescribed time, the court, on cause shown, will allow him to file them *nunc pro tunc*. (*In re Grefe*, 2 B. R. 329.)

The filing of an opposition to a bankrupt's discharge is the commencement of an individual proceeding on the part of the creditor against the bankrupt. It is, in fact, a suit arising in the course of the bankrupt proceedings. It involves pleadings, costs, and attorney's fees; it may involve a trial by jury. The question of discharge may linger in the court for years, and in every case involves more or less expense and costs. A letter of attorney, according to Form No. 26, does not authorize the attorney to make opposition to the discharge of the bankrupt, and involve him in such a controversy. (*Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166.)

The proceeding for a discharge depends on the proceedings in bankruptcy, and is inseparably connected with them. In fact and in law it must be considered as a continuation of the former proceedings. (*In re Ankrim*, 3 McLean, 285.)

If the original objector declines to prosecute his specifications, other creditors may be permitted to enter their appearance and be heard in support of the objections, although the time for entering an appearance is past. (*In re S. S. Houghton*, 10 B. R. 337; *contra*, *in re David A. McDonald*, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.)

Where there is no opposing party, the petition of the bankrupt for final discharge may be continued from time to time to suit the convenience of the bankrupt. A day is appointed for the creditors to show cause, but such appointment does not fix the day for hearing the application for a discharge. (*In re Robert A. Sutherland*, 1 Deady, 573.)

### Averments in Specifications.

The specification should state the name of the opposing creditor. (*In re Robert H. Shoemaker*, 4 Biss. 245.)

All grounds against the discharge, except those which appear on the face of the proceedings, must be assigned in writing as specifications, whether they are enumerated in section 5110 or not, if the creditor intends to rely on them. (*In re James M. Seabury*, 10 B. R. 90.)

The specifications must not be vague and general. The allegations must be allegations of facts, and must be distinct, precise, and specific, and must not be merely allegations in the language of section 5110, or allegations so general as really not to advise the bankrupt what facts he must be prepared to meet and resist. (*In re Rathbone*, 1 B. R. 294, 324; s. c. 2 Ben. 138; *in re Beardsley*, 1 B. R. 304; *in re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; *in re Mawson*, 1 B. R. 437; s. c. 2 Ben. 332; *in re Waggoner*, 1 Ben. 532; *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45; *in re Butterfield*, 14 B. R. 147; s. c. 5 Biss. 120.)

The strictness of common-law pleading is not required, but the bankrupt is entitled to such particularity of statement as to give him reasonable notice of what is expected to be proved against him. (*In re Smith & Bickford*, 5 B. R. 20.)

Specifications must particularize facts descriptive of the offense as charged to constitute the ground for objecting to the discharge, setting forth, as clearly as may be, the time, place, person, &c. A specification containing a reference to facts supposed to be shown upon an examination of the bankrupt is, in that respect, faulty. The facts alone should be set forth, without reference to any matter *aliunde*. (*In re Eidom*, 3 B. R. 106.)

The specifications may be amended. (*In re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; *in re Rathbone*, 1 B. R. 294; s. c. 2 Ben. 138; *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.)

The creditors will not be compelled to abide by the specifications placed on file, when there has not been sufficient examination or disclosure on the part of the bankrupt before the time appointed for a hearing in court upon his application for his discharge. (*In re Wm. H. Long*, 3 B. R. quarto, 66.)

The court may, in its discretion, where it appears to be due to justice, allow an amendment of the specifications, even at the trial. (*In re Belis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 53.)

Vague and general specifications may be stricken out. (*In re Waggoner*, 1 Ben. 532.)

Vague specifications may be disregarded. (*In re Rathbone*, 1 B. R. 294; s. c. 2 Ben. 138; *in re Son*, 1 B. R. 310; s. c. 2 Ben. 153; *in re Tyrell*, 2 B. R. 200; *in re Hanson*, 2 B. R. 211; *in re Dreyer*, 2 B. R. 212.)

### Trial of Specifications.

The bankrupt may question the sufficiency in law of the grounds of opposition to his discharge by a demurrer, or by exceptions analogous to those allowed in equity. (*In re Rosenfield*, 2 B. R. 117; 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *in re McVey*, 2 B. R. 257; *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.)



The court may direct a trial of the specifications by a jury. When there is a trial, the docket fee of \$20 to the attorney of the successful party is taxable as part of the costs. The word "trial" means a trial by jury. The pleadings may be filed, the issues made up, but until the jury is sworn there is no trial. (*Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749; *in re Eidom*, 3 B. R. 160.)

The opposing creditor can not move to dismiss the petition because the bankrupt is supposed to be dilatory in bringing the matter on for a hearing. The remedy of the creditor is to move the court to set down the matter for hearing upon the petition and his objections thereto. (*In re Robert A. Sutherland*, 1 Deady, 573.)

On the day assigned for hearing the specifications, the creditors are entitled to a trial by jury, without having previously made a special demand for it. (*In re Lawson*, 2 B. R. 113.)

The burden of proof is on the creditor to show that the bankrupt has forfeited his title to a discharge by having done some of the things specified in section 5110, as grounds for withholding it. (*In re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; *in re Mawson*, 1 B. R. 548; s. c. 2 Ben. 412; *in re Okell*, 2 B. R. 105; *in re Burgess*, 3 B. R. 196; *in re Noonan & Connolly*, 3 B. R. 267; *in re George & Proctor, Lowell*, 409; *Loud v. Pierce*, 25 Me. 233.)

When the creditors have established a *prima facie* case, the burden of overthrowing it is imposed upon the bankrupt. (*In re P. A. Doyle*, 3 B. R. 782.)

The decision rendered upon the petition for involuntary bankruptcy does not affect the debtor on the question of his discharge. (*In re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283.)

The debtor will not be prejudiced in his application for a discharge by allowing judgment to be taken by default on the petition in involuntary bankruptcy. (*In re Lathrop, Luddington & Co.* 3 B. R. 46; s. c. 2 L. T. B. 124; *contra, in re Schoo*, 2 B. R. 215.)

Evidence in support of the specifications is the only evidence that can be introduced. The creditor is bound by his specifications. He can not go beyond them, or produce evidence outside of them. (*In re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *Timothy v. Reed*, 21 Vt. 635.)

A creditor who has given his assent to any act on the part of the bankrupt is estopped from urging that act as a ground for withholding the discharge. (*In re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85; *in re Whetmore*, 1 Deady, 585; s. c. 1 L. T. B. 136; *in re Jones & Hoyt*, 12 B. R. 48; s. c. 7 C. L. N. 162.)

A person who was not a creditor at the time of the alleged removal of property, or whose debt was then barred by the statute of limitations, can not object to the discharge on the ground of the removal. Practically, as to him, there was no fraud. (*In re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.)

The only grounds on which the charge will be withheld, are those set forth in the specifications. (*In re Rosenfield*, 3 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *in re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.)

The assertion of a fact by the bankrupt's wife, in his presence and denied by him, can not be given in evidence to impeach the testimony of the bankrupt. (*In re John Q. McCarty*, 5 Law Rep. 822.)

An exemplification of the sworn answer of the bankrupt to a bill brought against him in chancery is admissible against him. (Anon 1 N. Y. Leg. Obs. 349; *in re Maynard Bragg*, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.)

Where an original bill filed by the bankrupt is given in evidence, the amended bill is not admissible to rebut or explain admissions made in the original bill. (*Pearsall v. McCartney*, 28 Ala. 110.)

When the transfer is shown to be in writing, the written instrument must be produced, although its contents can be proved by the declarations of the bankrupt. (*Flournoy v. Newton*, 8 Geo. 306.)

It is not competent for the bankrupt to repel a charge of fraud by evidence of his character. (*Pearsall v. McCartney*, 28 Ala. 110.)

The declaration of a party in the possession of real or personal property that he holds in his own right or under another, is proper evidence as a part of the *res gestæ*, which *res gestæ* is his possession, but such declarations beyond this are no part of the subject-matter or thing done, and can not be received as evidence. (*Gilbert v. Bradford*, 15 Ala. 769.)

The opposing creditor holds the affirmative of the issue, and ought to begin. In such a proceeding the objector is the actor, and the bankrupt stands on the defensive. (Anon. 3 N. Y. Leg. Obs. 155.)

If there was probable cause for filing specifications, each party may be required to pay his own costs. (*In re Christopher C. Rowell*, 21 Vt. 620.)

The costs of taking testimony before a register to be used in the trial of the specifications can not be taxed against an unsuccessful creditor. (*In re Eidorn*, 3 B. R. 160.)

When the bankrupt has, in all things, fully conformed to his duty under the act, the assignee, when he has funds belonging to the estate, should pay the costs incurred upon the petition for a discharge, the publication of notice of hearing, and the hearing of the petition. The case would be different if creditors successfully opposed the granting of a discharge. (*In re Olds et al.* 4 B. R. 146; s. c. 2 L. T. B. 125; *in re Dibblee et al.* 4 Ben. 304; *in re Moses Guild*, 1 W. & M. 29.)

A discharge granted after trial upon a specification charging the concealment of certain property, is not a bar to a suit by the assignee to recover the same. (*Jones v. Milbank*, 6 Lans. 73.)

The district court will not restrain the assignee from prosecuting a suit in a State court, although the allegations are the same in substance as those stated in specifications against a discharge by others than the assignee, and which were then held out to be proved as matter of fact. It is more proper that such questions should be determined in the plenary suit, if raised therein, and by the tribunal in which the suit is brought, with the provisions for review which obtain between party and party. (*In re Penn et al.* 8 B. R. 93; s. c. 5 Ben. 500.)

The district court may set aside the verdict of a jury, and order a new trial in consonance with the rules upon which such new trials are granted in courts of law. (*In re Barney Corse*, 1 N. Y. Leg. Obs. 231.)

The decision of the district court on the specifications is an estoppel to any other action between the same parties involving the same questions. (*Downer v. Rowell*, 25 Vt. 336.)

The discharge of the bankrupt after opposition by a creditor does not operate as a bar to a recovery by the assignee against a vendee in an action of ejectment for property fraudulently conveyed to him by the bankrupt. (*Bradley v. Hunter*, 50 Ala. 265.)

If there is an omission to enter an order refusing a discharge, the bankrupt court may make it *nunc pro tunc*, if no rights of third parties have intervened which can be prejudiced thereby. (*In re Drisko*, 13 B. R. 112; s. c. 14 B. R. 551.)

A bankrupt whose discharge has been refused, may, upon the repeal of the bankrupt law, apply for the benefit of a State insolvent law. (*Fisher v. Currier*, 48 Mass. 424.)

The refusal of a discharge by the district court protects the creditors whose debts were provable, against any discharge of the same debts by operation of any State law. (*Fisher v. Currier*, 48 Mass. 424.)

If the debtor whose discharge has been refused, takes the benefit of the State insolvent law upon the repeal of the bankrupt law, the creditors whose debts were provable in bankruptcy may prove their debts in insolvency, but in that case their debts will be barred by a discharge. (*Fisher v. Currier*, 48 Mass. 424.)

SEC. 5112.—In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge, but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

Statute Revised—July 27, 1868, ch. 258, § 1, 15 Stat. 22 7. Prior Statute—March 2, 1867, ch. 176, § 33, 14 Stat. 532.

SEC. 5112A (22 June, 1874, ch. 390, § 9, 18 Stat. 180).—That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section *five thousand one hundred and twelve* [thirty-three of said act of March second, eighteen hundred and sixty-seven] requiring fifty per centum of such assets is hereby repealed.

The amendment applies to pending cases; and any bankrupt, whether voluntary or involuntary, may obtain a discharge by complying with its provisions. (*In re King*, 10 B. R. 556; s. c. 3 Dillon, 3; *in re Griffiths*, 10 R. R. 456; s. c. 1 A. L. T. [N. S.] 476; s. c. 10 A. L. J. 249; s. c. 1 Cent. L. J. 507; *in re Perkins*, 10 B. R. 529; s. c. 6 Biss 185; *in re Louis Cerf*, 11 B. R. 143; s. c. 7 C. L. N. 79; *in re Jones & Hoyt*, 12 B. R. 48; s. c. 7 C. L. N. 162; *contra, in re Charles J. Francke*, 10 B. R. 438; s. c. 7 Ben. 420; s. c. 1 A. L. T. [N. S.] 476; *in re George H. Shelden*, 12 B. R. 63.)

In voluntary cases pending at the time of the passage of the amendment, the bankrupt need not show any per centage of assets, nor any assent of creditors in respect to debts contracted prior to January 1, 1869. (*In re George H. Shelden*, 12 B. R. 63.)

A voluntary bankrupt is only required to file the assent of the requisite proportion of the creditors to whom he is liable as principal debtor and who have proved their debts. (*In re James C. Derby*, 12 B. R. ~~244~~ 241)

A partner who is brought into bankruptcy by his copartner, must have assets to the required amount, or obtain the consent of the requisite proportion of the creditors, for such a proceeding is not involuntary or compulsory. (*In re W. F. Wilson*, 13 B. R. 253.)

The word "assets" means the proceeds of the bankrupt's property which are applicable to the payment of his debts. The subject-matter of this section points to this signification. Nothing else could pay debts. In this section the word "assets" is not synonymous with estate. (*In re Frederick*, 3 B. R. 465; s. c. 1 L. T. B. 181; s. c. 2 C. L. N. 139.)

The term "assets" is as comprehensive as "estate" or "effects." It includes all the estate of the bankrupt, not that only which is applicable to the payment of debts; but that applicable to the payment of costs and expenses as well. The term "assets" is not used to express the net balance to be distributed among the creditors, but means the entire estate of the bankrupt, irrespective of the use to which it may be appropriated by the court, and in determining the question whether the assets amount to the requisite thirty per cent., the costs and expenses of the proceedings are not first to be deducted. (*In re Kahley et al.* 6 B. R. 189; s. c. 3 Biss. 169; *contra*, *in re Vinton*, 7 B. R. 138.)

What sum the estate or assets may be appraised at is by no means a true criterion of their value, or rather what they are "equal to." There may be as many differing opinions as to the value of a given piece of property, as the number of individuals whose judgment is sought. The true test as to value, when that value is to be used to pay creditors, is the amount the property will bring upon a sale by the assignee in accordance with law; what it produces in money with which to pay dividends to creditors and costs of proceedings, money being the only thing with which such payments can be made. (*In re Van Riper*, 6 B. R. 573.)

The word "assets" does not mean money actually realized. So restricted a construction should not be placed upon it. Where the bankrupt has acted in good faith, and performed his duty under the bankrupt law, he is entitled to a discharge if, at the time he filed the petition, he was possessed of property fairly worth thirty per cent. of the debts proved against his estate, upon which he was liable as principal debtor. He ought not to be made the victim of circumstances over which he has no control. (*In re Lincoln & Cherry*, 7 B. R. 334; s. c. 2 L. T. B. 241; s. c. 20 Pitts. L. J. 1.)

The assets consist of the sum that remains after discharging all liens, and this surplus must equal thirty per cent. of the required claims. (*In re W. H. Graham*, 5 B. R. 155; s. c. 28 Leg. Int. 317; *in re Van Riper*, 6 B. R. 573.)

The proceeds of the bankrupt's property in the hands of his assignee, subject to be divided among his creditors, must at the time of the hearing of the application for the discharge, be equal to thirty per centum of the amount of the claims proved against his estate on which he was liable as principal debtor, in order to entitle him to a discharge without the assent of his creditors as provided for in this section. (*In re Webb & Taylor*, 3 B. R. 720; s. c. 2 C. L. N. 313.)

This provision does not admit of a fictitious or exaggerated valuation of his assets by the bankrupt, in his schedule or inventory, while, on the contrary, if

the assets are at a fair and just estimate and valuation equal to thirty per cent. of the debts proved, the bankrupt is not to be denied his discharge by reason of any sacrifice made by the assignee or creditors to convert the assets into cash, or because of the absorption of so large a proportion of the proceeds by expenses as to prevent the payment of thirty cents on the dollar. (*In re Thompson*, 2 Biss. 481.)

In the absence of proof to the contrary, the proceeds in the hands of the assignee will be taken to be the true value of the estate. (*In re Borden & Geary*, 5 B. R. 128; s. c. 5 Ben. 228.)

A motion for the appointment of appraisers to ascertain the value of the assets, made before the first meeting of creditors, can not be entertained. (*In re Frederick*, 3 B. R. 465; s. c. 1 L. T. B. 181; s. c. 2 C. L. N. 139.)

The fixing of the liability of an indorser does not make him liable as a principal debtor when he otherwise would not be so liable. Although the liability of an indorser, from being contingent, becomes absolute and fixed, it does not thereby become the liability of a principal debtor. When it is put into the shape of a judgment, the liability on such judgment becomes the liability of a principal debtor; but until then the fixed liability of an indorser is not the liability of a principal debtor. The maker of the note is the principal, or chief, or primary debtor. The indorser is the secondary debtor, liable only on the default of the maker after demand of payment, and on due notice thereof. Such default and notice fix the liability of the indorser, but it still remains the liability of an indorser. It can not be established without showing how it became fixed, and it must thus necessarily be shown to be the liability of an indorser. None of the contingent liabilities, or contingent debts, spoken of in section 5068, whether those of drawer, indorser, surety, bail, guarantor, obligor for the debt of another person, or whatever else, can be regarded as liabilities of a principal debtor, until they have undergone some other change than merely becoming absolute and fixed in contradistinction of being contingent. (*In re Loder*, 4 B. R. 190; s. c. 4 Ben. 125.)

An indorsement of the note of a third party does not constitute the indorser a principal to the holder of a protested note so as to require his consent to a discharge. The words principal debtor are to be taken in their ordinary legal acceptance, and do not include such an indorser. The liability of an indorser is secondary to that of the maker, who is the principal debtor, and the character of the obligation remains unchanged notwithstanding it may have become fixed by demand and notice of non-payment. (*In re Lewis B. Loder*, 4 Ben. 328.)

The time of the hearing of the application for a discharge is the return day of the order to show cause, whether the original day or the adjourned day. At or before that day, the assent in writing to the discharge, if such assent is necessary, may and must be filed. No claim proved after that day can be counted among the claims which are to be taken into account in computing the number requisite to a discharge. (*In re John B. Borst*, 11 B. R. 96.)

A party who purchases claims against the debtor, at a discount with his own funds, holds the debts to their full amount, although he was also trustee, under an assignment. (*In re Chas. P. Houghton*, 5 Law Rep. 321.)

A discharge can not be granted without the assent of the requisite proportion of the creditors whose debts are existing and unpaid at the time of the hearing. Creditors who have given releases in pursuance of an assignment made prior to the commencement of the proceedings in bankruptcy, can not be recognized as creditors. (*In re Aspinwall*, 3 Penn. L. J. 212.)

When a creditor has once given his consent in writing, and the bankrupt has acted upon it, and other creditors have given theirs, and presumptively been influenced by each other's action in this respect, and the assent of the requisite number in value and amount is obtained and filed at the hearing, a creditor thus assenting has no absolute right, even on the day fixed for the hearing, to withdraw or cancel his assent. (*In re Brent*, 8 B. R. 444; s. c. 2 Dillon, 129.)

If the holder of a note assents to the discharge of the maker, without the consent of the indorser, he thereby releases the indorser. (*In re David A. McDonald*, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.)

Sec. 5113.—Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

Statute Revised—March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute—April 4, 1800, ch. 19, § 36, 2 Stat. 81.

On the return of the order to show cause, the register should require the bankrupt to take the oath provided for by this section. This oath is to be taken and subscribed before the granting of the certificate of conformity. It should be administered whether specifications have been filed or not. (*In re Bellamy*, 1 B. R. 113; s. c. 1 Ben. 426; *in re E. Pulver*, 2 B. R. 313; s. c. 3 Ben. 65; *in re Frizelle et al.* 5 B. R. 119.)

When specifications are withdrawn after the oath has been taken, the oath should be again taken and subscribed after the withdrawal. (*In re Machad*, 2 B. R. 352.)

When a bankrupt dies before he has taken this oath, a discharge can not be granted. (*In re O'Farrell et al.* 2 B. R. 484; s. c. 3 Ben. 191; s. c. 1 L. T. B. 169; *in re Quinike*, 4 B. R. 92; s. c. 2 Biss. 354.)

The final oath is merely an item of indispensable evidence, without which the bankrupt is not entitled to his discharge, and it is sufficient if it be produced and filed on the hearing. (*In re Robert A. Sutherland*, 1 Deady, 573.)

If the bankrupt dies after the taking of the final oath and the granting of the certificate of conformity, the court has the power to order a discharge as on a date when the bankrupt was in life. (*Young v. Ridenbaugh*, 11 B. R. 563; s. c. 2 Dillon, 239.)

The presumption raised by a certificate of conformity which sets forth that the final oath has been taken, is not overcome by the mere fact that the oath is not on file. (*Young v. Ridenbaugh*, 11 B. R. 563; s. c. 2 Dillon, 239.)

Sec. 5114.—If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

Statute Revised—March 2, 1867, ch. 176, § 32, 14 Stat. 532. Prior Statute—Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

The provisions of this section, as to the prerequisites to a discharge, mean that all the requirements of the act as to what steps are to be taken, from the commencement of the proceedings to the end, must be conformed to as a prerequisite to the granting of a discharge, and not merely that the bankrupt has personally done what he is required to do. Before the discharge is granted, the register must certify that the bankrupt has complied with all the requirements of the act. (*In re Bellamy*, 1 B. R. 64, 98; s. c. 1 Ben. 390, 426; s. c. 1 L. T. B. 22; *in re Orne*, 1 B. R. 79; s. c. 1 Ben. 420; *in re Jabez Harris*, 2 B. R. 105.)

A special order of the district court is necessary to authorize the register to examine the papers and certify to the regularity of the proceedings. (*In re Bellamy*, 1 B. R. 98, 113; s. c. 1 Ben. 426, 474.)

When, on the return of the order to show cause before the register, a creditor appears to oppose the discharge, the register must make a certificate of the proceedings, stating the opposition, and return the papers into court in like manner as if there were no opposition. (*In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; *in re Bellamy*, 1 B. R. 98; s. c. 1 Ben. 426.)

When specifications have been filed, the certificate of conformity should except the particulars covered by the specifications. (*In re Pulver*, 2 B. R. 313; s. c. 3 Ben. 65.)

It is the duty of the court to examine the record before granting the discharge, and if it appears that the bankrupt is not entitled thereto, to refuse it, even though creditors do not interpose objections. When the record of the bankrupt's examination shows that he has, since the passage of the bankrupt act, lost money at gambling, the discharge must be refused. (*In re Wilkinson*, 3 B. R. 286; s. c. 2 W. J. 250; s. c. 16 Pitts. L. J. 237.)

No discharge can be granted when notice of the assignee's appointment has not been duly published. (*In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22; *in re Strachan*, 3 B. R. 601; *contra*, *in re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.)

Nor when the warrant has not been properly served upon the creditors. Proceedings subsequent to an irregularity must be set aside, and the same proceedings had again with due regularity. (*In re Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

Where there is any failure of jurisdiction, as where, by mistake, the case has been conducted by the wrong register, the discharge may be refused; so, probably, as a matter of practice, the meetings ought to be duly warned and held before the discharge can be granted. (*In re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.)

The omission to call the second and third meetings at the proper times is no ground for withholding the bankrupt's discharge. (*In re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *contra*, *in re Bushey*, 2 B. R. 685.)

The granting of a discharge may be suspended until the assignee shall have filed and settled his accounts. It is a part of the bankrupt's duty to his creditors to see that the assignee's account is exhibited in proper season. (*In re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204.)

When it appears that the bankrupt has innocently omitted certain property from his schedules, the granting of the discharge will be suspended until he shall have properly amended his schedules. (*In re Connell*, 3 B. R. 443.)

When the bankrupt has omitted the names of certain creditors from his schedules, he must make an amendment by inserting such names before a discharge will be granted. Petitions in bankruptcy must be full and true in point of fact; otherwise no discharge will be granted. (*In re Redfield*, 2 Ben. 72.)

A discharge will be refused if the bankrupt omits from his schedule debts which he claims are barred by the statute of limitations. (*In re John H. H. Cushman*, 7 Ben. 482.)

When an order for the bankrupt's wife to attend for examination has been served upon the bankrupt, though not served upon her, and she has failed to attend at the time and place specified, the bankrupt is not entitled to a discharge, unless he proves to the satisfaction of the court that he was unable to procure her attendance. (*In re Van Tuyl*, 2 B. R. 579; s. c. 3 Ben. 237.)

A discharge will not be granted until, under Rule VII, all the papers relating to the case are filed by the register in the office of the clerk of the district court. (*In re Bellamy*, 1 B. R. 98; s. c. 1 Ben. 426.)

The omission of the assignee to obtain the assignment, or have it recorded, is no ground for withholding a discharge. (*In re Wm. H. Pierson*, 10 B. R. 107.)

If the filing of specifications was unauthorized and null, a discharge may be granted *nunc pro tunc* as of the time when by law the bankrupt was entitled to it. (*Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166.)

The bankrupt is in no manner or degree reinvested by the discharge with control over the estate which he surrendered in bankruptcy. (*In re Geo. W. Anderson*, 9 B. R. 360.)

The discharge does not take effect until it is signed by the judge. *Pesoa v. Passmore*, 4 Yeates, 139.)

The original discharge is retained in the district court, and a copy is granted to the bankrupt. (*Pennell v. Percival*, 13 Penn. 197; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

SEC. 5115.—The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, District of .  
Whereas                      has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said                      be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the                      day of                      , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at                      , in the said district, this                      day of                      .  
(Seal.)                      , Judge.

Statute Revised—March 2, 1867, ch. 176, § 32, 14 Stat. 532.

SEC. 5116.—No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

Statute Revised—March 2, 1867, ch. 176, § 30, 14 Stat. 532. Prior Statutes—April 4, 1800, ch. 19, § 57, 2 Stat. 35; Aug. 19, 1841, ch. 9, § 12, 5 Stat. 447.

SEC. 5117.—No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while



acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Statute Revised—March 2, 1867, ch. 176, § 33, 14 Stat. 532. Prior Statutes—Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

The word "debt" is used as synonymous with "claim." (*Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.)

### Fraudulent Debts.

The statute does not say "actual" fraud, or "moral" fraud, or qualify the word by any other adjective. It uses only the generic word "fraud," which must be construed in its general sense. It therefore includes implied fraud. (*Jones v. Clark*, 25 Gratt. 642.)

The debt must be tainted with fraud in its inception. The vice must come into existence with the debt. If the contract was fair and honest when made, the discharge will release the bankrupt from his liability, although he was subsequently guilty of fraudulent conduct in respect to the debt. (*Brown v. Broach*, 52 Miss. 536.)

In order to render a debt fraudulent when contracted under a representation of the bankrupt, the intention to deceive is an essential element of the fraud. (*Broadnax v. Bradford*, 50 Ala. 270.)

A claim for deceit on account of certain false and fraudulent representations and inducements, whereby the bankrupt procured from the plaintiff an assignment of a complete stock in trade, including goods, *choses in action*, &c., in exchange for a note of much less value than was represented, if not wholly worthless, is not discharged. (*In re Devoe*, 2 B. R. 27; s. c. Lowell, 251; s. c. 1 L. T. B. 90.)

A claim against a purchaser of property from an executor on account of his having fraudulently participated with the latter in a *devastavit*, is a debt created by fraud, and is not released by a discharge. (*Jones v. Clark*, 25 Gratt. 642.)

A bond given by a claimant in order to obtain the delivery of property is not a debt created by fraud, although he subsequently endeavored to sustain his claim by false testimony. (*U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.)

A certificate of discharge in bankruptcy will not defeat the plaintiff's right of action in tort for the defendant's false and fraudulent representations. (*Morse v. Hutchins*, 102 Mass. 439.)

A purchase of goods with the intent never to pay for them is such a fraud as prevents the discharge from releasing the purchaser from the debt. (*Stewart v. Emerson*, 8 B. R. 462; s. c. 52 N. H. 301; s. c. 6 L. T. B. 250.)

A judgment in a court of law obtained in an action of tort, is a debt dischargeable under the bankrupt act. (*Manning v. Keyes*, 9 R. I. 224; *in re Wiggers*, 2 Biss. 71; *in re Samuel Book*, 3 McLean, 317.)

A discharge will release the debtor from his liability to his cotenants for his share of the rents, issues and profits of the property held in common. (*Flanagan v. Cary*, 37 Tex. 67.)

A judgment does not convert an unliquidated demand for damages into a debt. The record of the action in which the execution issues may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge will not release him. The execution is a writ issued in the cause. (*In*

*re* Whitehouse, 4 B. R. 63; s. c. Lowell, 429; *in re* Patterson, 1 B. R. 307; s. c. 2 Ben. 155; *Flanagan v. Cary*, 37 Tex. 67; *Warner v. Cronkhite*, 13 B. R. 52; s. c. 6 Biss. 453; *Reid v. Martin*, 11 N. Y. Supr. 590; *Taylor v. Renn*, 8 C. L. N. 410; *Horner v. Spelman*, 78 Ill. 206.)

Whether a judgment was for fraud or not is a question to be determined by the court from the record, and should not be submitted to a jury. (*Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.)

Where the record shows a material and traversable allegation of fraud as its sole foundation, the judgment need not, on its face, show that the demand originated in fraud. (*Warner v. Cronkhite*, 13 B. R. 52; s. c. 6 Biss. 453.)

If the plaintiff sues in assumpsit on the contract, he is not estopped by the form of his action to answer the plea of discharge by the replication of debt created by fraud. He does not by such a replication attempt to rescind, or invalidate, or renounce the contract, but he affirms it, and claims that the debt is a valid subsisting debt. In the declaration he asserts a debt. In the replication he asserts the same debt. He avers the fraud, not to avoid the contract himself, but to show that the defendant can not avoid it; not to show that by reason of the fraud the debt declared upon was never created, but to show that being created by fraud, it was not discharged under the bankrupt act—not to show that there is no such debt, but to show that there is such a debt notwithstanding the discharge. (*Stewart v. Emerson*, 8 B. R. 462; s. c. 51 N. H. 301; s. c. 6 L. T. B. 250; *Broadnax v. Bradford*, 50 Ala. 270.)

If the record shows that the debt was created by contract, the plaintiff can not, when a discharge is pleaded in bar to the judgment, be allowed to show that the debt sought to be collected was created by fraud. (*Palmer v. Preston*, 45 Vt. 154; *Shuman v. Strauss*, 10 B. R. 300; s. c. 34 N. Y. Sup. 6; s. c. 52 N. Y. 404.)

Whether the debt was created by fraud will not be determined upon conflicting affidavits, on a motion for leave to issue an execution. (*Shuman v. Strauss*, 10 B. R. 300; s. c. 52 N. Y. 404; s. c. 34 N. Y. Sup. 6.)

A claim arising from fraud may be prosecuted in any proper form of suit after the question of discharge has been determined, although it has been proved. (*Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.)

If the defendant in an action of trover pleads a discharge, the plaintiff may reply that the debt was created by fraud. (*Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.)

A discharge is no bar to an action for a debt created by fraud, although the creditor proved his claim and received a dividend thereon. (*Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.)

If the bankrupt bought the business of another under an agreement to indemnify him against all his liabilities, a discharge will release him although he falsely stated that he had paid a debt of the latter. (*Brown v. Broach*, 52 Miss. 536.)

### Fiduciary Debts.

The language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity, and not to be confined to any special fiduciary capacity. (*In re* Seymour, 1 B. R. 29; s. c. 1 Ben. 348.)

The construction of the bankrupt law must be the same all over the United States, and can not be varied in each State by the local law. To understand the use of terms employed in it, resort must be had to their meaning in the common law, and not in the local law of the State where the bankrupt may happen to be domiciled. (*Austill v. Crawford*, 7 Ala. 335.)

The phrase implies a fiduciary relation existing previously to, or independ-

ently of, the particular transaction from which the debt arose. A deposit of bills of exchange, with instructions to collect and apply the proceeds to the payment of certain debts, and to pay the balance to the depositor, does not create a fiduciary relation between the depositor and the bailee. The meaning of the phrase "fiduciary capacity," having been ascertained, and declared by a judicial construction of the act of 1841, is affixed to the general term, and this fixed definition is carried into the new statute. (*Cronan v. Cutting*, 4 B. R. 667; s. c. 104 Mass. 245.)

A claim against a person for withholding the proceeds arising from the sale of goods consigned to him to be sold on commission, is a debt contracted by him in a fiduciary capacity. (*In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; *in re J. H. Kimball*, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *Whitaker v. Chapman*, 3 Lans. 155; s. c. 1 L. T. B. 249; s. c. 4 L. T. B. 92; *Lemcke v. Booth*, 5 B. R. 351; s. c. 47 Mo. 385; *Rudge v. Rundle*, 1 N. Y. Supr. 649; *Gray v. Farran*, 2 Cin. 426; *Meador v. Sharp*, 14 B. R. 192; s. c. 54 Geo. 128; *Banning v. Bleakley*, 27 La. An. 257; *contra*, *Chapman v. Forsyth*, 2 How. 202; *Commercial Bank v. Buckner*, 2 La. An. 1023; *Hayman v. Pond*, 48 Mass. 328; *Austill v. Crawford*, 7 Ala. 385; *Woolsey v. Cade*, 15 B. R. 238; s. c. 4 Cent. L. J. 202; *Owensley v. Cobia*, 15 B. R. 489; s. c. 9 C. L. N. 323.)

The debt due from a collector of taxes for a municipal corporation to the corporation for taxes received and not accounted for, is a fiduciary debt. (*Morse v. Lovell*, 48 Mass. 152.)

The receipt of money to be carried to another place to pay a note does not create a debt of a fiduciary character. (*Phillips v. Russell*, 42 Me. 360.)

A receipt for the property given by the bankrupt to an officer who held an attachment against him, does not create a debt of a fiduciary character. (*Fowles v. Treadwell*, 24 Me. 377.)

If the bankrupt receives money as agent, to be used in a particular way or for a specific purpose, for the use of the principal, then the money is held by him in a fiduciary capacity. (*Matteson v. Kellogg*, 15 Ill. 547; *Flagg v. Ely*, 1 Edm. Sel. Cas. 206.)

If the bankrupt receives money under an assignment and a judgment in trust to pay certain creditors of the assignor, the debt is a fiduciary debt. (*Kingsland v. Spalding*, 3 Barb. Ch. 341.)

A general deposit, with authority to the bailee to mix the money with his own and use it until applied for by the depositor, does not create a fiduciary debt. (*Hervey v. Devereux*, 72 N. C. 463.)

A claim by a conditional vendor for a conversion of the property is founded upon a breach of trust, and is not barred by a discharge. (*Johnson v. Worden*, 13 B. R. 335; s. c. 47 Vt. 457.)

A conditional vendor by proving his debt does not loose his claim for the conversion of the property. (*Johnson v. Worden*, 13 B. R. 335; s. c. 47 Vt. 457.)

If the maker of a promissory note gives money to his surety to pay to the holder of the note, and the surety does not so apply it, this does not create a fiduciary debt. (*Bissell v. Couchane*, 15 Ohio, 58.)

A debt which arises from a consignment of goods to the debtor to sell under an agreement that he shall have as commissions all that can be realized above a certain sum, is a fiduciary debt. (*Treadwell v. Holloway*, 12 B. R. 61; s. c. 46 Cal. 547.)

An auctioneer acts in fiduciary capacity or character, and his discharge will not relieve him from liability for the proceeds of goods placed in his hands for sale. (*Jones v. Russell*, 11 B. R. 478; s. c. 44 Geo. 460; *in re Horace Lord*, 5 Law Rep. 258.)

1. A discharge does not relieve a guardian from his fiduciary obligations as such,

and if the surety discharges these and obtains a judgment therefor, he may levy upon the property of the bankrupt acquired after his discharge. (*Carlin v. Carlin*, 8 Bush, 41; *Halliburton v. Carter*, 10 B. R. 359; s. c. 55 Mo. 435.)

The surety upon the bond of a public officer is not liable in a fiduciary capacity. (*Saunders v. Comm.* 10 Gratt. 494; *Fowler v. Kendall*, 44 Me. 448.)

The liability of a surety on a guardian's bond is not a fiduciary debt. The sureties of a guardian have no control of his conduct. Their obligation is entirely different from his. They undertake to pay money on his account, while he in addition engages to be honest, faithful, and careful. It is for failure in this latter respect that the law refuses to release him from his debt. (*Jones v. Knox*, 8 B. R. 559; s. c. 46 Ala. 53; *Bouis v. Pucket*, 7 Humph. 169; *in re Samuel T. Taylor*, 16 B. R. 40.)

If the guardian gives his note under seal to the ward's husband, in settlement of his account, and receives a release from them, he is not liable thereon in a fiduciary capacity. (*Coleman v. Davies*, 45 Geo. 489.)

An agreement by an executor guaranteeing the payment of a demand against the estate is not a debt created by him while acting in a fiduciary capacity. In making the promise he acts outside of his character as executor, and he is not acting in a fiduciary character as respects the party to whom it is made. (*Amoskeag Manuf. Co. v. Barnes*, 49 N. H. 312)

A surety upon a constable's bond is not a public officer, and will be released from liability by a discharge. (*McMinn v. Allen*, 67 N. C. 131.)

An attorney who collects a debt for a client acts in a fiduciary capacity, and will not be released from his obligation to pay the money to his client by a discharge. (*Heffren v. Jayne*, 39 Ind. 463; *Heffren v. Leroy*, 39 Ind. 471; *White v. Platt*, 5 Denio, 269; *Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1; *contra*, *Wolcott v. Hodge*, 81 Mass. 547; *Williamson v. Dickens*, 5 Ired. 259.)

If an attorney received a note not in a professional character but as a gratuitous bailee, and his liability is merely for negligence in failing to return it; he is released by a discharge. (*McAdoo v. Lummis*, 43 Tex. 227.)

If an agent is authorized to carry the money received into account, and to report sales and pay over balances only monthly, the debt due to his principal is not a fiduciary debt. (*Grover v. Clinton*, 8 B. R. 312; s. c. 5 Biss. 324.)

If a fiduciary debt was merged in a judgment prior to the commencement of the proceedings in bankruptcy, it is released by a discharge. (*Wolcott v. Hodge*, 81 Mass. 547.)

The fiduciary creditor may sue the debtor, although he did not appear before the bankrupt court and have his debt excepted from the operation of the discharge. (*Chapman v. Forsyth*, 2 How. 202.)

A judgment rendered in an action where the pleading raised the issue whether the defendant acted in a fiduciary capacity is conclusive evidence that the debt was so contracted. (*Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.)

A replication to a plea of a discharge, that the debt is of a fiduciary character, is bad, for it states a legal conclusion instead of specially disclosing the facts, so that the court may determine whether the debt is founded on such a trust as is expected from the operation of the statute. (*Mabry v. Herndon*, 8 Ala. 848.)

The burden of proving that the debt is of a fiduciary character is on the creditor, and if he fails to make the proof, the debt will be taken to be one of an ordinary character. (*Sherwood v. Mitchell*, 4 Denio, 435.)

A debt which consists of a judgment rendered upon a promissory note is *prima facie* a debt that is barred by a discharge. (*Hayes v. Ford*, 15 B. R. 569.)

SEC. 5118.—No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

Statute Revised—March 2, 1867, ch. 176, § 33, 14 Stat. 532. Prior Statutes—April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

This section only applies to the discharge in bankruptcy merely, and does not refer to, or have in view, any act of the parties effecting a release of liability at law or in equity. (*In re David A. McDonald*, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.)

The creditor may sue any one else liable upon the same debt, and proceedings pending against others thereon and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered by proving the debt. (*In re Levy et al.* 1 B. R. 327; s. c. 2 Ben. 169; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344; *Moore v. Waller*, 1 A. K. Marsh. 488.)

The assignee of a promissory note is not bound to follow the maker into bankruptcy, in order to fix the liability on the assignor. (*Booth v. Storrs*, 3 C. L. N. 210.)

The fact that the principal in a note secured by a mortgage given by the surety on his own lands has taken the benefit of the bankrupt act does not relieve the surety, or affect the rights of any of the parties under the mortgage, and a suit for foreclosure may be instituted. (*Citizens' National Bank v. Leming*, 8 I. R. R. 132.)

The use of the word "partner" shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for or in the respect of partnership debts. (*In re Wm. Downing*, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207.)

When a firm which has been dissolved by the death of one of the partners is put into bankruptcy by proceedings against the surviving partner, the discharge of the surviving partner will not operate to release the estate of the deceased partner from liability. (*In re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397.)

If the obligation is joint, an obligor is a necessary party to the suit, although he has received a discharge in bankruptcy. (*Camp v. Gifford*, 7 Hill, 169; *contra*, *Dorn v. O'Neil*, 6 Nev. 155; *Jenks v. Opp*, 12 B. R. 19; s. c. 43 Ind. 108.)

If the fact of discharge arises after suit brought, and is pleaded by the bankrupt debtor, the creditor has the right to admit that such discharge has been obtained, and take a judgment against the other joint defendant alone. (*Dorn v. O'Neil*, 6 Nev. 155.)

The sureties upon an auctioneer's bond are not relieved by the discharge of the principal from liability for the proceeds of goods placed in his hands for sale. (*Jones v. Russell*, 11 B. R. 478; s. c. 44 Geo. 460.)

The discharge of the principal obligor in a forthcoming bond does not release the sureties. (*Garnet v. Roper*, 10 Ala. 842.)

The discharge of the debtor does not release the sureties upon a jail bond from liability for a breach which occurred after the commencement of the proceedings in bankruptcy. (*Dyer v. Cleveland*, 18 Vt. 241.)

The surety on an appeal bond remains liable, although the principal becomes a bankrupt and obtains his discharge while the appeal is pending. (*Hall v. Fowler*, 6 Hill, 630; *Knapp v. Anderson*, 15 B. R. 316; s. c. 14 N. Y. Supr. 295.)

The discharge of the maker of a note does not release the indorser from his liability. (*King v. Central Bank*, 6 Geo. 257.)

The giving of time to the maker of a note for a valuable consideration, after he has received his discharge, does not release the indorser, for he can prove the liability against the bankrupt's estate. (*Tiernan v. Woodruff*, 5 McLean, 350.)

The discharge of one judgment debtor does not release or effect the other joint debtors. The judgment being joint, it is necessary to the validity of the execution that it shall conform to the judgment, and a joint execution against all the debtors is regular. (*Linn v. Hamilton*, 34 N. J. 305; *vide Boyd v. Vanderkamp*, 1 Barb. Ch. 273.)

The sureties in a replevin bond, for the purpose of reducing the damages, may prove that the goods so replevied have never been paid for, although the notes given therefor are not in their possession, if the assignee of the principal has tendered the notes to the plaintiff, and he has refused them and prevented the sureties from getting them. (*Seldner v. Smith*, 41 Md. 602.)

A surety who is sued after the principal has been adjudged bankrupt, can not set off usury paid by his principal to the creditor on contracts other than the one sued on. (*Woolfolk v. Plant*, 46 Geo. 422.)

A careful perusal of this clause will show that it only applies to a surety who contracted to become liable for the payment of the debt, and not for the payment of the judgment which might be entered in a particular action. It clearly contemplates a case where the surety contracts to become liable with the principal for the payment of the debt. When a discharge is pleaded in the appellate court so that no judgment can be rendered against the defendant, a surety on an appeal bond conditioned to pay such judgment as might be entered in the appellate court, is released. As no judgment was rendered against his principal, no liability attached to him. (*Odell v. Wooten*, 4 B. R. 183; s. c. 38 Geo. 225; *Martin v. Kilbourn*, 1 Cent. L. J. 94.)

This clause applies to persons who are liable for the debt of the bankrupt which existed before, and is discharged by, the proceedings in bankruptcy. A bond given to dissolve an attachment is not such a debt. It does not become of the nature of a debt until the contingency arises upon which it is to be made operative—to wit, a judgment valid against the principal and which he is bound to pay. When a judgment is rendered for the defendant upon a plea of a discharge in bankruptcy, the bond is discharged, not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend. (*Carpenter v. Turrell*, 100 Mass. 450; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344; *Williams v. Atkinson*, 37 Tex. 16; *contra, Holyoke v. Adams*, 10 B. R. 270; s. c. 2 N. Y. Supr. 1; s. c. 8 N. Y. Supr. [Hun] 223.)

The discharge of a debtor in bankruptcy, after a bond requiring him to take the poor debtor's oath has become absolute by breach of the condition, can not avail the sureties as a defense. After such breach, the right to surrender the principal no longer exists, and the subsequent discharge of the debtor can not avail the sureties. Although the discharge releases the debtor, it can not release the sureties. (*Claflin v. Cogan*, 48 N. H. 411.)

It was not the intent of Congress to do anything more than to declare that the act should not be construed so as to discharge sureties, and this was done not so much to fix the law of the case, as by way of caution to prevent the act from being construed to have an effect that by its terms it would not have. In other words, the contract of a surety, as it is understood in the commercial world, is always conditioned that the surety shall not be discharged by the bankruptcy of the principal, and the provisions of the act are only in furtherance of, and declaratory of, what would have been true had they not been put in the act. The Code of Georgia does not have the effect to release the surety upon the discharge of the principal. (*Phillips v. Solomon*, 42 Geo. 192.)

If a debtor upon his arrest gives a bond to take the poor debtor's oath within

one year from the date, or surrender himself at the jail at the expiration of that time, and then files a petition in bankruptcy within the year and obtains a discharge, the discharge will not release the sureties if the bond is forfeited. (*Goodwin v. Stark*, 15 N. H. 218.)

Where the bankrupt leaves the prison limits after he receives his discharge, the discharge is a good defense for the sureties in an action on the jail bond. (*Kirby v. Garrison*, 21 N. J. 176.)

The discharge does not extinguish the debt, but merely relieves the bankrupt from his personal liability. It does not therefore release a party who has covenanted to pay a certain rate of interest until the principal debt is paid. (*Bowery Savings Bank v. Clinton*, 2 Sandf. 113.)

A promise by a third person to deliver certain property taken under an attachment, is not released or affected by the subsequent bankruptcy and discharge of the debtor whose property is so attached. (*Toule v. Robinson*, 15 N. H. 408.)

The surety on an administrator's bond is not released by the discharge of the principal. (*Moore v. Waller*, 1 A. K. Marsh. 488.)

A discharge of the principal under a petition filed after the return day of the *sci. fa.* issued against the bail, does not release the bail. (*Bennett v. Alexander*, 1 Cranch C. C. 90.)

The discharge of the principal in a replevin bond, and the delivery of the goods to his assignee in bankruptcy, does not operate to release or discharge the sureties. (*Flagg v. Tyler*, 6 Mass. 33.)

When the bankrupt is discharged, the court will on motion discharge his bail by ordering an *exoneretur* to be entered. (*Comm. v. Huber*, 5 Penn. L. J. 331; *McCausland v. Waller*, 1 H. & J. 156.)

A judgment in favor of a surety on a plea of his discharge in an action upon an administration bond is no defense to an action for contribution by a cosurety who was codefendant in that suit, and who has paid the judgment. (*Miller v. Gillespie*, 59 Mo. 220.)

A failure to prove a note against the principal for the purpose of obtaining a dividend thereon will not release a surety. (*Clopton v. Spratt*, 52 Miss. 251.)

SEC. 5119.—A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.

Statute Revised—March 2, 1867, ch. 176, § 34, 14 Stat. 533. Prior Statutes—April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

It was not intended by any of the provisions of the bankrupt act that the bankrupt court should pass, in a plenary manner, upon the question whether a particular claim will or will not be released by a discharge. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending.

When the discharge is pleaded, the question of the extent of its operation upon the debts of the bankrupt, and whether a particular debt is or is not discharged by it, comes up for determination by the court in which it is pleaded, and the determination will be a binding judgment between the parties. (*In re J. H. Simball*, 2 B. R. 204; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *in re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509.)

The fact that the assignee embezzled all the funds is no defense against a demand, even though it was proved, for nothing arising in the proceedings in bankruptcy can protect the bankrupt but a certificate of discharge duly obtained. (*Whitney v. Crafts*, 10 Mass. 23.)

The proving of a note payable in specific articles is equivalent to a demand upon the bankrupt for them. A demand on him would have been fruitless, as all his property was out of his control and vested in the assignee, who held the state in trust, as well for him as his creditors, to pay his debts. The assignee, having the fund, was the proper person on whom the demand ought to be made, and the proving of the claim was the making of a demand on the assignee. If the debtor fails to obtain a discharge, he is then liable on the note. (*Chandler v. Winship*, 6 Mass. 310.)

Mere bankruptcy, without a certificate of discharge, is no bar to an action upon a demand which was proved, and upon which the creditor received a dividend. The bankruptcy, in such a case, has the effect of a statute execution, which, like private executions, takes the property of the bankrupt towards the satisfaction of his debts without discharging them. (*Lummas v. Fairfield*, 5 Mass. 249; *Pesoa v. Passmore*, 4 Yeates, 139.)

A plea of an adjudication of bankruptcy is not a good defense to an action on a provable debt. (*Longacre v. Myers*, 1 W. N. 109; *Ins. Co. v. Ketterlinus*, W. N. 130; *Rarguel v. Gerson*, 2 W. N. 304.)

### Impeaching the Discharge.

It is competent for Congress to declare what shall be the force and effect of discharge. (*Reed v. Vaughan*, 15 Mo. 137.)

If the public notice required by the act has been given, creditors must be treated as having notice of the proceedings, and can not impeach them collaterally, as they are in the nature of a proceeding *in rem* before a court of record having jurisdiction. (*Shurhan v. Wherritt*, 7 How. 627.)

When the discharge is pleaded, the court will presume that the requirements of the law in regard to notice to creditors, were complied with, and, consequently, that they were parties to the proceedings in bankruptcy. (*Lathrop v. Stuart*, McLean, 167.)

The district court must be presumed to have proceeded regularly according to the jurisdiction granted, until the contrary appears. (*Morrison v. Woolson*, 23 H. 11.)

The discharge can not be impeached collaterally on account of defects and irregularities in the proceedings, between the petition and the discharge. (*Wright v. Watkins*, 2 Greene [Iowa] 547; *Beach v. Miller*, 15 La. An. 601; *McNulty v. Frame*, 1 Sandf. 128; *Linton v. Stanton*, 4 La. An. 401; *Morrison v. Woolson*, 23 N. H. 11; *Sinclair v. Smyth*, 1 Brews. 402; *Campbell v. Perkins*, N. Y. 430; s. c. 5 Barb. 699; *Morrison v. Woolson*, 29 N. H. 510; *Richards v. Tison*, 20 Penn. 19.)

The discharge is conclusive against a creditor who proved his claim, and can not be impeached by him in a collateral action. (*Connor v. Gupton*, 11 Humph. 10; *Downer v. Rowell*, 25 Vt. 336; *Wales v. Lyon*, 2 Mich. 276; *Lyon v. Marshall*, 11 Barb. 241; *Humphreys v. Sweet*, 31 Me. 192; *contra*, *Gupton v. Connor*, 11 Humph. 287.)



A discharge duly granted by a district court of competent jurisdiction, can not be impeached in a collateral action because a discharge had been refused by another district court in a prior proceeding. (*Morrison v. Woolson*, 23 N. H. 11.)

The mere pendency of proceedings on the petition of one partner in one district, will not render a discharge void which is granted upon a subsequent petition filed by another partner in another district when that discharge is pleaded in a collateral action. (*Morrison v. Woolson*, 23 N. H. 11.)

If the notice required by the statute had been duly published, the discharge will bar the debt, although the name of the creditor was not placed on the schedule nor any notice given to him. (*Symonds v. Barnes*, 6 B. R. 377; s. c. 59 Me. 191; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344; *Randall v. Sutton*, 2 Houst. 510; *Knabe v. Hayes*, 71 N. C. 109; *Stern v. Nussbaum*, 47 How. Pr. 489; s. c. 5 Daly, 382; *in re William Archenbraun*, 11 B. R. 149; s. c. 7 C. L. N. 99; *Williams v. Butcher*, 12 B. R. 143; s. c. 22 Pitts. L. J. 141; *Blum v. Ricks*, 39 Tex. 112; *Hood v. Spencer*, 4 McLean, 163; *Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448; *Burnside v. Brigham*, 49 Mass. 75; *Shelton v. Pease*, 10 Mo. 473; *Fox v. Paine*, 10 Ala. 523; *Brown v. Rebb*, 1 Rich. 374; s. c. 1 Strob. Ch. 296; *Strong v. Clawson*, 19 Ill. 346; *Magoon v. Warfield*, 3 Greene [Iowa], 293; *Hubbell v. Cramp*, 11 Paige, 310; *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 699; *Mitchell v. Singletary*, 19 Ohio, 291; *Downer v. Dana*, 22 Vt. 337; *Lamb v. Brown*, 12 B. R. 522; s. c. 7 C. L. N. 363; *Platt v. Parker*, 13 B. R. 14; s. c. 11 N. Y. Supr. [Hun], 135; 6 N. Y. Supr. 377; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400; *Thomas v. Jones*, 39 Wis. 124; *Heard v. Arnold*, 15 B. R. 543; s. c. 56 Geo. 570; *Jones v. Knox*, 51 Ala. 387; *Thornton v. Hogan*, 63 Mo. 143; *contra*, *Morse v. Presby*, 25 N. H. 299; *Russell v. Cheatham*, 16 Miss. 703; *Barnes v. Moore*, 2 B. R. 573; s. c. 2 L. T. B. 92; *Anon.* 1 B. R. 123; *Hill v. Robbins*, 1 Mich. [N. P.] 305; s. c. 22 Mich. 475; *Thornton v. Hogan*, 63 Mo. 163.)

The notice which must be duly published in order to give the district court jurisdiction over the creditors who are not notified personally, is the notice required on the filing of the application for a discharge. (*Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400.)

A creditor whose name was fraudulently omitted from the schedules may waive the want of notice and make himself a party to the proceedings. A creditor who applies to the district court to annul and set aside a discharge, voluntarily makes himself a party to the proceedings, and can not impeach the discharge by any other suit or proceeding. (*Burpee v. Sparhawk*, 4 B. R. 685; s. c. 108 Mass. 111.)

A discharge granted by a district court which has no jurisdiction over the person of the bankrupt because neither his residence nor place of business was within the district, is void. (*Stiles v. Lay*, 9 Ala. 795.)

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system professes to summon the creditors before some tribunal to show cause against granting a discharge to the bankrupt. (*Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 246.)

A discharge granted without jurisdiction is void; for by this section it is only a discharge duly granted, which is of any avail. A discharge granted without jurisdiction to grant it is not duly granted, and is no discharge. (*In re Penn et al.*, 3 B. R. 582; s. c. 4 Ben. 99.)

A fact which goes to defeat the jurisdiction of the court of bankruptcy may be shown by plea and proof in any court by a person not estopped to show it. (*In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.)

The discharge is a bar to the action, although the particular debt upon which the suit is brought was not placed on the schedules. (*Rogers v. West Ins. Co.* 1 La. An. 161.)

The discharge can not be impeached on the ground that the bankrupt being an alien, came to this country and took up a temporary residence for the purpose of seeking the benefit of the bankrupt law. (*Tompkins v. Bennett*, 8 Tex. 36.)

### What Claims are Barred.

The certificate of discharge is a bar only to debts and demands which were or might have been proved, but not as against personal covenants and engagements which were not provable. If a demand is not provable, it is not barred by the certificate. This is the just and settled rule. (*Murray v. De Rottenham*, 6 Johns. Ch. 52.)

If the debt is provable, the action is barred, although it was not actually proved. (*Hardy v. Carter*, 8 Humph. 153; *Rogers v. West Ins. Co.* 1 La. An. 161.)

The words "creditor or creditors," as used in the several provisions of the bankrupt act, do not include the United States. (*U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. [N. S.] 274; *U. S. v. King*, Wall. Sr. 12; *contra*, *U. S. v. Davis*, 3 McLean, 483; *U. S. v. Throckmorton*, 8 B. R. 309; s. c. 6 Pac. L. R. 102; s. c. 5 C. L. N. 520; s. c. 18 I. R. R. 54.)

A surety for the faithful performance of the duties of a public officer is not released from his obligation by a discharge. (*U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. [N. S.] 274; *contra*, *U. S. v. Throckmorton*, 8 B. R. 309; s. c. 5 C. L. N. 520; s. c. 6 Pac. L. R. 102; s. c. 18 I. R. R. 54; *U. S. v. Davis*, 3 McLean, 483.)

Debts due to the United States are not within the provisions of the bankrupt law. (*U. S. v. King*, Wall. Sr. 12; *U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.)

A bankrupt law will not be construed as intended to bind a State, unless the intent is manifested by express words or irresistible implication. The statute discloses no purpose on the part of Congress to bind a State. A discharge will not, therefore, release the bankrupt from a debt due to the State. (*Saunders v. Comm.* 10 Gratt. 494; *Comm. v. Hutchinson*, 10 Penn. 446.)

A discharge releases a bail from his liability on a bond given to the State to secure the appearance of a person accused of a crime to answer the charge in court. (*Jones v. State*, 28 Ark. 119.)

If a debtor applies to take the poor debtor's oath, and charges of fraud are filed against him prior to the commencement of proceedings in bankruptcy, the certificate of discharge will not defeat or avoid the proceedings to punish him criminally for fraud upon being convicted thereof on the charges so filed. The certificate of discharge is no bar to his being sentenced and imprisoned, as prescribed by statutes, upon such conviction. (*Stockwell v. Silloway*, 105 Mass. 517.)

A discharge does not release the bankrupt from a fine imposed by a State court for the violation of an injunction. (*Spalding v. New York*, 4 How. 21; s. c. 7 Hill, 301; s. c. 10 Paige, 284.)

The discharge does not release the bankrupt from his liability for a contempt in violating an injunction. (*Macy v. Jordan*, 2 Denio, 570.)

If there is partnership property, a discharge in proceedings against one partner alone will not release him from liability for partnership debts. (*Crompton v. Conkling*, 15 B. R. 417; 13 Pac. L. R. 205; s. c. *Hudgins v. Lane*, 11 B. R. 462.)

If the bankrupt gave a deed with warranty of title when he had no deed for the land, his liability on the warranty is released by his discharge. (*Williams v. Harkins*, 15 B. R. 34; s. c. 55 Geo. 172.)

An action of covenant on a warranty of title is barred, although the covenant is not broken until after the discharge is granted. (*Bates v. West*, 19 Ill. 134; *Shelton v. Pease*, 10 Mo. 473; *Bailey v. Moore*, 21 Ill. 165; *Jemison v. Blowers*, 5 Barb. 686; *contra*, *Bush v. Cooper*, 18 How. [Miss.] 82; s. c. 26 Miss. 599; *Burrus v. Wilkinson*, 31 Miss. 537; *Reed v. Pierce*, 36 Me. 455.)

If a creditor received certain property as a collateral security, and held the possession thereof or of the proceeds until after the granting of the discharge, when it was taken away by a claim under a prior and paramount title, the discharge is no bar to an action on the implied warranty of title. (*Bennett v. Bartlett*, 60 Mass. 225.)

The claim of an indorser who pays the note after the commencement of the proceedings in bankruptcy, is barred by the discharge of the maker. (*Baker v. Vasse*, 1 Cranch C. C. 194.)

The certificate of discharge is a complete defense to an action by an indorser against the bankrupt, who was the acceptor of a bill of exchange, which the indorser paid after the commencement of proceedings in bankruptcy. (*Hunt v. Taylor*, 4 B. R. 683; s. c. 108 Mass. 508.)

A discharge will not release the bankrupt from liability to a warehouseman for storage, which accrued after the commencement of proceedings in bankruptcy. (*Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.)

If the bankrupt indorses a note between the time of the commencement of proceedings in bankruptcy and the date of his discharge, he will be liable to the holder, notwithstanding such discharge. (*Sparhawk v. Broome*, 6 Binn. 256.)

A promissory note for money received by the bankrupt from his wife is discharged. (*Thoms v. Thoms*, 45 Miss. 263.)

A debt barred by the statute of limitations is discharged. Whether a claim is provable or not is to be determined by its nature, and not by inquiring whether it is possible to establish it. Provision is made in the act itself for the exclusion of many debts and claims which are in their nature provable. The discharge is equally effectual as against such creditors to release the bankrupt as it is against any other creditor. (*In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; *in re Ray*, 1 B. R. 203; s. c. 2 Ben. 53; *in re Dane* P. Kingsley, 1 B. R. 329; s. c. Lowell, 216; *in re Harden*, 1 B. R. 395; s. c. 1 L. T. B. 48; *in re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.)

A covenant against incumbrances is broken by the existence of an incumbrance at the time of the conveyance, and is released by a discharge. (*Reed v. Pierce*, 36 Me. 455.)

The discharge of the husband releases him from the debts of his wife contracted *dum sola*, and the creditors can not have her separate estate applied to the payment of their debts during his life. (*Vanderheyden v. Mallory*, 1 N. Y. 452.)

If a *feme sole* marries after the filing of a petition for a discharge, but before the granting of a discharge, a discharge granted to her in her maiden name will, on proof of identity, be a good defense to her and her husband in an action to recover a provable debt. (*Chadwick v. Starrett*, 27 Me. 138.)

The covenant in a deed of trust, to pay the taxes, is not a covenant to pay the debt secured by the deed, but to protect the pledge, and is a covenant as distinct from and independent of the debt as a covenant in a mortgage against incumbrances or to insure the title. Such a covenant runs with the land. The

creditor may resort to the personal covenant of the debtor for the purpose of rendering the security available. If the breach of the covenant arose after the discharge, and did not relate to any certain and specific demand capable of being proved, the covenantee is entitled to his remedy notwithstanding the certificate of discharge. (*Murray v. De Rottenham*, 6 Johns. Ch. 52.)

A discharge will not release the bankrupt from liability on an express covenant to pay rent where the rent fell due after the commencement of the proceedings in bankruptcy. (*Large v. Bosler*, 3 Penn. L. J. 246; *Kingsley v. Prentiss*, 6 Penn. L. J. 479.)

The discharge does not release the bankrupt from the rent that accrued after the commencement of the proceedings in bankruptcy and before the discharge. (*Savory v. Stocking*, 58 Mass. 607; *Prentiss v. Kingsley*, 10 Penn. 120.)

A discharge is no bar to an action upon a covenant in a ground rent deed for an instalment that became due after the granting of the discharge. (*Bosler v. Kuhn*, 8 W. & S. 183.)

If the bankrupt occupies the premises after his discharge, he will be liable for the rent that accrues during such occupation. (*Hendricks v. Judah*, 2 Caines, 25; *Steinmetz v. Ainslie*, 4 Denio, 573.)

The grantor can not, in an action on a covenant to pay rent in a ground rent deed, obtain a judgment for the rent that fell due prior to the commencement of the proceedings in bankruptcy to be levied only upon the land, and a personal judgment against the bankrupt for the rent that fell due after that time. A single judgment can not thus consist of two parts to be enforced in different modes. (*Large v. Bosler*, 3 Penn. L. J. 246.)

If the original ground of action is founded in contract, but the immediate causes arise *ex delicto*, and the claim is for damages unliquidated by express agreement, or such as will not be implied, the discharge does not bar the action. (*Dusar v. Murgatroyd*, 1 Wash. 13; *Hughes v. Oliver*, 8 Penn. 426.)

The only rule prescribed is to practicability of proving the debt, and this can not be evaded by the form of action which the creditor may select. (*Hatten v. Speyer*, 1 Johns. 37; *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 699; *Hughes v. Oliver*, 8 Penn. 426; *contra*, *Williamson v. Dickens*, 5 Ired. 259.)

A person who received money prior to his bankruptcy, under a promise to put it out on bond and mortgage, and which he failed to do, is not liable after his discharge, in a special action on the case, for such neglect. (*Hatten v. Speyer*, 1 Johns. 37.)

A demand for damages for breach of a contract of a common carrier is barred by a discharge. (*Campbell v. Perkins*, 5 Barb. 699; s. c. 8 N. Y. 430; *vide* *Dusar v. Murgatroyd*, 1 Wash. 13.)

A claim arising from the neglect of an officer is a tort, and is not discharged. (*Ellis v. Ham*, 28 Me. 385.)

A suit against an agent for a breach of duty in the management of his agency is not barred by a discharge. (*Williamson v. Dickens*, 5 Ired. 259.)

The discharge is not a bar to an action for deceit in falsely representing that he had confessed a judgment on a judgment note, and thereby made it a lien on his land, for the action is distinct and independent of the debt. (*Hughes v. Oliver*, 8 Penn. 426.)

An action by a shipper against a carrier for negligence whereby the goods of the former were injured, is not barred by a discharge. (*Dusar v. Murgatroyd*, 1 Wash. 13.)

No decree will be rendered in equity against a bankrupt after his discharge, for mortgaging property not his own, or for disposing of the mortgaged property prior to the commencement of the proceedings in bankruptcy. (*Wolfe v. Bate*, 9 B. Mon. 208.)

A discharge is no bar to an action in equity to rescind a contract on the ground of fraud. (*Doggett v. Emerson*, 1 W. & M. 195; *Smith v. Babcock*, 2 W. & M. 246.)

If the bankrupt as claimant signed a bond conditioned to restore the vessel if judgment should be rendered against him, a discharge will not release him from the bond, if the decision was not rendered until after the declaration of the final dividend. (*U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.)

When the evidence does not show when the final dividend was made, the discharge will only be deemed to operate on claims which were liquidated or fixed at the time of the commencement of the proceedings in bankruptcy. (*U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.)

A discharge of the bankrupt does not prevent the assignee from recovering property that belonged to his estate, although it was not placed on his schedules. (*Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. [N. S.] 21.)

If the bankrupt waives the benefit of his discharge and permits judgment to be entered against him, a fraudulent grantee can not object that the defense was not made. (*Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.)

### Sureties.

The surety on a custom house bond, in case of the discharge of the principal in bankruptcy, is, like other creditors, barred of his action for a debt due before the bankruptcy. (*Reed v. Emory*, 1 S. & R. 339; *Kerr v. Hamilton*, 1 Cranch C. C. 546.)

A surety who has paid a duty bond has not the right of the United States to proceed against the person of the bankrupt, but only against his effects, and the claim is barred. (*Kerr v. Hamilton*, 1 Cranch C. C. 546.)

The discharge does not extend to contracts upon which no claim could be founded at the time of the commencement of the proceedings in bankruptcy, and in regard to which there was then no reason to presume that any demand for money would ever exist. The discharge does not release a surety from liability on a bond given by an officer for the faithful performance of his duties, where the breach occurred after the discharge was granted. (*Loring v. Kendall*, 67 Mass. 305; *Fowler v. Kendall*, 44 Me. 448.)

A discharge does not release a bankrupt from his liability as surety on an injunction bond, when the proceedings in which the injunction was issued are not determined until after the granting thereof. (*Eastman v. Hibbard*, 13 B. R. 360; s. c. 54 N. H. 504.)

A bond to secure the faithful performance of official duties is a continuing indemnity, and every breach of it is a good cause of action, affording a remedy when, and only when, each severally occurs. A discharge releases the surety for all breaches that occurred prior to the commencement of the proceedings in bankruptcy. (*Fowler v. Kendall*, 44 Me. 448.)

A discharge does not release the bankrupt from his liability to his surety on a delivery bond if he pays the amount for which he is liable after the commencement of the proceedings in bankruptcy, although the breach occurred before that time. (*Pogue v. Joyner*, 6 Ark. 241.)

The claim of a surety upon an official bond, arising from the neglect of the officer, is not barred by a discharge. (*Ellis v. Ham*, 28 Me. 385.)

If a judgment is rendered against the principal and the surety after the commencement of proceedings in bankruptcy, but before the granting of a discharge to the principal, the surety on paying the judgment will have a claim against the principal. (*Pike v. McDonald*, 32 Me. 418.)

The discharge releases the bankrupt from his liability to a surety upon his

note or bond, although some of the installments fell due and were paid by the surety after the granting of the discharge. (*Fullwood v. Bushfield*, 14 Penn. 90.)

A surety can not recover against a principal who has been discharged in bankruptcy, upon payment of an obligation for which the bankrupt was liable before his discharge. His claim is contingent, and may be proved. (*Lipscomb v. Grace*, 26 Ark. 231; *Mace v. Wells*, 7 How. 272; s. c. 17 Vt. 503; *contra*, *Greenleaf v. Maher*, 2 Wash. 44.)

The discharge does not release the bankrupt from his liability to a surety for money paid on a judgment rendered against them both after the granting of the discharge. (*Leighton v. Atkins*, 35 Me. 118.)

The claim of a surety on a replevin bond against his cosurety for contribution is barred, although judgment is not rendered in the replevin suit until after the discharge is granted. (*Tobias v. Rogers*, 13 N. Y. 59.)

The discontinuance of a suit by the obligee in an official bond against the surety, upon a plea of the discharge does not relieve him from liability for contribution to his cosurety. (*Dole v. Warren*, 32 Me. 94.)

### Judgments.

A demand *ex delicto* is not discharged unless a judgment was obtained upon it before the commencement of the proceedings in bankruptcy, thereby changing its character from tort to debt. (*Ellis v. Ham*, 23 Me. 385; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schuyler*, 2 Denio, 73.)

A discharge releases the bankrupt from all judgments rendered against him prior to the commencement of the proceedings in bankruptcy, for a judgment is a debt of record. (*Blake v. Bigelow*, 5 Geo. 437.)

A judgment of separation of property is released by a discharge. (*Alling v. Egan*, 11 Rob. [La.] 244.)

A judgment in an action in tort is barred by a discharge. (*Comstock v. Grout*, 17 Vt. 512; *in re Edson Comstock*, 22 Vt. 642.)

A judgment obtained upon a breach of promise to marry is barred. (*In re Sidle*, 2 B. R. 220.)

A judgment in an action for seduction, rendered prior to the commencement of the proceedings in bankruptcy, is not barred. (*In re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370; *Nassau v. Parker*, 2 Penn. L. J. 298.)

The discharge does not release the bankrupt from a decree for the maintenance of a bastard child. The character of the claim partakes of the nature of a penalty and police regulation for the enforcement of a moral and natural duty, resulting from a wrongful and criminal act, and has nothing of the character of a debt except the duty to pay money to another. (*Comm. v. Erisman*, 21 Pitts. L. J. 69; *in re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370.)

Where a decree directs the payment of a certain sum every month as alimony, the monthly payments which fall due after the commencement of the proceedings in bankruptcy are due by natural obligation and not by contract, and are not affected by a discharge. (*In re Edward Garrett*, 11 B. R. 493.)

The certificate of discharge is no bar to a judgment for a prior debt obtained after the granting thereof. (*Selfridge v. Lithgow*, 2 Mass. 374.)

The discharge may be pleaded to a *sci. fa.* to revive a judgment. (*Duncan v. Hargrove*, 22 Ala. 150; *Alter v. Nelson*, 27 La. An. 242.)

The discharge is no defense to a *sci. fa.* to revive a judgment of revival entered after the granting of a discharge. (*Stewart v. Colwell*, 24 Penn. 67.)

A judgment entered after the commencement of the proceedings in bank-

ruptcy in an action in tort is not barred by a discharge, although the verdict was rendered before that time. (*Kellogg v. Schuyler*, 2 Denio, 73.)

If a verdict in an action for a tort is rendered before the commencement of the proceedings in bankruptcy, and the entry of a judgment is suspended by a motion for a new trial, and is not made until after the granting of a discharge, the judgment is not barred. (*Nassau v. Parker*, 2 Penn. L. J. 298.)

The report of referees is equivalent to the verdict of a jury. Although the report liquidates the damages, it does not change the nature of the demand. That remains the same until it is extinguished by the judgment, and if that is entered after the commencement of the proceedings in bankruptcy the claim for the tort is not barred by a discharge. (*Crouch v. Gridley*, 6 Hill, 250.)

An agreement among the referees as to the amount of the damages, without a report, does not change the nature of the demand. So long as the report remains incomplete there is nothing but the original tort. (*Crouch v. Gridley*, 6 Hill, 250.)

If a judgment by default is entered before the granting of a discharge in an action pending at the time of the commencement of the proceedings in bankruptcy, and a final judgment entered after the granting of the discharge, the discharge is not a bar to the demand, for the bankrupt was not bound to submit to the discretion of the court by applying to have the default set aside. (*Ewing v. Peck*, 17 Ala. 339.)

The discharge does not release the bankrupt from a judgment entered up after the granting of a discharge in an action pending at the time of the commencement of the proceedings in bankruptcy, and in which a default was entered before the discharge was granted. (*Hollister v. Abbott*, 31 N. H. 442.)

A judgment entered after the filing of the petition in bankruptcy upon a decision rendered prior thereto is released by the discharge. (*Monroe v. Upton*, 6 Lans. 255; s. c. 50 N. Y. 593.)

The discharge is not a bar to the bankrupt's liability for costs of a suit pending in his name at the time of the commencement of the proceedings in bankruptcy, and subsequently prosecuted in his name. (*Bridges v. Armour*, 5 How. 91.)

If the bankrupt was plaintiff in an action pending at the time of the commencement of proceedings in bankruptcy, and made no objection at the time of the entry of a judgment against him for costs on his failure to sustain his suit, his discharge will not release him from such judgment. (*Wilkins v. Warren*, 27 Me. 438.)

If the bankrupt's partner institutes a suit in the name of the firm after the commencement of proceedings in bankruptcy to collect a debt due to the firm the discharge will not release the bankrupt from a judgment for costs entered after the granting thereof. (*Ward v. Barber*, 1 E. D. Smith, 423.)

The costs which accrue after the commencement of the proceedings in bankruptcy rest upon the original debt, and a plea *puis darrein continuance* operates as a discharge of the action for the costs as well as the debt. (*Harrington v. McNaughton*, 20 Vt. 293; *Clark v. Rowling*, 3 N. Y. 216.)

The discharge releases the bankrupt from all liability for costs in an action pending in his name at the time of the commencement of the proceedings in bankruptcy, although the suit was prosecuted by him after that time and dismissed after the granting of his discharge. (*Leavitt v. Baldwin*, 4 Edw. Ch. 289.)

The discharge releases the bankrupt from a judgment for a provable debt entered after the commencement of the proceedings in bankruptcy and before the granting of a discharge. (*Harrington v. McNaughton*, 20 Vt. 293; *Dresse v. Brooks*, 3 Barb. 429; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *McDonald v. Ingraham*, 30 Miss. 389; *Clark v. Rowling*, 3 N. Y. 216; *Rogers v. West*, 10

*Co. 1 La. An.* 161; *Fox v. Woodruff*, 9 Barb. 498; *Dick v. Powell*, 2 Swan, 632; *Downer v. Rowell*, 26 Vt. 397; *contra, Bradford v. Rice*, 102 Mass. 472; *Ellis v. Ham*, 28 Me. 385; *Thompson v. Hewitt*, 6 Hill, 254; *Kellogg v. Schuyler*, 2 Denio, 73; *Woodbury v. Perkins*, 59 Mass. 86; *Holbrook v. Foss*, 27 Me. 441; *Uran v. Houdlette*, 36 Me. 15; *Pike v. McDonald*, 32 Me. 418; *Ingersoll v. Rhoades*, Hill & D. Sup. 371; *Fisher v. Foss*, 30 Me. 459; *Roden v. Jaco*, 17 Ala. 344.)

A discharge is no bar to an action on a judgment rendered in another State after the granting of the discharge, if it would not be a bar to a similar action upon a judgment rendered in the State. (*Rees v. Butler*, 18 Mo. 173.)

When an action is brought in another State on a judgment rendered after the commencement of the proceedings in bankruptcy, but before the granting of a discharge, it will be deemed to be barred by the discharge if it would be barred by the laws of the State where the judgment was rendered. (*Haggerty v. Amory*, 89 Mass. 458.)

If the jurisdiction of the district court over the person of the debtor is shown, it will be presumed that the notices to the creditors have been regularly given until the contrary appears. (*Morse v. Presby*, 25 N. H. 299; *Ruckman v. Cowell*, 1 N. Y. 505; *Norris v. Goss*, 2 Spear, 80.)

### Remedies against Judgments.

A judgment will be set aside for the purpose of letting the bankrupt plead his discharge when it appears to have been entered without his knowledge or acquiescence, or under such circumstances as would induce a court to open a judgment, when it is clear that the defendant has a valid defense. (*Comm. v. Huber*, 5 Penn. L. J. 331.)

If a judgment for a deficiency is entered against a bankrupt in a proceeding to foreclose a mortgage, he may move to set it aside as soon as he learns what has taken place, and then plead his discharge. (*Mutual Life Ins. Co. v. Cameron*, 1 Abb. N. C. 424.)

If application is seasonably made, a judgment by default will be stricken off upon terms to allow a party to plead his discharge in bar to the further maintenance of the suit. The bankrupt law is to be treated with the same respect as if it were a statute of the State. (*Savings Bank v. Webster*, 48 N. H. 21; *Lee v. Phillips*, 6 Hill, 246; *Carter v. Goodrich*, 1 How. Pr. 239.)

If the bankrupt's attorney fails by mistake to appear and plead his discharge, and judgment is entered by default, a review may be granted. (*Shurtleff v. Thompson*, 12 B. R. 524; s. c. 63 Me. 118.)

The bankrupt may be required to pay costs before the judgment will be set aside. (*Lee v. Phillips*, 6 Hill, 246.)

If he omits to plead his discharge when he has the opportunity, the court will not relieve him on motion. (*Rudge v. Rundle*, 1 N. Y. Supr. 649.)

The plea of bankruptcy is not a privileged plea, nor is it regarded with such favor that, under the rules of common-law practice and pleading, a default will be opened to let in the plea. (*Park v. Casey*, 35 Tex. 536.)

A new trial will not be granted if the bankrupt has been guilty of laches in pleading his discharge. (*Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536.)

A judgment obtained against a discharged bankrupt in a pending action under circumstances going to show fraud, trick, or contrivance, may be enjoined. (*Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536.)

If the bankrupt at the time of the rendition of the judgment against him is in attendance upon the court as a grand jurymen, this is good ground for



enjoining the judgment. It is error not to cause him to be called before entering a judgment by default against him. (*Mamwarring v. Kouns*, 35 Tex. 171.)

If the judgment is set aside to permit the defendant to plead a discharge, the plaintiff may discontinue without costs. (*Lee v. Phillips*, 6 Hill, 246.)

When a judgment is set aside by the granting of a new trial, the defendant may plead a discharge obtained since the rendition of the judgment. The court can not render a judgment against the defendant in the face of his discharge, nor in his favor upon any plea of set-off, as that belongs to his assignee. The suit may be dismissed without prejudice, leaving the parties to their remedies under the bankrupt law. (*Humble v. Carson*, 6 B. R. 84.)

The defendant can not move to have his discharge entered of record for the purpose of preventing the issuing of an execution before one is sued out, for that would enable him to become the actor while the creditor is passive. (*Brown v. Branch Bank*, 20 Ala. 420.)

An execution should not issue upon a judgment after the debtor has obtained a discharge, without an order of the court allowing it made upon notice to the bankrupt of the motion for such order. (*Francis v. Ogden*, 22 N. J. 210; *Alcott v. Avery*, 1 Barb. Ch. 347.)

If execution is issued upon a judgment which is released by the discharge, it will be set aside, on motion, and a perpetual stay entered. (*Huber v. Ely*, 4 A. L. J. 185; *Monroe v. Upton*, 6 Lans. 255; s. c. 50 N. Y. 593; *Thomas v. Shaw*, 2 Cin. 97; *Graham v. Pierson*, 6 Hill, 247; *McDougald v. Reid*, 5 Ala. 810; *Stewart v. Hargrove*, 23 Ala. 429; *Alcott v. Avery*, 1 Barb. Ch. 347; *Curtis v. Slosson*, 6 Penn. 265; *Chambers v. Neale*, 13 B. Mon. 256; *Milhoux v. Aicardi*, 51 Ala. 594.)

When the discharge is granted, an execution levied prior to that time upon property of the bankrupt acquired subsequently to the filing of the petition in bankruptcy, will be set aside, although the judgment creditor did not prove his debt. (*Bank v. Franciscus*, 10 Mo. 27.)

A perpetual stay of execution will be granted where a verdict was rendered before the commencement of the proceedings in bankruptcy, but the entry of the judgment was suspended by a motion for a new trial, but finally made before the granting of the discharge. (*Mechanics' Bank v. Lawrence*, 1 Sandf. 659.)

A perpetual stay will not be granted where the judgment was entered after the commencement of the proceedings in bankruptcy, under an agreement that it should not be affected by any discharge that might be obtained. (*Thompson v. Hewitt*, 6 Hill, 254.)

A perpetual stay of execution is never granted where the defendant might have pleaded his discharge. (*Lee v. Phillips*, 6 Hill, 246.)

On motion for a perpetual stay of execution, the discharge may be proved by a copy. (*Thompson v. Hewitt*, 6 Hill, 254.)

As the creditor is entitled to appear and oppose, the motion will only be granted upon the payment of the costs of opposing. (*Huber v. Ely*, 4 A. L. J. 185; *Mechanics' Bank v. Lawrence*, 1 Sandf. 659.)

Whether the property which is taken on the execution was fraudulently transferred to another prior to the commencement of the proceedings in bankruptcy, is a question which will not be tried on the motion to set aside the levy. (*Thomas v. Shaw*, 2 Cin. 97.)

A court of equity has no more right to interfere to annul a judgment rendered after the bankrupt had an opportunity to plead his discharge, in order to give effect to the discharge, than it has to set aside a judgment in favor of any other defense. (*Bellamy v. Woodson*, 4 Geo. 175; *Steward v. Green*, 11 Paige, 535; *Goodrich v. Hunton*, 2 Woods, 137.)

The mere postponement of a cause from term to term, until the defendant obtains his discharge, and the taking of a judgment at that time, do not constitute a fraud in the obtaining of the judgment, or entitle the defendant to relief in equity. (*Bellamy v. Woodson*, 4 Geo. 175.)

Where a judgment by default was rendered against the bankrupt prior to the commencement of the proceedings in bankruptcy, and the case then continued from term to term, until a discharge was granted, his negligence in omitting to plead his discharge will prevent him from obtaining relief in equity against a final judgment subsequently rendered against him. (*Bellamy v. Woodson*, 4 Geo. 175.)

A discharge extinguishes a judgment which existed before the commencement of proceedings in bankruptcy, and all proceedings on a *fiery facias* issued thereon are irregular and illegal, and may be enjoined. (*Murphy v. Smith*, 22 La. An. 441.)

If the goods of a bankrupt are seized under a *fiery facias* issued upon a judgment in respect of a debt due before the bankruptcy, the court, on motion, will set aside the execution. The remedy is in the court out of which the execution issued, by a summary application, when the discharge operates upon the judgment. The court will not set aside the execution without giving the execution creditor an opportunity to show that the discharge is inoperative as against his debt, and, when necessary, will direct an issue to try the fact. The creditor may resist the application on any of the grounds which except his debt from the effect of the discharge, and the court will determine the question on affidavits in a summary manner, or will grant an issue in its discretion. (*Linn v. Hamilton*, 34 N. J. L. 305.)

When the execution is regular upon its face, and is issued by the proper authority, and executed by the officer to whom it is directed, the judgment debtor can not recover the possession of the property by an action of replevin, even though he may, after the rendition of the judgment and before the issue of the execution, have obtained a discharge in bankruptcy. (*Westenberger v. Wheaton*, 8 Kans. 169.)

The district court has no jurisdiction to enjoin a creditor who has caused an execution to be issued on a judgment rendered after the commencement of proceedings in bankruptcy. The jurisdiction of the bankrupt court ceases with the granting of the discharge. (*Penny v. Taylor*, 10 B. R. 200.)

If a discharge is valid, it extinguishes a prior judgment, and an execution thereon, though it may be a protection to the officer who makes the levy, can not justify the party at whose instance it issues. He acts at his peril. Although he is ignorant of the discharge, yet, if he takes the bankrupt's property without authority, it is a trespass for which he must answer, however innocent he may be of any intention to do an illegal act. (*Ruckman v. Cowell*, 1 N. Y. 505.)

A judgment creditor may issue an execution on his judgment, and the execution is not absolutely void but voidable only; that is, it is a valid writ until the bankrupt shows it to be erroneous. The execution will afford protection to the party issuing it until it is set aside. (*Cogburn v. Spence*, 15 Ala. 549; *Roden v. Jacob*, 17 Ala. 344.)

When the bankrupt has caused the execution to be set aside, then the party suing the process is responsible for all the injury resulting to the bankrupt from the execution. (*Cogburn v. Spence*, 15 Ala. 549.)

### Alien Creditors.

A discharge in bankruptcy bars a foreign as well as a domestic creditor. There is no need of an express declaration of the legislature that foreign creditors are included in the operation of the bankrupt law when the language of the statute is otherwise sufficiently general and comprehensive, and when the evi-

dent policy of the law is to embrace all debts that can be proved, and to give the unfortunate merchant who conducts himself fairly, new credit in the commercial world and new capacity for business. (*Murray v. De Rottenham*, 6 Johns. Ch. 52; *in re Augustus Zarega*, 1 N. Y. Leg. Obs. 40; s. c. 4 Law Rep. 480; *Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448; *contra, Lizardi v. Cohen*, 3 Gill, 430; *McMenomy v. Murray*, 3 Johns. Ch. 435.)

### Liens.

In order to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, mortgagees and other lien creditors are permitted to have their satisfaction out of the property mortgaged or subject to lien. (*Peck v. Jenness*, 7 How. 612.)

If a vendee who has taken a bond of conveyance sells the land to another who agrees to pay the consideration, a discharge will release the vendee from personal liability but will not affect the vendor's lien or the rights of the purchaser. (*Lewis v. Hawkins*, 23 Wall, 119)

If a vendee sold the land before the commencement of the proceedings in bankruptcy, his discharge will not prevent the entry of a judgment *in rem* to enforce the vendor's lien. (*Elliott v. Booth*, 44 Tex. 180.)

A discharge will not prevent the entry of a judgment *in rem* to enforce a vendor's lien. (*Boone v. Revis*, 44 Tex. 384.)

A bill to enforce vendor's lien can not be enforced against bankrupts. (*Pearce v. Foreman*, 29 Ark. 563.)

The certificate of discharge does not prevent those entitled from recovering any specific property held by the bankrupt in a fiduciary capacity. (*Waller v. Edwards*, 6 Litt. 348.)

The discharge operates to bar actions for the recovery of debts only, and can not be pleaded to a summary process in the nature of a possessory action to recover the possession of land. (*Crosby v. Wentworth*, 48 Mass. 10; *Lomax v. Spear*, 51 Ala. 532.)

The discharge of the tenant will not prevent the landlord from recovering in an action of replevin instituted prior to the commencement of the proceedings in bankruptcy to recover property taken as distress for rent. (*Butler v. Morgan*, 8 W. & S. 53.)

The discharge can not be pleaded to a *sci. fa.* to enforce a mechanic's lien, for the proceeding is strictly *in rem*. (*McCullough v. Caldwell*, 5 Ark. 237.)

The discharge does not affect the lien of a judgment. (*McCance v. Taylor*, 10 Gratt. 580; *Heard v. Patton*, 27 La. An. 542.)

If the judgment proposed to be revived is a lien on land, the revival may be limited to a sale of the land, leaving the discharge to operate as an absolution of the personal obligation. (*Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223.)

If an action of covenant is brought against the bankrupt on an express covenant in a ground rent deed, for rent that fell due prior to the commencement of the proceedings in bankruptcy, a restricted judgment may be entered, to be levied only on the land out of which the ground rent issues, for the rent is a lien on the land. (*Large v. Bosler*, 3 Penn. L. J. 246.)

When an attachment has been laid upon the property of the bankrupt prior to the period of four months next preceding the commencement of proceedings in bankruptcy, a judgment may be entered in the court in which such attachment is pending, to be enforced against the property attached, and not to be enforced against the person of the bankrupt, even though the discharge is pleaded in bar of the further maintenance of the attachment suit. (*Bates v. Tappan*, 3 B. R. 647; s. c. 99 Mass. 376; *Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me..

559; *Leighton v. Kelsey*, 4 B. R. 471; s. c. 57 Me. 85; *Ingraham v. Phillips*, 1 Day, 117.)

A party having a judgment lien upon property conveyed by the bankrupt, before the filing of his petition to another, may enforce it by a *fi. fa.*, even after a discharge has been granted, when neither the judgment nor the property has ever been before the bankrupt court for adjudication. (*Jones v. Lellyett*, 39 Geo. 64; *contra*, *Blum v. Ellis*, 13 B. R. 345; s. c. 73 N. C. 293.)

A judgment which is a lien upon property sold by the bankrupt before the commencement of the proceedings in bankruptcy may be enforced against such property after the granting of the discharge, although it was proved against the bankrupt's estate, if such proof was subsequently withdrawn under a special order of the bankrupt court. (*Phillips v. Bowdoin*, 14 B. R. 43; s. c. 52 Geo. 544.)

A judgment creditor may enforce his lien against land sold by the bankrupt before the commencement of the proceedings in bankruptcy, although he abandoned a levy made upon personal property by permitting it to go back into the hands of the defendant, and did not follow it into the hands of the assignee. (*Winship v. Phillips*, 14 B. R. 50; s. c. 52 Geo. 593.)

A party who has a lien upon property fraudulently conveyed away by the bankrupt may prosecute a suit to enforce it, instituted before the commencement of proceedings in bankruptcy, even though the discharge is pleaded in bar of the suit. (*Pagne v. Able*, 4 B. R. 220; s. c. 7 Bush. 344; *Fetter v. Cirode*, 4 B. Mon. 482; *Lowry v. Morrison*, 11 Paige, 327.)

In such a case the proper course for the bankrupt is to apply for an order that the complainant proceed, and bring the assignee before the court by a supplemental bill in the nature of a bill of revivor. The bankrupt may then by plea or answer set up his discharge in bar of the suit so far as he is continued a party to the same by such supplemental bill. (*Lowry v. Morrison*, 11 Paige, 327.)

A discharge in bankruptcy constitutes no defense to an action to foreclose a mortgage. But no judgment can be rendered against the bankrupt for any deficiency. This applies to a mortgage of personal as well as real property. (*Pierce v. Wilcox*, 40 Ind. 70; *Truitt v. Truitt*, 38 Ind. 16; *City Bank v. Walton*, 5 Rob. [La.] 158; *Stewart v. Anderson*, 10 Ala. 504; *Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367; *Roberts v. Woods*, 38 Wis. 60; *Carlisle v. Wilkins*, 51 Ala. 371.)

When the bankrupt has received a discharge, he may apply to the State court for an erasure of the conventional and judicial mortgages. (*Diggs v. Prieur*, 11 Rob. [La.] 54.)

A creditor can not file a bill in equity to set aside a fraudulent conveyance after a discharge has been granted, for the debt is thereby discharged. (*Botts v. Patton*, 10 B. Mon. 452.)

A bill of equity, to reach the property of the bankrupt, cannot be further proceeded in against the bankrupt himself after the granting of a discharge. (*Penniman v. Norton*, 1 Barb. Ch. 246.)

The commencement and pendency of proceedings in bankruptcy is no matter in bar of a creditor's suit, as the bankrupt may fail in his effort to obtain a discharge. (*Dick v. Powell*, 2 Swan, 632; *Ingalls v. Savage*, 4 Penn. 224.)

If the assignee repudiates a particular piece of property because it is so hedged about with difficulty and embarrassments as to render it doubtful whether it would be profitable to endeavor to acquire it, a creditor may subject it to the payment of his claim, although the bankrupt has obtained his discharge. (*Rugely v. Robinson*, 19 Ala. 404.)

If a party who has taken the benefit of a State insolvent law under a statute which gives the trustee or the creditors a right to claim future acquisitions, subsequently takes the benefit of the bankrupt law, his discharge will release his

future acquisitions from the claims of those creditors whose debts existed prior to the filing of his petition. (*Beach v. Miller*, 15 La. An. 601.)

If a debtor who has obtained a discharge under a State insolvent law, subsequently obtains a discharge under the bankrupt law, the discharge in bankruptcy will not affect the right of the insolvent trustee to property acquired by inheritance after the granting thereof. (*Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153.)

If a surety enters into a covenant to pay the amount that may be recovered against the principal in a certain action, and the principal subsequently becomes bankrupt, the court may allow the suit to be prosecuted to judgment upon the entry on the docket, by the plaintiff, of a stipulation that such judgment shall not affect the defendant's property as a alien, or be the ground of an execution against him, and the sum so ascertained may be recovered from the surety upon the covenant. (*Bond v. Gardner*, 4 Binn. 269.)

Although the bankrupt personally is released, yet the debt due from the land remains undischarged, and he does not derive from the statute any power to do or assert anything which will impair a mortgage otherwise valid. His personal discharge does not free him from an estoppel arising from a covenant in the mortgage. If the mortgage contains a covenant against incumbrances, the debtor is estopped from setting up a title acquired after his discharge under a lien existing prior to the mortgage. (*Bush v. Cooper*, 18 How. [Miss.] 82; s. c. 26 Miss. 599; *Stewart v. Anderson*, 10 Ala. 504.)

A discharge under the bankrupt law does not prevent the creditor from proving his debt in a proceeding previously commenced under a State insolvent law, and receiving a dividend from the insolvent estate. (*Minot v. Thacher*, 48 Mass. 348.)

As a discharge extinguishes the debts, the trust under an assignment for the benefit of creditors is thereby terminated unless it is made to appear that the debts survive the discharge and are to be paid out of the assigned property. (*Seymour v. Street*, 5 Neb. 85.)

### New Promise.

There is no law that requires a promise to pay a debt discharged by proceedings in bankruptcy, to be made in writing to be valid. Therefore such a promise may be proved by parol, and when proved is binding. (*Barron v. Benedict*, 44 Vt. 518; *Hill v. Robbins*, 22 Mich. 475; s. c. 1 Mich. N. P. 345; *Apperson v. Stewart*, 27 Ark. 619; *Henly v. Lanier*, 15 B. R. 280; s. c. 75 N. C. 172.)

If a bankrupt promise to pay the debt in consideration of an agreement on the part of the debtor to take no dividend from the estate, the promise is binding if everything is fair. (*Kingston v. Wharton*, 2 S. & R. 208.)

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted, to recover his debt by suit, is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. (*Dusenberry v. Hoyt*, 10 B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. [N. S.] 132; s. c. 36 N. Y. Sup. 94; *Yates v. Hollingsworth*, 5 H. & J. 216; *Murim v. Morse*, 8 Mass. 127; *Stewart v. Reckless*, 24 N. J. 427; *Spooner v. Russell*, 30 Me. 454; *Williams v. Robbins*, 32 Me. 181; *Fletcher v. Neally*, 20 N. H. 464; *Herndon v. Givens*, 16 Ala. 261; *Blane v. Banks*, 10 Rob. [La.] 115.)

The promise by which a discharged debt is revived must be clear, distinct, and unequivocal. There must be an expression by the debtor of a clear intention to bind himself to the payment of the debt. (*Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Fraley v. Kelly*, 67 N. C. 78; *Linton v. Stanton*, 4 La. An. 401; *Branch Bank v. Boykin*, 9 Ala. 820; *in re Hazleton*, 32 Leg. Int. 13.)

The new promise must be distinct, unambiguous and certain. (*Stern v. Nussbaum*, 47 How. Pr. 489; s. c. 5 Daly, 382.)

The promise must be express in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt. (*Yortheimer v. Keyser*, 11 Penn. 364; *Pratt v. Russell*, 61 Mass. 462; *Bennett v. Everett*, 3 R. I. 152; *Horner v. Speed*, 2 Pat. & H. 616; *Porter v. Porter*, 31 Me. 169.)

The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect. (*Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Dearing v. Moffitt*, 6 Ala. 776; *Stewart v. Reckless*, 24 N. J. 427; *Church v. Winkley*, 73 Mass. 460; *Yortheimer v. Keyser*, 11 Penn. 364.)

The expression of an intention to do right is not sufficient to revive the debt, for what may be right depends on many circumstances. The principle is impracticable as a rule of action to be administered by the courts. (*Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1.)

There is no precise form of words required. The true test is, did the party mean that he would pay the amount of the debt? If he did, and the words used by him were susceptible of no other construction, then they amount in law to an express promise. (*Evans v. Carey*, 29 Ala. 99; *Bennett v. Everett*, 3 R. I. 152.)

A declaration that he expects to pay as fast as he can pay in money is the expression of a mere hope, without any words of promise or manifestation of the intent to contract an obligation. (*Bartlett v. Peck*, 5 La. An. 669.)

If the words spoken amount to nothing more than loose declarations or mere admission, or the mere expression of the obligation *in foro conscientia*, they are insufficient. (*Bartlett v. Peck*, 5 La. An. 669; *Prewett v. Caruthers*, 20 Miss. 491; *Bennett v. Everett*, 3 R. I. 152.)

A declaration that he is able and willing to pay the debt amounts to an express promise to pay it. (*Evans v. Carey*, 29 Ala. 99.)

As a promise is merely evidence of the determination of the mind to do a particular act, there is no reasonable distinction between "I will pay" and "I intend to pay," on the happening of a particular event. (*Dearing v. Moffitt*, 6 Ala. 776.)

To prove a new promise it is not necessary to show that the word "promise" was used. An agreement to pay, or any word signifying an intent to pay, or giving assurance that he would pay is sufficient evidence of a new promise. (*Harris v. Peck*, 1 R. I. 262.)

The bankrupt is at liberty to make the proposition in such manner as suits his own purposes, and the promise must be taken as it is made. If he promises to pay the debt by giving a new note, this can not be construed as a promise to pay the prior note. The promise is to make at a future time a written agreement to pay the debt, and his liability is not fixed until the new note is given. (*Porter v. Porter*, 31 Me. 169.)

A refusal to give a new note is not inconsistent with an express promise to pay the existing note. (*Underwood v. Eastman*, 18 N. H. 582; *Pratt v. Russell*, 61 Mass. 462; *vide Horner v. Speed*, 2 Pat. & H. 616.)

Partial payments on a debt are not in law a new promise to pay the debt, nor do they constitute evidence from which a jury may infer a new promise to pay the debt. (*Stark v. Stinson*, 23 N. H. 259; *Viele v. Ogilvie*, 2 Greene, 326.)

The mere payment of the interest on the note does not revive the debt. (*Cambridge Institution v. Littlefield*, 60 Mass. 210.)

A promise to settle a demand which is justly due, and wholly unpaid, can mean nothing less than that it shall be paid. (*Stillwell v. Coope*, 4 Den. 225.)

The new promise, like every other contract, must have the assent of both parties. (*Samuel v. Cravens*, 10 Ark. 380.)

The fact that no time was fixed when the payment was to be made does not affect the force of the legal obligation, for the law itself will fix the time. (*Harris v. Peck*, 1 R. I. 262.)

It is not necessary that the new promise shall be made by the bankrupt to the creditor or his authorized agent. It may be made to a third person. (*Haines v. Stauffer*, 13 Penn. 541; *McKinley v. O'Keson*, 5 Penn. 369; *Evans v. Carey*, 29 Ala. 99; *Bennett v. Everett*, 3 R. I. 152; *Comfort v. Eisenbeis*, 11 Penn. 13; *contra*, *Underwood v. Eastman*, 18 N. H. 582.)

In determining whether the words amount to an express promise, the fact that they were spoken to a third person, and not to the creditor nor his agent, may be taken into consideration with the other facts in evidence, for the sense of the words may best appear from them, and the cause and occasion of speaking them considered together. (*Evans v. Carey*, 29 Ala. 99; *Prewett v. Caruthers*, 20 Miss. 491; *Horner v. Speed*, 2 Pat. & H. 616.)

A request made by the bankrupt to a third party, out of the presence of the creditor, to endorse a note for the amount which he owed the creditor, does not raise a presumption of a promise to pay the debt. (*Bach v. Cohn*, 3 La. An. 101.)

The new promise must be an express promise, and must be absolute and unconditional. If there is anything like a condition in the promise, it must be removed by testimony, and placed on the footing of an absolute undertaking, to entitle the creditor to a recovery. As if the bankrupt should say that he would pay when he was able, the creditor must show an ability to pay. (*Yates v. Hollingsworth*, 5 H. & J. 216; *Brown v. Collier*, 8 Humph. 510; *Mason v. Hughart*, 9 B. Mon. 480; *La Tourrette v. Price*, 28 Miss. 702; *Samuel v. Cravens*, 10 Ark. 380; *Sherman v. Hobart*, 26 Vt. 60; *Taylor v. Nixon*, 4 Sneed. 352; *Ingersoll v. Rhoades*, Hill & D. Supp. 371; *Apperson v. Stuart*, 27 Ark. 619.)

The ability to pay must be clearly proven. The mere opinion of witnesses that a party has means sufficient wherewith to discharge the debt can not be regarded as sufficient evidence. The jury should be fully satisfied, by facts proved to exist, that the debtor has property and means which enable him to pay. (*Mason v. Hughart*, 9 B. Mon. 480.)

If the promise is to pay when he is able, the debtor may defeat the *prima facie* right established through proof that he owns property, by showing that the payment of debts contracted honestly and in the ordinary course of his business, subsequent to his discharge will exhaust his estate. (*Ecklar v. Galbraith*, 16 A. L. Reg. 80.)

If the promise is to pay out of the proceeds of certain work, the plaintiff must prove that the bankrupt has received the proceeds. (*Dearing v. Moffitt*, 6 Ala. 776.)

There is no distinction between a promise made after the filing of the petition, but before the certificate, and one made after it. Both are equally binding, the only consideration being the old debt. (*Hornthal v. McRie*, 67 N. C. 21; *Fraley v. Kelly*, 67 N. C. 78; *Donnell v. Swaim*, 3 Penn. L. J. 393; *Corliss v. Shepherd*, 38 Miss. 550; *Otis v. Gaslin*, 31 Me. 567; *Stillwell v. Coope*, 4 Denio, 225; *contra*, *Stebbins v. Sherman*, 1 Sandf. 510; *Ingersoll v. Rhoades*, Hill & D. Supp. 371.)

If the bankrupt, after the filing of his petition, continues to deal with a creditor whose name is not placed upon his schedules, and makes payment without directing that they shall be applied to the subsequent purchases, they will be applied in their order to the first items of his account. (*Hill v. Robbins*, 22 Mich. 475; s. c. 1 Mich. N. P. 305)

If the action is against a firm, the new promise must be made by both partners. (*Breit v. Osner*, 2 W. N. 601.)

The statute of limitations only commences to run from the time of the new promise. (*Horner v. Speed*, 2 Pat. & H. 616.)

A State law requiring the new promise to be in writing is valid, although it applies to a promise made before its adoption, for it prescribes the kind of evidence necessary to establish a fact, and regulates the remedy. (*Kingley v. Cousins*, 47 Me. 91.)

If there has been a new promise, the debt may be enforced, although it was proved in the proceedings in bankruptcy. (*Mason v. Hughart*, 9 B. Mon. 480.)

The benefit of the new promise does not pass to the indorsee of the note to whom it is subsequently indorsed, for the new promise is not negotiable. (*Wardell v. Foster*, 31 Me. 558; *White v. Cushing*, 30 Me. 267; *Walbridge v. Harroon*, 18 Vt. 448.)

A new promise made to the payee of a negotiable note is a promise to pay to him or order, according to its tenor, and will inure to the benefit of a subsequent indorsee. (*Way v. Sperry*, 60 Mass. 238; *Underwood v. Eastman*, 18 N. H. 582.)

A new promise to pay a specialty debt does not revive the original debt as a debt by specialty, but the original debt is merely a good consideration for the new promise. (*Field's Estate*, 2 Rawle, 351; *Graham v. Hunt*, 8 B. Mon. 7.)

If the debt has been revived by a new promise, an action of debt may be maintained on a judgment. A new promise places the debt in the same condition as it was before the discharge, and is a full and complete answer to the discharge. (*Otis v. Gazlin*, 31 Me. 567; *Maxim v. Morse*, 8 Mass. 127.)

The creditor should wait until the proceedings in bankruptcy are fully closed, for the promise must be understood as meaning only to pay so much as may remain unpaid after exhausting all the assets, and after the assignee has fully reported. (*Mason v. Hughart*, 9 B. Mon. 480.)

Whether the debtor has made a new promise will not be determined upon conflicting evidence on a motion for leave to issue an execution. (*Shuman v. Strauss*, 10 B. R. 300; s. c. 52 N. Y. 404; s. c. 34 N. Y. Sup. 6.)

When the bankrupt has promised to pay the debt after his discharge, the creditor may bring his action upon the original demand, and reply the new promise in avoidance of the discharge set out in the plea. The discharge bars the debt *sub modo* only, and the new promise operates as a waiver of the defense which the discharge gave. (*Dusenbury v. Hoyt*, 10 B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. [N. S.] 132; s. c. 36 N. Y. Sup. 94; *Maxim v. Morse*, 8 Mass. 127; *contra*, *Egbert v. McMichael*, 9 B. Mon. 44; *Carson v. Osborn*, 10 B. Mon. 155.)

The creditor may, if he so elects, ground his action on the new promise instead of the original debt. (*Horner v. Speed*, 2 Pat. & H. 616.)

If the declaration is based on a new promise, it need not set forth the original consideration for the debt where a note has been given therefor. (*Egbert v. McMichael*, 9 B. Mon. 44.)

A declaration on a conditional promise need not state in what the defendant's ability to pay consisted. (*Horner v. Speed*, 2 Pat. & H. 616.)

A conditional promise and an unconditional promise may be joined in the same declaration. (*Horner v. Speed*, 2 Pat. & H. 616.)

If the plaintiff avers an absolute and unconditional new promise, he can not prove a conditional promise by the bankrupt to pay when he is able. (*Egbert v. McMichael*, 9 B. Mon. 44.)

If the defendant, after a demurrer to a replication of a new promise has



been overruled, files a rejoinder, this is a waiver or withdrawal of the demurrer, and leaves him in the same condition as he would have been had the demurrer never been filed. (*Carson v. Osborn*, 10 B. Mon. 155.)

If the words are capable of being construed as a promise, it is for the jury to determine whether the bankrupt, by the words, intended to promise to pay the debt. (*Pratt v. Russell*, 61 Mass. 462; *Bennett v. Everett*, 3 R. I. 152.)

Where the evidence is conflicting, it is for the jury to determine whether the promise was absolute or conditional. (*La Tourrette v. Price*, 28 Miss. 702.)

If a verdict is found in favor of the plaintiff, and the cause of action is based on the original debt instead of the new promise, the verdict will not authorize the court to enter a judgment against the defendant. (*Carson v. Osborn*, 10 B. Mon. 155.)

If the plaintiff avers a new promise to a plea of discharge in an action on a judgment, and the defendant rejoins, judgment will be entered on the verdict, although the defendant moves in arrest of judgment. (*Muxim v. Morse*, 8 Mass. 127.)

### Plea of Discharge.

The State court does not lose jurisdiction of the person of the defendant by his being adjudicated a bankrupt. A judgment may be rendered against him if he does not plead his discharge. A discharge will not avail unless it is pleaded. (*Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536; *Fellows v. Hall*, 3 McLean, 487; *Steward v. Green*, 11 Paige, 535; *Freeman v. Warren*, 3 Barb. Ch. 635; *Seymour v. Browning*, 17 Ohio, 362; *Taylor v. Renn*, 8 C. L. N. 410; *Horner v. Spelman*, 78 Ill. 206.)

A discharge should be pleaded both at law and in equity, and can not be taken advantage of by motion. (*Fellows v. Hall*, 3 McLean, 281.)

No time is prescribed within which a discharge must be pleaded. If the discharge is pleaded in the proper order, and at the proper stage of the proceedings, it makes no difference whether the time is long or short. (*Pugh v. York*, 74 N. C. 383.)

The court in its discretion may allow a plea of a discharge although a long time has elapsed since it was obtained. (*Falkner v. Hunt*, 76 N. C. 202.)

If the defendant becomes bankrupt while the action is pending, he has a right to plead his discharge as soon as he obtains it. (*National Bank v. Taylor*, 120 Mass. 124.)

If a discharge is obtained after the institution of a suit to which it would be a bar, the defendant, on motion, will be allowed to plead it in a supplemental answer. (*Lyon v. Isett*, 34 N. Y. Supr. 41.)

An application for leave to set up a discharge by a supplemental answer is addressed to the discretion of the court, and will be denied when there has been unreasonable delay in making it. (*Medbury v. Swan*, 8 B. R. 537; s. c. 46 N. Y. 200; *Barstow v. Hansen*, 4 N. Y. Supr. 569; s. c. 9 N. Y. Supr. [Hun] 333.)

Leave to file a supplemental answer setting up the discharge must be granted unless the papers show a case in which the court may exercise a discretion as to granting or withholding it. (*Holyoke v. Adams*, 13 B. R. 413; s. c. 59 N. Y. 233.)

If a judgment by default constitutes a lien on the debtor's land, and is permitted to stand as a security for the creditor's claim upon leave given to the defendant to answer, a supplemental answer setting up a discharge will not be allowed, for that would defeat the lien. (*Barstow v. Hansen*, 4 N. Y. Supr. 569; s. c. 9 N. Y. Supr. [Hun] 333.)

A discharge is a matter which a court may allow to be set up by an amendment of the proceedings. (*Richards v. Nixon*, 20 Penn. 19.)

If a discharge is obtained after an answer in equity has been filed, special leave should be given to the defendant that he may plead it. (*Fellows v. Hull*, 3 McLean, 281.)

When a discharge is obtained after the pleadings are closed in a suit in equity, it is usually pleaded as a defense at the very next term happening after the last continuance. If a long delay afterwards intervenes, it can not be pleaded unless a good excuse is given for the delay and on suitable terms. (*Doggett v. Emerson*, 1 W. & M. 195; *Smith v. Babcock*, 2 W. & M. 246.)

A discharge granted after the commencement of the suit should be pleaded in bar of its further maintenance, and not in bar generally. (*Kunsler v. Kohaus*, 5 Hill, 317.)

If the discharge is obtained after pleas have been filed, it should be pleaded *pais darrein continuance* not in bar of the action, but to the further prosecution of the suit, and can not be given in evidence under the other pleas. (*Corpening v. Grinnell*, 10 Ired. 15.)

If there has been no personal service of the writ on the defendant, and the plea is filed at the first term at which he appears, it need not be pleaded in bar of the further maintenance of the action, for when the matter of the plea in bar of the further maintenance is, in the first instance, and before any other plea filed, pleaded in bar, it need not be alleged to be *pais darrein continuance*. (*Cutter v. Folsom*, 17 N. H. 139.)

A plea *pais darrein continuance* need not state the time when the defendant pleads. (*Keene v. Mould*, 16 Ohio, 12.)

If a plea of a discharge in bankruptcy is put in as a plea *pais darrein continuance*, the court may set it aside when it is manifestly fraudulent and against the justice of the case. (*Zollar v. Jarvin*, 49 N. H. 114.)

A plea of a discharge must set forth a copy of the discharge. (*Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.)

A complaint setting up a discharge is sufficient, although it does not set forth a copy thereof. (*Hayes v. Ford*, 15 B. R. 569.)

A plea of a discharge in bankruptcy is sufficient if it sets out a discharge duly authenticated. (*Lathrop v. Stewart*, 5 McLean, 167; *White v. How*, 3 McLean, 291; *McNeil v. Knott*, 11 Geo. 142; *Rowan v. Holcomb*, 16 Ohio, 463; *Downer v. Chamberlin*, 21 Vt. 414; *Reed v. Vaughn*, 10 Mo. 447; *Morrison v. Woolson*, 23 N. H. 11; *Preston v. Simons*, 1 Rich. 262; *Keene v. Mould*, 16 Ohio, 12.)

It is not necessary that the plea shall set out the proceedings at large. If the court appears to have had jurisdiction and to have granted the discharge, any mere error in the course of its proceedings would not avail to defeat the discharge. If the proceedings were set forth in detail, most of the averments could not be traversed, as that would only lead to an immaterial issue. It is, therefore, only necessary to set forth enough to show that the court had jurisdiction of the case and granted the discharge. (*Johnson v. Ball*, 15 N. H. 407; *Morrison v. Woolson*, 23 N. H. 11; *McCormick v. Pickering*, 4 N. Y. 276; *Price v. Bray*, 21 N. J. 13.)

The facts to be stated distinctly in a plea of discharge in voluntary bankruptcy, for the purpose of showing the jurisdiction of the district court to grant the discharge, are: 1st. The residence of the defendant, or the place where he carried on business. 2. The existence of debts to the amount of \$300. 3d. That the defendant presented a petition to the district court where he resided or carried on business, and that the petition contains what the act required that it should contain. If the plea shows these facts the presumption is thenceforward in favor of the regularity of the proceedings. (*McCormick v. Pickering*, 4 N. Y. 276)

The plea should set forth what court entertained the case and granted the discharge. (*Morrison v. Woolson*, 29 N. H. 510.)

It is not sufficient to aver that the defendant was a bankrupt, but the plea must aver that he owed provable debts. (*Coates v. Simmons*, 4 Barb. 403.)

The plea must plead the discharge, and not merely a decree granting a discharge. (*Hayes v. Flowers*, 25 Miss. 169; *contra*, *Viele v. Blanchard*, 4 Greene, 299; *Magoon v. Warfield*, 3 Greene [Iowa], 293.)

A plea of the commencement of proceedings in bankruptcy which does not set forth a discharge is bad. (*Atkinson v. Fortinberry*, 15 Miss. 302.)

Facts which are necessary to confer jurisdiction must be positively stated. Hence the plea must allege that the defendant owed debts to the requisite amount, not that he filed a petition setting forth that he owed such debts. (*Varnum v. Wheeler*, 1 Denio, 331.)

The plea must aver that the defendant resided or carried on business in the district where the petition was filed at the time of the filing thereof. (*Johnson v. Ball*, 15 N. H. 407; *Loring v. Kendall*, 67 Mass. 305.)

The plea must allege that the defendant applied to the district court by petition setting forth the list of his creditors and inventory of his assets as required by law. (*Cutter v. Folsom*, 17 N. H. 139.)

The plea of a discharge in involuntary bankruptcy need not aver the existence of the facts upon which the creditors were authorized to file the petition. An averment in general terms that the defendant had become a bankrupt is sufficient. (*Stephens v. Ely*, 6 Hill, 607.)

The plea must allege that the discharge was granted by the court and not the judge. (*Sackett v. Andross*, 5 Hill, 327.)

It is not necessary to set out all the steps which were taken in obtaining the discharge, but it is necessary to show that the court acquired jurisdiction to grant it. It is not enough to say in general terms that the court had jurisdiction, but the facts on which jurisdiction depends must be specially set forth. (*Sackett v. Andross*, 5 Hill, 327; *Stow v. Parks*, 1 Chand. 60; *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.)

The plea need not aver that the court granting the discharge had jurisdiction to entertain the proceedings. (*Lathrop v. Stuart*, 5 McLean, 167.)

No direct and formal admission of the cause of action is necessary in a plea of a discharge. It is enough that the cause of action is not denied, for not being denied it is in law admitted. A plea which says that "the supposed cause of action, if any there was," is sufficient. (*Morrison v. Woolson*, 23 N. H. 11.)

The plea must aver that the claim in suit was a provable debt. (*Hayes v. Flowers*, 25 Miss. 169; *Sackett v. Andross*, 5 Hill, 327.)

If the plea avers that the debt which is the cause of action was due and owing at the time of the commencement of the proceedings in bankruptcy, it need not aver that the debt was provable. (*Morrison v. Woolson*, 23 N. H. 11.)

The plea need not allege that the debt was provable where the debt alleged in the declaration is *prima facie* provable. If there is any peculiarity which exempts the debt from the operation of the discharge, the plaintiff must set it forth in his replication. (*Cutter v. Folsom*, 17 N. H. 139.)

The plea of a discharge in an action upon a bail bond should aver the date of the final dividend of the bankrupt's assets, and that the liability was fixed before that time. (*Houston v. State*, 34 Tex. 542.)

When the plea consists of matter of fact as well as matter of record, it should

conclude with an ordinary verification. (*Price v. Bray*, 21 N. J. 13; *Kirby v. Garrison*, 21 N. J. 176; *Downer v. Chamberlin*, 21 Vt. 414; *Preston v. Simons*, 1 Rich. 262.)

The defendant may conform to the practice of the State court, and plead the general issue, and give notice of his discharge where that mode of pleading is allowed. (*Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 699.)

The plea of a discharge in bankruptcy introduces new matter in confession and avoidance of the plaintiff's claim, and ought to conclude with a verification. The plaintiff can then reply, and if the defendant thinks the replication sets up matter inadmissible under the bankrupt act, he can raise the question by a demurrer. (*Mayer v. Gimbel*, 30 Leg. Int. 5; *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.)

A garnishee can not plead the discharge of the defendant. (*Frazier v. Banks*, 11 La. An. 31.)

If the bankrupt joins with his sureties in pleading his discharge, if the plea is insufficient for them it is bad for all. (*Dyer v. Cleaveland*, 18 Vt. 241; *Hall v. Fowler*, 6 Hill, 630)

A defective plea of a discharge in bankruptcy may be amended. (*Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.)

A defective plea may be deemed to be cured by a replication and a verdict. (*Dresser v. Brooks*, 3 Barb. 429.)

If the bankrupt is sued jointly with others upon a joint contract, and pleads his discharge, the plaintiff may enter a *nolle prosequi* as to him, and prosecute the suit against the others. (*Coburn v. Ware*, 25 Me. 330.)

Where the discharge is obtained before the action is commenced, the plaintiff can not discontinue without the payment of costs. (*Camp v. Gifford*, 7 Hill, 169.)

If the defendant pleads his discharge to a pending action, the plaintiff, under the laws of Massachusetts, should be allowed to discontinue solely on the grounds of the discharge; or if the defendant insists on going to trial, he should be required to waive his discharge and to proceed on his other grounds of defense. (*Geward v. Dunbar*, 58 Mass. 500.)

### Demurrer.

If the plea *puis darrein continuance* is filed, with leave of the court, it will not be held bad on demurrer, although the matter of the plea arose before the last continuance. (*Keene v. Mould*, 16 Ohio, 12.)

When a demurrer to a plea of a discharge is sustained, the judgment should be *respondeat ouster*. (*Hayes v. Flowers*, 25 Miss. 169.)

The suggestion of the pendency of the proceedings in bankruptcy suspends the cause until the final action of the bankrupt court granting or denying a final discharge. If a demurrer to a plea of a discharge subsequently entered is sustained, the discharge is virtually out of the case, and the cause again stands suspended upon the suggestion of pending proceedings in bankruptcy, and the entry of a personal judgment against the bankrupt is irregular. (*Gibson v. Green*, 45 Miss. 209.)

### Replication.

A replication admits the genuineness of the discharge. (*Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344.)

If the debt is excepted from the operation of the discharge, the better practice is to declare as if there were no anticipation of a plea of a discharge, and when the plea is put in, to reply to the facts to avoid its effect. (*Jacobson v. Horne*, 52 Miss. 185; *Brown v. Broach*, 52 Miss. 536.)

If the plaintiff seeks to avoid the discharge, on the ground that the debt sued upon was of a fiduciary character, he should allege that fact in his replication to the plea. (*Stow v. Parks*, 1 Chand. 60; *Rowan v. Holcomb*, 16 Ohio, 463; *Dick v. Powell*, 2 Swan, 632; *Cutter v. Folsom*, 17 N. H. 139; *McCabe v. Cooney*, 2 Sandf. Ch. 314; *contra*, *Sackett v. Andross*, 5 Hill, 327; *Maples v. Burnside*, 1 Denio, 332; *Frost v. Tibbetts*, 30 Me. 188; *Sorden v. Gatewood*, 1 Ind. 107; *Bivens v. Newcomb*, 2 Ind. 98.)

If the plea omits to aver the filing of a petition in bankruptcy, the defect is waived by a replication. (*Price v. Bray*, 21 N. J. 13.)

When the plaintiff replies that the district court had no jurisdiction to grant the discharge, because the bankrupt did not at the time reside or carry on business within the district, and issue is joined thereon, parol evidence is not admissible to contradict the record, if that shows that the court had jurisdiction. (*Lathrop v. Stewart*, 6 McLean, 630; *Reed v. Vaughan*, 15 Mo. 137; *vide* *Stiles v. Lay*, 9 Ala. 795.)

The plaintiff can not aver that the defendant did not become a bankrupt, or that he did not comply with all the requisites of the statute, or that he did not obtain a discharge. He may reply *nul tiel record*; or if he can not safely deny the record, he may plead that the cause of action has accrued since the commencement of the proceedings in bankruptcy, or a new promise. (*Price v. Bray*, 21 N. J. 13.)

If there is any matter which renders the discharge invalid, or takes the case out of its operation, the plaintiff may set it forth in the replication. (*Johnson v. Ball*, 15 N. H. 407.)

A replication in confession and avoidance admits every fact substantially set forth in the plea in bar; and if the discharge is substantially set forth in the plea, there can not, after a verdict, be a judgment *non obstante veredicto*, or a repleader. (*Jenkins v. Stanley*, 10 Mass. 226.)

A replication which sets forth several distinct allegations, each of which standing alone would be a sufficient answer to the plea, is bad, for duplicity. (*McNulty v. Frame*, 1 Sandf. 128; *Downer v. Rowell*, 26 Vt. 397.)

### Evidence.

Parol testimony is not admissible to prove a discharge without sufficient excuse for the non-production of the certificate, for the certificate is the best evidence of the discharge. (*Regan v. Regan*, 72 N. C. 195.)

The validity of a discharge will not be determined on affidavits, but the allegations of the parties must be tried in a more formal way. (*Bangs v. Strong*, 1 Denio, 619.)

A discrepancy of dates in a certificate of discharge is no reason for excluding the record, where that is obviously a clerical error and time is immaterial. (*Pennell v. Percival*, 13 Penn. 197.)

It is not necessary to prove the proceedings in the district court preliminary to the granting of the discharge, for the certificate is conclusive. (*Thompson v. Wiley*, 34 Me. 194.)

The certificate itself is competent evidence of the fact of bankruptcy, without the production of the whole record. (*Boas v. Hetzel*, 3 Penn. 298; *Morse v. Clayes*, 11 Barb. 100; *Pennell v. Percival*, 13 Penn. 197; *Strader v. Lloyd*, 1 West. L. J. 396.)

The certificate of discharge is admissible in evidence, although the plaintiff produces a full record of the proceedings, which does not contain any discharge, for the clerk may have neglected to make the entry of the final discharge. (*King v. Dietz*, 12 Penn. 156.)

If the certificate of discharge is to be used in another State, it should be

authenticated by the seal of the court, the attestation of the clerk, and the certificate of the judge that the attestation is in due form. (*Tappan v. Norvell*, 3 Sneed, 570.)

If the clerk merely signs the certificate, without stating that the seal is the seal of the court, parol evidence is admissible to prove that fact. (*Mason v. Lawrason*, 1 Crane C. C. 190.)

The authentication by the judge must certify that the clerk at the time of the certificate was the clerk of the district court, as well as that the exemplification is in due form of law. (*Pennell v. Percival*, 18 Penn. 197.)

A certified copy of a discharge granted by a district court in another State is not admissible in evidence without an authentication of the clerk's certificate by the judge. (*Dorsey v. Maury*, 18 Miss. 298; *Heard v. Patton*, 27 La. An. 542.)

A copy of the entire and full record of the proceedings is competent evidence of the discharge. The law prescribes no particular form in which the certificate of the clerk shall be made, and the part of the record not absolutely required is only surplusage. (*Tompkins v. Bennett*, 3 Tex. 36.)

If a copy of the discharge is produced, it will be presumed that the notice by publication was duly given. (*Jones v. Knox*, 51 Ala. 367.)

If the replication merely denies that the discharge was granted in manner and form as alleged in the plea, the defendant, upon the production of a duly certified copy thereof, is entitled to a verdict, and neither the judge nor the jury can pass upon or decide as to the effect to be given to it. (*Dresser v. Brooks*, 3 Barb. 429.)

An objection that the clerk did not certify that he had compared the copy with the original, and that it was a correct transcript therefrom, and of the whole original, and that the seal was not impressed on wax, wafer, or other substance, if overruled at the trial, may be obviated on a motion for a new trial by the production of a copy duly authenticated in the precise form required by the objection. (*Dresser v. Brooks*, 3 Barb. 429.)

A duly certified copy of a discharge is admissible in evidence, in an action to recover a debt, although the creditor was not notified of the proceedings in bankruptcy, for the court in the absence of proof can not presume that it does not operate to discharge the debt. (*Thornburgh v. Madren*, 33 Iowa, 380.)

The plea of bankruptcy must be supported by proper evidence. (*Owens v. Grimsley*, 44 Ala. 359.)

The production of a certificate of discharge, will not authorize the court to dismiss the suit. This plea in bar is not different from any other plea. The fact of discharge is a matter to go to the jury, just like any other fact. (*Austin v. Markham*, 10 B. R. 548; s. c. 44 Geo. 161.)

The burden of maintaining that the debt was provable, is on the bankrupt. If it does not clearly appear when the petition was filed, that fact may be left to the jury. (*Clement v. Hayden*, 4 Penn. 138.)

When the discharge is given in evidence without being pleaded, jurisdiction to grant it is presumed until the contrary appears. (*Rucknam v. Cowell*, 1 N. Y. 505.)

### Practice in Appellate Tribunals.

If a party in whose favor judgment was rendered in the subordinate court is declared bankrupt, and obtains a discharge before the judgment is reversed in the appellate court, a decree may be entered upon the reversal, that no execution shall issue upon the judgment without a previous order to that effect made by the subordinate court, after reasonable notice to the party to appear and show cause, if any he can, against it. (*Exchange Bank v. Knox*, 19 Grat. 789.)

When a party against whom a judgment has been rendered, takes an appeal, and gives bond with surety to pay such judgment as may be entered in the appellate court, where the case is brought up for a new trial before a special jury, and after appeal is taken is adjudged a bankrupt, and duly obtains a discharge, he may plead such discharge in the appellate court, and the suit will not be allowed to proceed to judgment to bind the surety. The contract of the surety was to pay the judgment that might be entered. But as no judgment could be rendered against his principal, no liability attached to him. He complied with the contract, and his liability was terminated. (*Odell v. Wooten*, 4 B. R. 183; s. c. 38 Geo. 225.)

An appellate court can not entertain a petition to set aside a judgment rendered by it after the granting of the discharge in bankruptcy. If it were to entertain it, the opposite party would have the right to controvert the facts stated therein. This might result in issues of fact and of law which would constitute a new lawsuit. None but a court with original jurisdiction could try and determine this issue. (*Riggs v. White*, 4 Heisk. 503.)

The bankruptcy of the plaintiff or defendant, after the judgment or decree of an inferior court can not be made available in the appellate court by a plea in abatement, although the bankruptcy may have occurred and the discharge have been granted before the filing of the record for writ of error. (*Longley v. Swayne*, 4 Heisk. 506, note)

A certificate of discharge is a bar to further proceedings in an appellate court to obtain a reversal of a judgment rendered in favor of the bankrupt, who is defendant in the case. (*Fox v. Weed*, 21 La. An. 58.)

If a judgment on which an appeal is pending is proved, the appellate court may order that the appellant be discharged therefrom. (*Haggerty v. Morrison*, 59 Mo. 324.)

The appellate court, after a discharge, can render no judgment in a case except that of dismissal. (*Viosca v. Weed*, 22 La. An. 218.)

The suggestion of the discharge of the defendant while his appeal is pending, can have no effect in the appellate court. The remedy is by a motion for a perpetual stay of execution. (*Cornell v. Dakin*, 38 N. Y. 253.)

If a discharge is obtained after rendition of the judgment in the subordinate court, the appellate court may in its discretion reverse the judgment *pro forma*, in order to enable the defendant to plead his discharge. (*Bank v. Onion*, 16 Vt. 470.)

If the defendant against whom a judgment has been rendered, obtains a discharge between the argument of the cause in the appellate court, and the decision affirming the judgment, the appellate court on application will order a perpetual stay of execution. (*Parks v. Goodwin*, 1 Mich. 35.)

Where the party against whom a judgment has been rendered, neglects to inform his attorney that he has obtained a discharge, because he supposes that his discharge is a sufficient protection, and the attorney brings the case to a hearing in the appellate court without setting up the discharge, the appellate court on motion will grant a perpetual stay of execution. (*Bostwick v. Dodge*, 2 Doug. 331.)

If on appeal the verdict is set aside, the defendant may plead his discharge when the case is remanded to the subordinate court. (*Minot v. Brickett*, 49 Mass. 560.)

A motion to discontinue without costs will be granted, although the defendant waives the benefit of his discharge. (*Sundford v. Sinclair*, 6 Hill, 248.)

The plaintiff in error may discontinue his suit without costs, if the defendant in error becomes bankrupt after the joinder in error. (*Labron v. Woram*, 5 Hill, 373.)

No costs will be allowed to the plaintiff in review, under the laws of Maine, where the reversal of the judgment is obtained by pleading a discharge obtained after the rendition of the judgment. (*Foster v. Hinckley*, 40 Me. 54.)

When judgment has been rendered against the plaintiff, he can not have leave to discontinue without costs on the bankruptcy of the defendant, although a writ of error is pending. He can only discontinue on the reversal of the judgment. (*Sandford v. Sinclair*, 6 Hill, 248.)

SEC. 5120.—Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

Statute Revised—March 2, 1867, ch. 176, § 34, 14 Stat. 533. Prior Statutes—April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

The authority to set aside and annul a discharge in bankruptcy conferred upon the Federal courts by this section is incompatible with the exercise of the same power by a State court; and the former is paramount. A discharge duly granted, when pleaded in bar to the further maintenance of an action for a prior indebtedness, can not be impeached in a State court, for any cause which would have prevented the granting of it under section 5110, or been sufficient ground for annulling it under this section. Proceedings in bankruptcy are statutory proceedings. The powers exercised and the remedies provided in bankruptcy are given by statute. The impeaching tribunal is specified, and this designation, according to well established principles of interpretation, forms a part of the remedy, and excludes all others. The authority of Congress over the subject of bankruptcies being paramount to State authority, where it has provided a mode of dealing with a bankrupt's estate, that mode only can be pursued; and it would be an infringement of the paramount law, if State courts should adopt another and a different mode. There is no distinction between actions brought before the debtor petitions to be adjudged a bankrupt, and those brought afterwards. The authority of Congress over the subject-matter is the same in both cases,



(*Corey v. Ripley*, 4 B. R. 503; s. c. 57 Me. 69; *Parker v. Atwood*, 51 N. H. 181; *Oats v. Parish*, 47 Ala. 157; *Ocean National Bank v. Olcott*, 46 N. Y. 12; *Way v. Howe*, 4 B. R. 677; s. c. 108 Mass. 502; *Alston v. Robinett*, 9 B. R. 74; s. c. 37 Tex. 56; *Hudson v. Bingham*, 8 B. R. 494; s. c. 6 L. T. B. 326; s. c. 12 A. L. Reg. 637; *Dusenbury v. Hoyt*, 10 B. R. 313; 14 Abb. Pr. [N. S.] 132; s. c. 53 N. Y. 521; s. c. 36 N. Y. Sup. 94; *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223; *Stephens v. Brown*, 10 B. R. 568; s. c. 49 Miss. 597; *Smith v. Ramsey*, 15 B. R. 447; s. c. 27 Ohio St. 339; *Seymour v. Street*, 5 Neb. 85; *contra*, *Perkins v. Gay*, 3 B. R. 772; s. c. 1 L. T. B. 221; s. c. 2 C. L. N. 279; s. c. 18 Pitts. L. J. 98; *Beardsley v. Hall*, 36 Conn. 270.)

A discharge can not be impeached in a State court on the ground that the name of the creditor was fraudulently omitted from the schedules and he had no notice of the proceedings. (*Black v. Blazo*, 13 B. R. 195; s. c. 117 Mass. 17; *Rayl v. Lapham*, 15 B. R. 508; s. c. 27 Ohio St. 452; *Milhous v. Aicardi*, 51 Ala. 594; *contra*, *Barnes v. Moore*, 2 B. R. 573; s. c. 2 L. T. B. 92; *Batchelder v. Low*, 8 B. R. 571; s. c. 43 Vt. 662.)

The circuit court has no jurisdiction to annul a discharge for frauds upon the statute, which would have prevented the bankrupt from receiving it. The district court alone has the power to inquire into such frauds. (*Commercial Bank v. Buckner*, 20 How. 108.)

The bankruptcy court has the same inherent power as all other courts to recall its own decrees, or to vary or annul them, as justice may require. All courts claim and exercise this power when it is the only remedy for the party aggrieved. When a sudden and overpowering accident prevents the attendance of the creditor's counsel at the hearing, the court will reopen the decree granting the discharge. The decree, however, will only be opened upon good cause shown, and for a trial upon the merits, and not upon any mere technical matter. (*In re Dupee*, 6 B. R. 89; *Thomas v. Hunter*, 3 McLean, 297.)

A suit to set aside a discharge of a bankrupt must be brought within two years from the time it was granted, although the creditor did not discover the cause therefor until a long time afterwards, because the bankrupt had fraudulently concealed it. (*Pickett v. McGavick*, 14 B. R. 236.)

The certificate is, *prima facie*, conclusive as to the validity of the discharge, subject, however, to be impeached for fraud, if any was perpetrated in obtaining it. (*Gupton v. Connor*, 11 Humph. 287.)

The specifications must be precise and definite. (*In re McIntire*, 1 B. R. 436; s. c. 2 Ben. 345; *in re Rainsford*, 5 B. R. 381; *Stewart v. Hargrove*, 23 Ala. 429; *Chadwick v. Starrett*, 27 Me. 138; *Tompkins v. Bennett*, 3 Tex. 36; *Lathrop v. Stewart*, 6 McLean, 630; *Drake v. Jones*, 3 Ala. 638; *Chambers v. Neal*, 13 B. Mon. 256; *Rand v. Upham*, 22 N. H. 39; *Shelton v. Pease*, 10 Mo. 473; *Hazard v. Boykin*, 8 Rob. [La.] 253.)

The creditor can not contest the discharge on any ground not stated in the specification. (*Ashley v. Robinson*, 29 Ala. 112.)

The creditor may rely upon certain grounds, although other creditors relied on the same acts as a ground of opposition to the granting of the discharge. (*Beekman v. Wilson*, 50 Mass. 434.)

The decision on the specifications in opposition to the discharge is conclusive although the creditor presents a different claim. (*Wales v. Lyon*, 2 Mich. 276.)

A creditor who has opposed the granting of the discharge may impeach it for other and further instances of fraud. The estoppel is limited to the specifications that were passed upon. (*Downer v. Rowell*, 25 Vt. 336.)

Under a specification of a judgment for \$132 81, a judgment for \$122 81 can not be given in evidence. (*Ashley v. Robinson*, 29 Ala. 112.)

If the bankrupt has willfully made a false oath by omitting the name of a

creditor from his schedule, the discharge may be set aside upon the application of a creditor who had no knowledge of the act until after the granting of the discharge. (*In re* Chas. K. Herrick, 7 B. R. 341.)

Conveyances made by the bankrupt, and alleged to be fraudulent, can not be shown in evidence unless charged in the specifications, except so far as they may be used to show the intent of certain acts which are specified. (*Tenney v. Collins*, 4 B. R. 477; s. c. 1 Dillon, 66.)

The wife of a bankrupt can not be made a witness for or against her husband on a motion to set aside a discharge. (*Tenney v. Collins*, 4 B. R. 477; s. c. 1 Dillon, 66, note; *in re* Moritz Augenstein, 2 McArthur, 322.)

The dying declarations of an alleged fraudulent grantee are not competent evidence against the bankrupt. (*In re* A. P. Marionneaux, 13 B. R. 222; s. c. 1 Woods, 37.)

The conspiracy must be established before the declarations of an alleged conspirator are competent evidence against the bankrupt. (*In re* A. P. Marionneaux, 13 B. R. 222; s. c. 1 Woods, 37.)

A decree annulling a discharge can not be set aside without an application therefor and due notice thereof to the parties affected thereby. (*In re* Moritz Augenstein, 2 McArthur, 322.)

## CHAPTER SIX.

### PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

Sec.

5121.—Bankruptcy of partnerships.

5122.—Of corporations and joint stock companies.

Sec.

5123.—Authority of State courts proceeding against corporations.

SEC. 5121.—Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners, or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

Statute Revised—March 2, 1867, ch. 176, § 36, 14 Stat. 534. Prior Statute—Aug. 19, 1841, ch. 9, § 14, 5 Stat. 443.

**When Partnerships may be adjudged Bankrupts.**

Two or more persons "who are partners" in trade, may be adjudged bankrupt on the petition of the partners or any one of them. This language can only apply to a subsisting partnership. But a mere formal dissolution of the partnership, so long as there are partnership debts and partnership assets existing, the partners being joint debtors and the assets being joint property, will not prevent the operation of the act upon the partners, either in a voluntary or an involuntary case. Where there are assets as well as debts of the partnership remaining, the partnership may properly be considered as subsisting *quoad* its creditors, and for the purpose of applying its joint stock and property to the payment of its creditors. (*Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21; *in re* Elisha Foster, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127; *in re* H. C. McFarland & Co. 10 B. R. 381.)

Where partnership affairs are to be wound up, the partners may join or be joined in one petition. If it were not so, the partners would always have it in their power to defeat one of the main provisions of the law, which is, that the creditors of the firm shall choose the assignee. It seems to be settled that there may be a joint petition so long as joint assets remain to be distributed. A like result must also follow if there are joint debts outstanding. It is for the benefit of the joint creditors, so long as any remain, that the proceedings should be joint, because they have the choice of the assignee. Whether there are any joint assets or not may often be disputed, and be the very question which an assignee is needed to try; but the fact of joint creditors whose rights are to be protected is easy of ascertainment, and, when ascertained, shows a necessity for a joint action. So long as joint debts remain outstanding and unsettled, the proceedings, whether voluntary or involuntary, may be joint. (*In re* Williams & Co. 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; *in re* Joseph A. Noonan, 10 B. R. 331; s. c. 3 Biss. 491; *contra*, *Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21; *in re* Moritz & Pinner, 5 Law Rep. 325; *in re* Mark Hartz *et al.* 1 N. Y. Leg. Obs. 39.)

A fraudulent dissolution will not oust the jurisdiction of the district court over a petition *in invitum* filed thereafter. (*In re* Waite & Crocker, 1 B. R. 373; s. c. Lowell, 207.)

A dissolution of a partnership, though binding as between the parties themselves, can not have any effect upon the rights of those who subsequently become creditors, provided the partners continue to treat each other, in point of fact, as partners, and to act as such in their business transactions with others. (*In re* H. C. McFarland & Co. 10 B. R. 381.)

An agreement for a dissolution, stipulating that one partner shall take the partnership property, and apply it to the payment of the partnership debts, does not dissolve the partnership as to the other partner and the creditors, nor does the transfer make the property the individual property of the partner receiving it, until and unless the partnership debts are first paid. The case is not one where the transfer of the interest of the retiring partner in the partnership property is absolute, and the remaining partner merely agrees to pay and assume the debts of the partnership. (*In re* T. S. Sheppard, 3 B. R. 172; s. c. 3 Ben. 347.)

Although one partner has taken the partnership property under an agreement to pay all the partnership debts, either of them may, after such dissolution, petition for the benefit of the act on behalf of the firm. The partner who petitions is acting for the creditors as well as himself, and the creditors may proceed against all the partners in bankruptcy, unless they have agreed to accept one as their debtor. Such a proceeding by partners differs in this from one by creditors, that no act of bankruptcy need be alleged, but only that the firm is insolvent. If a partner could not petition by reason of any contract with his copartner, the creditors would be deprived of the very important power of procuring adjudication through the petition of one partner, when the firm is clearly

insolvent, but no technical joint act of bankruptcy has been committed. (*In re J. R. Stowers et al.* Lowell, 528.)

A partner, by intrusting his copartner with the payment of the debts, takes the risk of his being both able and willing to do so, and in defense to the petition of such copartner, can not set up that he left the firm solvent, and that the act of the petitioner changed the state of affairs. (*In re J. R. Stowers et al.* Lowell, 528.)

\*When it is made to appear that the interests of creditors will not be served by bankruptcy, and that they do not press the case, but it is brought forward by one partner for ends of his own, he must fully and clearly establish the insolvency of his copartner. (*In re Bennett et al.* 12 B. R. 161.)

An assignment which transfers all the right, interest, property and claims of the retiring partner in and to the partnership and firm business, terminates the partnership. Persons who are not partners in trade, or who do not at the time of the filing of the petition have any joint stock or property belonging to the firm of which they have been members, can not be brought jointly into bankruptcy. (*Hartough v. Hayden*, 3 B. R. 422.)

A member of a firm may commit a separate act of bankruptcy and become bankrupt without joining his copartners. When two persons who have been partners under one firm name file their joint petition in bankruptcy, the proceedings can not be stayed on the ground that they have omitted to bring in a third person who has been a partner with them under another firm name. If such third person shall apply to have the other firm adjudged bankrupt, the court may consolidate the suits, if expedient, or arrange in some other appropriate way, that the greatest convenience to creditors shall be arrived at with the least expense. The rights of all classes of creditors are the same, under all forms of proceeding. (*In re Mitchell et al.* 3 B. R. 441; *in re R. Stevens*, 5 B. R. 112; s. c. 1 Saw, 397.)

The institution of proceedings in a State court for a dissolution of the firm and the appointment of a receiver, will not prevent the bankrupt court from taking jurisdiction. (*In re Joseph A. Noonan*, 10 B. R. 331; s. c. 3 Biss. 491; *in re Hathorn & Batchelor*, 2 Woods, 73.)

If a firm is dissolved by the death of one of the partners, the executors of the deceased partner can not be brought into bankruptcy, nor can possession be taken of his separate estate, which is under the process and control of a probate court. Hence no proceedings can be taken under this section against the estate of a deceased partner. But if the surviving partner, while clothed with his rights as such, commits an act of bankruptcy, the creditors may invoke the aid of a court of bankruptcy to take out of his hands the joint assets as well as his separate estate, and distribute them among his creditors. Such proceedings can be taken against him by either a joint or separate creditor. (*In re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397.)

If the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property, which he is administering in the probate court, the district court may, in its discretion, refuse to adjudge the partnership bankrupt. (*In re Daggett et al.* 8 B. R. 433; s. c. 8 B. R. 237; s. c. 3 Dillon, 83.)

### **Mode of bringing Partnerships into Bankruptcy.**

The provisions of this section clearly contemplate that persons who are copartners may be adjudged bankrupts on three descriptions of petitions: 1st. The petition of all the copartners. 2d. The petition of one of the copartners. 3d. The petition of a creditor of the copartners. The proceeding by the petition of all the copartners is purely voluntary, and where they all unite, the jurisdiction of the court over all of them, either by residence or by carrying on business, must appear in the petition. The proceeding by the petition of a creditor

of the copartners is a purely involuntary proceeding, and requires the adjudication to proceed on the commission of some act of bankruptcy. The proceeding by the petition of one of two or more copartners to have such copartners adjudicated bankrupts is a proceeding which necessarily is neither wholly voluntary nor wholly involuntary, but is partly voluntary and partly involuntary. So far as the petitioner is concerned, it is voluntary; so far as the copartners not petitioning are concerned, it is not involuntary, in the sense of section 5021, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy, although it may be involuntary in the sense of not being voluntary, under section 5014. Where it is not involuntary in the sense of section 5021, the adjudication may be asked on the ground that the members of the copartnership are unable to pay all their debts, and no allegation that an act of bankruptcy has been committed, either by the firm or by the copartners who are proceeded against, is necessary. A partner may also petition to have himself adjudged bankrupt, because of his inability to pay his debts, and to have his copartners adjudged bankrupts because of the commission by them of an act of bankruptcy to which he was not a party. (*In re Penn et al.* 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190; *in re Joseph Noonan*, 10 B. R. 331; s. c. 3 Biss. 491.)

The firm can not be adjudged bankrupt upon the petition of one partner if the other partners do not consent, and neither reside nor carry on business in the district. (*In re Henry Martin*, 6 Ben. 20.)

Where a petition is filed to have a firm declared bankrupt, if all the members of the firm do not join in or consent to the petition, notice of the filing must be given to such of the members as do not join in it or assent to it, in like manner as if the proceedings were on an involuntary petition against the members of the firm. Until this is done, the register has no authority to make an adjudication in regard to the bankruptcy of the firm. (*In re Henry Lewis*, 1 B. R. 239; s. c. 2 Ben. 96; *in re Prankard et al.* 1 B. R. 297; *in re Moritz & Pinner*, 5 Law Rep. 325; *in re Rufus E. Moore*, 5 Biss. 79.)

When a petition, in due form, for the adjudication of a firm has been filed by one partner, the other may come in voluntarily by petition and assent to the adjudication of the bankruptcy of the firm. This affects a compliance with Rule XVIII. Even though the latter petition prays for the adjudication of the bankruptcy of the firm, it may be regarded as simply giving assent to the adjudication under the first petition. Rule XVI does not apply to such a case. (*In re Henry Lewis*, 1 B. R. 239; s. c. 2 Ben. 96; *in re Horace Hall*, 5 Law Rep. 269.)

If the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property, which he is administering in the probate court, the district court may, in its discretion, refuse to adjudge the partnership bankrupt. (*In re Daggett et al.* 8 B. R. 287; s. c. 8 B. R. 433; s. c. 3 Dillon, 83.)

When one member of a firm files a petition praying for his discharge alone, his copartners residing in another district can not be permitted to join in the proceedings. This section only applies to a case where two or more persons who are partners are adjudged bankrupts. (*In re Boylan*, 1 B. R. 2; s. c. 1 Ben. 266.)

The case of two members of a firm constituting a separate firm under another name was not contemplated by this section, but its provisions, as applicable to the estate and debts of a single firm, and the separate property and individual debts of the members of such firm, are only declaratory of the acknowledged principles of equity upon which the court would marshal the assets in the absence of such provision. When the firm which embraces the members of such separate firm has been declared bankrupt, it is improper to proceed to an adjudication against the separate firm while the former proceedings are pending. (*In re Leland & Leland*, 5 B. R. 222; s. c. 5 Ben. 168; s. c. 1 L. T. B. 284; s. c. 4 L. T. B. 185.)

When the partners reside in different districts, and have no place of business in the district where the petition is filed, the non-resident partner can not be adjudged a bankrupt upon his own petition until he shall have filed a petition in the district where he resides. (*In re Prankard et al.* 1 B. R. 297.)

When there are partnership debts and partnership assets of an insolvent firm, the assignee of one of the partners may file a petition against the other members to have the firm adjudged bankrupt, and the partnership assets distributed by the bankrupt court. If the other members of the firm deny the insolvency, they are entitled to have that issue tried by a jury, but in such cases, it is wholly unnecessary to show an act of bankruptcy on their part. When one member of the firm has asked for the benefit of the bankrupt act, the question before the court becomes a purely legal one, and the firm must of necessity be adjudged bankrupt. (*In re Grady*, 3 B. R. 227; *in re Greenfield*, 42 How. Pr. 469; s. c. 5 Ben. 552.)

Unless the firm is declared a bankrupt, no member thereof can be discharged from the firm debts, because the theory and intent of this section and Rules XVI and XVIII are that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of the firm. (*In re Little*, 1 B. R. 341; s. c. 2 Ben. 186; *in re Bidwell*, 2 B. R. 229.)

The bankrupt can not be discharged of a portion of his liabilities merely, but if discharged at all, he must be discharged of all of them, and this can not be unless the firm debts are paid, or the firm assets administered in the bankrupt court. (*In re Grady*, 3 B. R. 227.)

This applies to partnerships actually existing, or where there are assets belonging to the firm, and not to partnerships terminated by bankruptcy, insolvency, assignment, or otherwise. (*In re Winkens*, 2 B. R. 349.)

Where there are no partnership assets to be administered, a member of a late partnership may, upon his individual petition, be discharged from all his debts, partnership as well as individual. (*In re Abbe*, 2 B. R. 75; s. c. 7 A. L. Reg. 824)

Proceedings in voluntary bankruptcy can not be conducted in the united names of parties who have no common interest and do not seek a common decree. Individuals can not associate and make a joint and several petition with a view to a separate adjudication in favor of each applicant. A petition by two petitioners conjointly, when they can not petition as partners, can not avail them individually. (*In re Moritz & Pinner*, 5 Law Rep. 325.)

Persons can not join or be joined in a petition in bankruptcy who could not sue or be sued in any form of action at law or in equity. Distinct firms composed in part of different persons can not be so joined. (*In re Wallace & Newton*, 12 B. R. 191.)

No number less than the whole of a firm can file a voluntary petition. (*In re Moritz & Pinner*, 5 Law Rep. 325.)

The filing of a petition in bankruptcy by one partner against his copartner will not prevent the latter from bringing a suit on his individual claim, and prosecuting it to judgment. (*Booth v. Meyer*, 14 B. R. 575; s. c. 3 W. N. 196.)

While the proceeding by one partner against his copartner is pending, the district court may enjoin the latter from disposing of the firm assets, although he has been appointed receiver in a State court on a proceeding by him against the former. (*In re Hathorn & Batchelor*, 2 Woods, 73.)

Partners are not liable to be adjudged bankrupts upon the petition of their creditors, upon mere proof of their insolvency, without other proof of the commission of an act of bankruptcy. (*In re Ralph Johnson*, 1 N. Y. Leg. Obs. 166;

s. c. 5 Law Rep. 313; *in re John W. Hull*, 1 N. Y. Leg. Obs. 1; *contra, in re Galbraith, Cromwell & Co.* 1 N. Y. Leg. Obs. 5, note.)

### Proceedings at First Meeting of Creditors.

None but creditors of the firm can participate in the election of an assignee. (*In re Phelps, Caldwell & Co.* 1 B. R. 525; s. c. 2 L. T. B. 25; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

This section draws a distinction between the creditors of "the copartnership" and "the separate creditors" of each partner. It also calls the former "joint creditors," and speaks of the debts due to them as "joint debts," while it speaks of the debts due to such separate creditors as separate debts. It puts joint creditors and joint debts in antithesis, and separate creditors and separate debts. This it does, although necessarily the copartners are jointly and severally liable to the creditors of the copartnership for the joint debts. The separate debts must, therefore, be regarded as confined to debts which arise out of a liability other than, or in addition to, that resulting solely from a debt contracted by the firm. (*In re Walter P. Long & Co.* 9 B. R. 227; s. c. 7 Ben. 141.)

A firm creditor who holds a firm note indorsed by one of the partners may elect to prove his debt against the separate estate of such copartners. (*Stevenson v. Jackson*, 9 B. R. 255.)

A creditor holding notes both of the partnership and of the individual partners for a partnership debt has the right to prove the notes against the respective makers, and is entitled to receive dividends from the joint and separate estates according to such proof. (*Meade v. National Bank of Fayetteville*, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108.)

Although by this section, where partners in trade shall be adjudged bankrupts, all the joint property of the partnership and also all the separate estate of each of the partners shall be taken, yet in the distribution the joint and separate estates are considered as distinct estates. This is perfectly clear by the rule laid down for their administration. It has therefore been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security; he would, therefore, by the same principle, be allowed to prove his whole claim against both estates, and receive a dividend from each, but so as not to receive more than the full amount of his debt. A creditor holding a note indorsed both by the firm and by one of the copartners, may prove his claims against both estates. (*In re Howard, Cole & Co.* 4 B. R. 571; s. c. 2 L. T. B. 161; *Emery v. Canal National Bank*, 7 B. R. 217; s. c. 5 L. T. B. 419; *Meade v. National Bank of Fayetteville*, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108; *in re Bradley*, 2 Biss. 515; *in re Peter Farnum*, 6 Law Rep. 21.)

If a dividend has been paid by one estate, the amount thereof should be deducted and a dividend only on the balance allowed from the other. (*In re Peter Farnum*, 6 Law Rep. 21)

Although the consideration passed to the firm, yet if the obligation is given by the partners individually, and not by the firm name, the debt is provable against their individual estate. (*In re Bucyrus Machine Co.* 5 B. R. 303.)

Where the partnership as such receives and uses the funds belonging to an estate of which one partner is the executor, with full knowledge of its character, it becomes liable therefor, and the beneficiaries may prove their claim either against the partnership estate or against the individual estate of the partner who was executor. (*In re E. P. & E. M. Tesson*, 9 B. R. 378.)

If a person takes the note of one partner without knowing that the money is for the benefit of the firm, he can not prove a claim against the firm after he has obtained a judgment on the note. (*In re Hugh T. Herrick*, 13 B. R. 312.)



A person who takes a note of one partner for money loaned for the use of the firm, can not prove a claim against the firm. (*In re Hugh T. Herrick*, 13 B. R. 312.)

Where the deposition on its face shows a several debt, the creditor can not be held to have proceeded against the joint estate, although the proof is in that form. (*In re Hugh T. Herrick*, 13 B. R. 312.)

A judgment against the partners individually and others constitutes a several debt as to the partners, and can not be proved against the joint estate. (*In re Hugh T. Herrick*, 13 B. R. 312.)

A creditor holding a partnership bond, by express terms joint and several, for a partnership debt, has the right to prove it against the separate estates, and is entitled to receive dividends out of the individual assets. (*In re Bigelow et al.* 2 B. R. 371; s. c. 3 Ben. 146; s. c. 2 L. T. B. 41.)

A joint agreement given by two members of a firm to indemnify a retiring partner may be proved for the full amount against the separate estate of each partner. (*In re Beers et al.* 5 B. R. 211.)

A bond signed by the members of a firm, in their individual names, as sureties, and not given for a partnership liability, is a claim against them individually, and not as members of the firm. (*In re W. D. Webb & Co.* 2 B. R. 614; s. c. 2 L. T. B. 87; s. c. 16 Pitts. L. J. 43; *in re* Edmund H. Miller, 1 N. Y. Leg. Obs. 38; *in re* Roddin & Hamilton, 6 Biss. 377.)

Where one of the partners of a bankrupt firm is also a member of another firm, a claim by the latter against the former may be proved by the solvent partner, for the firms are regarded as distinct legal entities, capable of contracting with each other in equity. (*In re Buckhause & Gough*, 10 B. R. 206.)

When a partnership consists of two persons, and they both sign a note or bill with their individual names, and not by the name of the firm, or one draws a bill and the other accepts it, if it is in fact for a partnership object, it may be treated for all purposes as a partnership debt. (*In re Henry Warren*, 2 Ware, 322.)

When the intention of the contracting parties is that the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm in whatever form it may be made, whether signed by the partners jointly, or with the firm name, or by one partner alone. (*In re Henry Warren*, 2 Ware, 322.)

The presumption that arises from the form of the note, that the separate name of the partner was taken from choice, may be overcome by proof that no such election was made. (*In re Henry Warren*, 2 Ware, 322.)

A creditor who takes the individual note of one partner in a transaction for the benefit of the firm is presumed to elect to take that in preference to the firm note. (*In re Henry Warren*, 2 Ware, 322.)

The assignee of the firm is the assignee of a member of the firm, and may sue to recover money due to him. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

An assignee of a firm may recover property transferred by one partner in violation of the bankrupt law. (*Barnewall v. Jones*, 14 B. R. 278.)

### **Assignee of Individual Partner.**

An adjudication upon the petition of one partner in his own behalf, and as a member of a firm, does not pass the partnership effects to his assignee. (*In re Paulson*, 1 N. Y. Leg. Obs. 6, cited.)

Upon the bankruptcy of one partner, his private property and his interest

in the funds of the firm pass to his assignee. (*Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.)

The assignee of a bankrupt partner and the remaining solvent partner, are tenants in common in respect to the partnership funds, and, like all tenants in common, one party can not call the joint property out of the hands of the other. They are entitled equally to the possession in law. Neither party is strictly entitled, as against the other, to anything more than his share of the surplus after the partnership debts are paid. (*Murray v. Murray*, 5 John. Ch. 60; *Ayer v. Brastow*, 5 Law Rep. 498; *in re Shannahan & West*, 6 Biss. 39.)

Where partners agree to give another an interest in the assets after the payment of the firm debts, the latter upon the bankruptcy of the former, is not entitled to receive the property from their assignee until the debts are paid. (*In re Shannahan & West*, 6 Biss. 39.)

The solvent partner has generally the right to retain the control and possession of the partnership assets until an account is taken for the purpose of applying them in good faith to the discharge of the joint debts and for his share of the surplus. (*Ayer v. Brastow*, 5 Law Rep. 498; *Talcott v. Dudley*, 5 Ill. 427.)

The solvent partner, upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession, and may sell the partnership effects for a valuable consideration and without fraud. They can not be called out of his possession by his cotenant. But, on the other hand, there is no foundation in law or equity for the solvent partner to call to account either the partnership debtors who have *bona fide* settled with the assignee, or the assignee himself for the funds in his possession. (*Murray v. Murray*, 5 Johns. Ch. 60.)

The only interest in partnership property which passes to the assignee of an individual partner, is the interest which the bankrupt may appear to have on taking an account. But the interest of the bankrupt does not pass to the assignee with precisely the same powers over the property which the bankrupt himself had. Before the bankruptcy, his power over it was that of a partner; it was a joint tenancy. The bankrupt could dispose of the whole property. But, by the bankruptcy, the partnership is dissolved, and the joint tenancy severed. The assignee succeeds to the rights of the bankrupt, not as a partner, but as a tenant in common. (*Ayer v. Brastow*, 5 Law Rep. 498.)

Without a special order of the court for that purpose, the assignee of an individual partner has no power to take and dispose of the assets of the firm so as to divest the rights of the other partners and vest the entire interest in the assets of the firm in a purchaser at his sale. (*Buckner v. Calcote*, 28 Miss. 432.)

Where one partner becomes bankrupt, the district court may take into its own hands the exclusive management and administration of all the partnership assets and inhibit the other partners from intermeddling therewith for the purpose of ascertaining the partnership assets and debts, and adjusting and distributing the same, but will do so with caution. (*Parker v. Muggridge*, 2 Story, 334; *Ayer v. Brastow*, 5 Law Rep. 498; *McLean v. Ihmsen*, 1 West. L. J. 189.)

A creditor who has obtained a judgment against the ostensible partner may levy on the firm goods, although they are placed in the possession of the assignee of the dormant partner prior to the levy, but after the issuing of the execution. (*Talcott v. Dudley*, 5 Ill. 427.)

If one partner, who owns all the property, is declared a bankrupt, his assignee will be estopped from denying that his copartner had all the usual rights of a partner as against an attaching creditor of the firm. (*Kelly v. Scott*, 49 N. Y. 595.)

The appropriation of the firm property to pay an individual debt of one partner, where he becomes a bankrupt, does not bind the firm unless the solvent

partners assent to it prior to the commencement of the proceedings in bankruptcy. (*Anshutz v. Fitzsimmons*, 9 Penn. 180)

The assignee of a liquidating partner is merely a mandatary of the interest of the other partner for purposes of liquidation, and a purchaser from him will not acquire that interest. (*Akin v. Oakley*, 10 Rob. [La.] 410.)

The assignee of an individual partner, does not by virtue of the interest he takes in the firm, acquire any claim against the bankrupt. (*Buckner v. Calcote*, 28 Miss. 432.)

Where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets which would belong to the bankrupt after payment of all the partnership debts, and the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares. (*Parker v. Muggridge*, 2 Story, 334.)

The assignee of an individual partner, who is a member of three firms composed of the same individuals, can only claim what may be due after the payment of all the debts of the firms, and upon an account of the respective interests of the partners *inter se*. (*Buckner v. Calcote*, 28 Miss. 432.)

Where an individual partner applies alone and surrenders partnership assets, a sale by his assignee will pass the entire interest of the firm. (*Judson v. Luthrop*, 6 La. An. 587.)

If the assignee of the bankrupt partner settles with the partnership debtor, the solvent partner can not set aside such settlement in order to obtain possession of what was due from the debtor for the purpose of distribution, inasmuch as the assignee had competent power to make the settlement and to obtain possession of what was due and coming from the settlement for the like purpose of distribution. (*Murray v. Murray*, 5 Johns. Ch. 60.)

The assignee of one partner may become a party on the record with the other partner or his assignee when the suit is prosecuted to collect a demand due to the firm. (*Cannon v. Wellford*, 22 Gratt. 195.)

Where the partnership is insolvent, so that the assignee of an individual partner has no interest in the effects of the firm, the assignee need not be made a party to a suit in equity to obtain payment of a debt due to the firm. (*Coe v. Whitbeck*, 11 Paige, 42.)

Where one partner becomes bankrupt, a suit on a cause of action belonging to the firm should be brought in the name of the solvent partner and the assignee. (*Peel v. Ringgold*, 6 Ark. 546; *Coe v. Whitbeck*, 11 Paige, 42; *Halsey v. Norton*, 45 Miss. 703.)

But it must be shown that there is another person not coplaintiff who ought to be joined. This may be by a plea in abatement, or by nonsuit, if proved at the trial, or by demurrer, if it appears on the face of the declaration. If the non-joinder of the solvent partner is relied on to nonsuit the assignee, the defendant must prove the existence of such a partner. (*Halsey v. Norton*, 45 Miss. 703.)

If upon the declarations of the firm one partner takes the firm assets and undertakes to pay the firm debts, and the retiring partner subsequently pays firm debts to an amount more than sufficient to cover the deficiency that might remain after applying the joint assets to pay the joint debts, the assignee of the latter is entitled to the surplus of the firm assets in the hands of the former. (*Hyde v. Baker*, 11 Pac. L. R. 81.)

There must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding before any step can be taken to reach the partnership assets in bankruptcy. The partnership property can not be taken and administered by the bankrupt court unless all the persons who have an interest as copartners in such property are adjudged

bankrupt. An assignee of the individual and separate estate of one partner has no title to call third parties to an account for partnership property. The court does not intend to decide what the right of the assignee would be to set aside a transfer of the bankrupt's interest in the joint property. (*In re T. S. Shepard*, 3 B. R. 172; s. c. 3 Ben. 347; *Forsaith v. Merritt*, 3 B. R. 48; s. c. Lowell, 336; s. c. 1 L. T. B. 168; *Withrow v. Fowler*, 7 B. R. 339; s. c. 5 Pac. L. R. 102; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

The assignee of an individual partner can not maintain an action to recover money of the firm secretly paid to a firm creditor, in fraud of the rights of other creditors, under a compromise. (*Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.)

### Distribution of Assets.

This section was inserted simply to indicate the correct and equitable mode of administration of the partnership property and separate estates of each partner when two or more persons who are partners in trade shall be adjudged bankrupt, and can not be made to apply to a case where only one of the partners is proceeded against. In its main features it embodies no new law, but was only declaratory of the equitable principles which the courts had adopted in the distribution of the bankrupt's assets. It was, nevertheless, proper and useful in this respect—that it put to rest the long mooted and much discussed question of the power of the bankrupt court, in administering the bankrupt's estate, to make orders for the marshaling of assets and the payment of partnership debts with partnership funds, and separate debts with separate funds, without the intervention of proceedings by bill in equity. (*In re Melick*, 4 B. R. 97; *Collins v. Hood*, 4 McLean, 186; *in re Collier, Taylor & Co.* 12 B. R. 266; *Ancker v. Levy*, 3 Strobh. Eq. 197.)

The rule applies only where the joint estate as well as the separate is before the court for distribution, and where there are joint creditors and also separate creditors. (*Lewis v. U. S.* 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618; *in re R. S. Pease*, 13 B. R. 168.)

In the distribution of the estate, it is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against two partners or only one. Everything is conducted in the same way, and the rights of creditors and all others are precisely the same. (*In re Edward P. Morse*, 13 B. R. 376.)

Where one partner goes into bankruptcy alone, the separate creditors are entitled to be paid solely out of the separate estate, and the partnership creditors are entitled solely to be paid out of the partnership estate. (*In re William Ingalls*, 5 Law Rep. 401; *in re Henry B. Williams*, 5 Law Rep. 402.)

Premises used by partners for the purpose of carrying on their trade are *prima facie* a part of the partnership property. (*Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 590.)

Real estate held as partnership assets does not lose that character until it is shown not only that the firm creditors have been paid, but that as between themselves the accounts of the partners have been settled. (*Hiscock v. Green*, 12 B. R. 507.)

If real estate is purchased as a speculation in which the capital is to be derived from and the losses sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm, it will be deemed to be partnership assets. (*Hiscock v. Green*, 12 B. R. 507.)

If a partner, after a formal dissolution, continues to carry on business under the firm name, with the consent of his copartner, his trade assets should be treated as joint assets. (*In re Edward P. Morse*, 13 B. R. 376.)

Where an individual partner is bankrupt, a partnership creditor who has received a payment in part from the firm assets held by the copartners, may prove his debt for the balance, and share *pro rata* with the individual creditors. (*In re R. S. Pease*, 13 B. R. 168.)

When a partner takes all the firm property and stipulates to pay all the firm debts, he makes those debts his individual debts, and the creditors of the partnership may prove their debts against him alone, and share in his separate estate *pro rata* with his individual creditors. By this promise he is bound, and the creditors of the firm are in equity entitled to enforce it against him. It is, on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to get the benefit of this promise made by one of the members for their benefit. The right of the creditors is not defeated by his subsequent bankruptcy. They may assent to and claim the benefit of it at any time, either before or after the bankruptcy of the debtor. (*In re Wm. Downing*, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207; *in re George Rice*, 9 B. R. 373; *in re Walter P. Long & Co.* 9 B. R. 227; s. c. 7 Ben. 141; *in re Collier*, Taylor & Co. 12 B. R. 266.)

An agreement between two traders to unite their stocks in trade, as the capital of a partnership to be formed between them, and to convert the separate debts of either into joint debts of the firm, will not entitle a separate creditor, who has not acceded in any way to the arrangement, to prove in bankruptcy as a joint creditor of the firm. (*In re Isaacs & Cohen*, 6 B. R. 92; s. c. 3 Saw. 35.)

If partners divide the firm property on a dissolution, and one partner puts his share into a new firm, the assignee of the last firm is entitled to have it first applied towards the payment of the partnership debts, as against a creditor of the prior firm who has levied an execution thereon. (*Crane v. Morrison*, 13 Pac. L. R. 81.)

When there is no joint estate and no solvent partner, all the creditors, joint and separate, will share *pari passu* in the estate of the bankrupt partner, in case of his separate application for the benefit of the bankrupt act. Under such circumstances, the creditors of the firm have a right to prove their debts against the estate of the bankrupt partner, and are entitled to share *pro rata* under section 5091, as it extends to "all creditors whose debts are duly proved," and are embraced in the discharge provided for in section 5119. In other words, this section of the bankrupt act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule, firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate estate of their debtor. (*In re Wm. Downing*, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207; *in re Fred'k Jewett*, 1 B. R. 491; s. c. 7 A. L. Reg. 291; s. c. 15 Pitts. L. J. 354; *in re Goedde & Co.* 6 B. R. 295; *in re George Rice*, 9 B. R. 373; *in re Knight*, 8 B. R. 436; s. c. 2 Biss. 518; *in re William Mills*, 11 B. R. 74; *Trucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419; *contra*, *in re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499; *in re Frear*, 1 B. R. 660; s. c. 35 How. Pr. 249; s. c. 2 Ben. 467.)

In order to share in the separate estate, there must be absolutely no joint estate. If there is any, however small, the joint creditors can not be allowed to receive dividends from the separate estate. (*In re Albert Marwick*, 2 Ware, 233; s. c. 3 N. Y. Leg. Obs. 286; *in re Elijah E. Smith*, 13 B. R. 500.)

The rule covers all cases where there is a joint fund, without regard to its origin. A separate creditor may therefore purchase a worthless asset belonging to the joint fund for a small sum in order to defeat the right of the joint creditors to share in the separate estate. (*In re Albert Marwick*, 2 Ware, 233; s. c. 3 N. Y. Leg. Obs. 286.)

Where there are partnership assets, the partnership creditors can not share

in the individual estate although the partners were declared bankrupts on separate petitions. (*In re* Edward P. Morse, 13 B. R. 376.)

Where there are assets of a firm and of the individual members thereof, each estate must pay its proportion of the entire expenses of administering the estate. (*In re* Elijah E. Smith, 13 B. R. 500; *in re* William Ingalls, 5 Law. Rep. 401.)

If the firm assets are only sufficient to pay the cost of the proceedings, the firm creditors may share in the individual estate, for the words "net proceeds" refer to the estate to be distributed among the creditors, and were only designed to exclude one class in case there were some funds for distribution in the class to which such creditors belonged. (*In re* McEwen & Sons, 12 B. R. 11; s. c. 6 Biss. 294.)

Where the firm is in bankruptcy, the firm creditors may share *pari passu* with the separate creditors in the separate estate if there are no joint assets. (*In re* Collier, Taylor & Co. 12 B. R. 266.)

The burden of proving that there is a joint fund rests upon the individual creditors. The partnership creditors can not be required to prove a negative. (*In re* Frederick Jewett, 1 B. R. 491; s. c. 7 A. L. Reg. 291; s. c. 15 Pitts. L. J. 354; *contra*, *in re* Byrne, 1 B. R. 464; s. c. 7 A. L. Reg. 499.)

The court will not presume that the other partner is solvent and has property that can be reached by the joint creditors. His pecuniary responsibility is a matter of affirmative proof by the individual creditors who object to the firm creditors sharing in a dividend from the bankrupt's estate. (*In re* George Rice, 9 B. R. 373.)

If a petition is filed against a firm, and an adjudication is thereupon entered against the firm and one partner, but no adjudication is entered against the other partner, the separate creditors of the partner so declared bankrupt, can not participate in the firm assets. An adjudication against the other partner can only be necessary for the purpose of reaching his individual property, and may be made at any subsequent time, if it becomes necessary in the course of the proceedings. (*In re* Kinkead, 7 B. R. 439; 3 Biss. 405.)

When partners are in fact insolvent, they are considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and they can not, by a transfer of the interest of one to the other, defeat this trust. A sale by one partner to his copartner when the firm is insolvent and upon the eve of bankruptcy, which, if upheld, would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is presumptively fraudulent as to firm creditors, and the court will set aside such sale, and distribute the property as firm property to the payment of the firm debts. If the legal effect of such transfer is to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it will be void as creating a preference. (*In re* Cook & Gleason, 3 Biss. 116; *Collins v. Hood*, 4 McLean, 186.)

If a transfer of the firm property to one of the copartners is made honestly and in good faith upon a dissolution, and for a valuable consideration, and without any fraud or collusion between the copartners to defeat the rights of the joint creditors, the joint property becomes by such transfer the separate property of such copartner. (*In re* Walter P. Long & Co. 9 B. R. 227; s. c. 7 Ben. 141.)

Where only five days had intervened between the dissolution of the firm and the commencement of proceedings in bankruptcy, the transfer of the partnership property was held to be void, as a fraud on the partnership creditors, and the property so transferred was held to be a joint fund. (*In re* Byrne, 1 B. R. 464; s. c. 7 A. L. Reg. 499.)

When firm property has been transferred to a partner under an agreement to apply the proceeds of the same to the payment of the firm debts, and he has purchased other property, and mingled it with the firm property in such a manner as to make it impossible to distinguish between them, the whole should be

regarded as his individual property, and liable, in the first instance, to his individual debts. (*In re* H. B. Montgomery, 3 B. R. 374; s. c. 3 L. T. B. 40.)

The separate estate of a partner is that in which he is separately interested to the exclusion of his copartners. If the interest of each partner extends to the entire stock in trade, the excess of the interest of one partner over that of the other partners is not the former's separate estate. (*In re* Lowe & Richards, 11 B. R. 221.)

If the surviving partner, with the knowledge and consent of the administrator of the deceased partner, converts the firm assets to his own use, the property belongs to his individual estate. (*In re* William Mills, 11 B. R. 74.)

If one partner in good faith sells the partnership property to his copartner, who agrees to pay the firm debts, the property from the moment of sale ceases to be partnership property, and becomes the individual property of the purchasing partner, and primarily liable for the payment of his individual debts. (*In re* William H. Wiley, 4 Biss. 214.)

When the bankrupt has been a member of two separate firms, the property of each firm must be applied to the payment of its own debts in preference to the debts of the other firm. No part of the proceeds of such property can be applied to the latter debts until the former are fully paid. (*In re* Hinds *et al.* 3 B. R. 351.)

If any surplus remains after the individual creditors are paid, it must be distributed *pro rata* among all the creditors who have proved their claims and to whom the partner was liable either as a member of the bankrupt firm or any other firm. (*In re* Robert K. Dunkerson & Co. 12 B. R. 391; s. c. 4 Biss. 323.)

If a partner is a member of two distinct firms, both of which are liable to a creditor on commercial paper, the creditor has no advantage over the creditors of either firm in the distribution of his individual estate. (*In re* R. K. Dunkerson & Co. 4 Biss. 227.)

If the partners conduct business in two different places under different names, the two firms, in the distribution of the assets, will be treated as one firm, and no notice will be taken of the indebtedness of one firm to the other. (*In re* Theo. H. Vetterlein *et al.* 4 B. R. 599; s. c. 5 Ben. 311; *Buckner v. Cal-cote*, 28 Miss. 432; *Ballin v. Ferst*, 55 Geo. 546; *vide in re* Buckner & Co. 28 Miss. 447, note.)

If one of the bankrupts is a member of a firm which is a creditor, the whole dividend should not be paid to the firm, but the proportion to which the bankrupt would be entitled should be retained for his individual creditors, and the rest paid to the other members of the firm. (*In re* Joel A. H. Ellis, 5 Ben. 421.)

The firm creditors can not have recourse to the separate estate for money advanced by the firm to one of the partners. (*In re* G. H. Lane & Co. 10 B. R. 135; *in re* McEwen & Son, 12 B. R. 11; s. c. 6 Biss. 294; *in re* John McLean & Son, 15 B. R. 333.)

The firm creditors can not have recourse to the separate estate for goods sold by the firm to one of the partners. (*In re* G. H. Lane & Co. 10 B. R. 135.)

The amount which a firm is entitled to prove against a copartner, is the balance that remains after deducting the partner's share of the profits. (*In re* Jay Cooke & Co. 12 B. R. 30.)

If a creditor, having a firm note indorsed by a partner and holding property of the partner as security, obtains payment by the sale of a security, the separate creditors are entitled to receive from the joint estate a sum equal to the dividend on the note. (*In re* Norman B. Foote *et al.* 12 B. R. 337.)

If the holder of a firm note indorsed by one partner resorts to the separate estate, the separate creditors are entitled to be substituted in the place of the holder of the note, and allowed to prove the note against the joint estate. (*In re* Norman B. Foote *et al.* 12 B. R. 337.)

Real estate purchased with the intention that it shall be held as partnership property, will be deemed to be personalty so far as creditors are concerned, and will be applied to pay firm debts, even as against individual creditors who have obtained judgments which would otherwise be liens thereon. (*Marrett v. Murphy*, 11 B. R. 181; s. c. 1 Cent. L. J. 554.)

If partners purchase land with partnership funds, and take a deed to themselves jointly as tenants in common, and the orphans' court, upon the death of one of them, orders his interest in the land to be sold, the proceeds do not belong to the assignee of the surviving partner. What was sold was the estate of the decedent, and not that of the partnership. The money is the proceeds of his estate. Whether the sale was of a moiety of the lands, the title of the decedent as a tenant in common, or his interest as a partner in the firm, the result is the same, and the assignee has no right to the money. (*Jones' Appeal*, 70 Penn. 169.)

A creditor holding a judgment against one partner acquires no lien upon firm property transferred to that partner at a time when the firm is insolvent. (*In re Cook & Gleason*, 3 Biss. 122.)

If the judgment of a partnership creditor against the firm is prior in point of time to the judgment of an individual creditor against one of the partners, the share which the partnership creditor is entitled to receive out of the partnership assets must be first applied as a credit on his judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor. (*In re A. T. Lewis*, 8 B. R. 546.)

When a judgment has been obtained by a partnership creditor against the members of the firm, it operates as a several lien against the real estate of each partner, and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment. (*In re A. T. Lewis*, 8 B. R. 546.)

A creditor who holds a judgment against all the partners, rendered on a firm note, is not entitled to a dividend out of the separate estate of each partner on an equal footing with the separate creditors. (*In re Berrian et al.* 44 How. Pr. 216; s. c. 6 Ben. 297.)

The assignee may settle an indebtedness of the partnership by canceling a debt due from the creditor to the separate estate of one of the partners, and placing the sum to the proper account. If the claim is disputed, the assignee may retain in his possession as much of the proceeds which would otherwise belong to the creditor of the partnership as may be necessary to satisfy the debt due from the partnership creditor to the separate estate of one of the members. (*In re Atkinson & Kellogg*, 10 B. R. 535; s. c. 7 C. L. N. 9.)

The rule that appropriates partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. A mortgage is not void as against partnership creditors, because the notes or debts which it was in fact given to secure were individual debts of the respective partners, and not properly a partnership demand. (*In re Kahley et al.* 4 B. R. 378; s. c. 2 Biss. 383.)

The presumption is, that an arrangement made by one partner to sell firm property, and, in consideration thereof, to receive goods for his own individual use, is entered into by both parties in fraud of the partnership. This presumption may be rebutted by showing an express or implied assent of the other partners, but without such proof the arrangement is void. (*Taylor v. Rasch*, 5 B. R. 399.)

A member of a firm may assign his interest in the existing assets of the firm, subject to the claims of the creditors of the firm and of the other partners. The fact that the mortgagor purchased other goods after the making of the mortgage, and mingled them with mortgaged goods, is not material, when the proceeds of the property actually mortgaged are more than the sum claimed by the mortgagee. The mortgagor can not, by such an act, in any way affect the title of the mortgagee. (*Thompson v. Spittle*, 102 Mass. 207.)



The fact that a note secured by a mortgage is also secured by the signature of a surety who gave the payee a mortgage of his property as additional security, imposes no obligation on the payee of the note to resort to him. He has a right to resort to the principal debtor and to the security obtained from him. Against the surety the unsecured creditors have no superior equity. (*Thompson v. Spittle*, 102 Mass. 207.)

If the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the adjudication of bankruptcy, the surplus of such separate estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts after that time. (*In re Berrian et al.* 44 How. Pr. 216; s. c. 6 Ben. 297.)

A former partner of the bankrupt will not be allowed to receive a dividend on notes given to him by the bankrupt for his share in the firm at the time of the dissolution thereof until the joint creditors are paid in full. (*In re Fredk. Jewett*, 1 B. R. 495; s. c. 7 A. L. Reg. 294.)

### Discharge.

Upon an application for a discharge, there are in reality two cases, and the petition of each partner for a discharge, and the objections made to it, must be considered severally. Each bankrupt must stand or fall by his own acts. Those of his copartner, committed without his knowledge, will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one only. (*In re George & Proctor*, Lowell, 409; *in re George M. Garwood*, Crabbe, 516.)

Specifications which apply to one partner alone will not prevent the discharge of the other partners. The discharge is to be granted or refused to them the same as it would be if the defaulting partner were not a party to the proceedings. (*In re Scofield et al.* 3 B. R. 551.)

The question whether the bankrupts were partners or not, at the time of the commencement of proceedings in bankruptcy, will not be entertained on the hearing of their petition for a discharge. (*In re Gilbert & Lamphier*, 1 N. Y. Leg. Obs. 327.)

### Proceedings where Partners Reside in Different Districts.

This section applies only to a case where two or more persons who are partners are adjudged bankrupts. The clause which provides that where "such copartners reside in different districts, that court in which the petition is first filed, shall retain exclusive jurisdiction over the case," means that where two or more petitions are filed in different districts, praying that two or more persons who are partners be adjudged bankrupt, the court in which the first in order of time is filed shall have exclusive jurisdiction to do what this section allows and requires to be done in a case where two or more persons who are partners are adjudged bankrupts. (*In re Boyian*, 1 B. R. 2; s. c. 1 Ben. 266; *in re M. C. Smith*, 1 B. R. 214.)

This provision implies that the court which first obtains jurisdiction over the subject-matter of the petition and over the person of the petitioner, shall have exclusive jurisdiction over the case; that is over the subject-matter of the petition and over all the copartners, if the non-petitioning copartners are brought in by appropriate process. (*In re Penn et al.* 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.)

One partner can not file a petition against his copartners in the district where he resides, but in which they have neither resided nor carried on business during any portion of the six months next preceding the filing of the petition. (*In re Work, McCough & Co.* 30 Leg. Int. 861; *contra*, *in re Penn et al.* 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.)

Where the members of a firm reside in different districts, the only court that has jurisdiction of a petition against the firm, is the district court of the district in which the firm carries on business. (*Cameron v. Canico*, 9 B. R. 527; *in re Horace Hall*, 5 Law Rep. 269.)

If proceedings to have the firm declared bankrupt, are commenced in one district on the same day that proceedings in bankruptcy are commenced by one of the partners in another district, the assignee elected in the former proceedings is alone the proper assignee of the firm. (*Cannon v. Wellford*, 22 Gratt. 195.)

By the commencement of proceedings to have a firm declared bankrupt, the district court obtains jurisdiction of both partners, and a subsequent proceeding by one partner in another district is void. (*Cannon v. Wellford*, 22 Gratt. 195.)

When each partner files a separate petition in distinct and separate courts, the partnership property will not vest in the assignee of either court. The proceedings in the court where the latest petition was filed are void. (*In re Greenfield*, 42 How. Pr. 469; s. c. 5 Ben. 552.)

An adjudication against a member of a firm in one district does not prevent a subsequent adjudication against the firm in another district. (*In re Jewett & Co.* 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.)

SEC. 5122.—The provisions of this Title shall apply to all moneyed, business or commercial corporations and joint stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in the Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof.

Statute Revised—March 2, 1867, ch. 176, § 37, 14 Stat. 535.

### Construction.

Only such portions of the bankruptcy system as are expressly or impliedly adopted by this section are applicable to corporations or joint stock com-

panies. (*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 13 B. R. 385; s. c. 10 B. R. 355; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

### What Corporations.

A corporation created for the purpose of carrying on or pursuing any lawful business defined by its charter, and clothed with power so to do for the sake of gain, is clearly a business corporation, and amenable to the provisions of the bankrupt act. (*Rankin & Pullen v. Florida, Atlantic & G. C. R. R. Co.* 1 B. R. 647; s. c. 1 L. T. B. 85.)

Public corporations created for municipal or political purposes, and such private corporations as are ecclesiastical or eleemosynary, or established for the advancement of learning, are clearly not made subject to the provisions of the act. The words, "moneyed, business, or commercial corporations," are intended to embrace all those classes of corporations that deal in or with money or property in the transactions of money, business, or commerce, for pecuniary gain, and not for religious, charitable, or educational purposes. The attempt to limit the word "business" so as to be merely synonymous with trading, would deprive it of its meaning beyond that included in the other words, "moneyed" and "commercial." A trading corporation is a commercial corporation. The word "business" has a broader meaning as applied to corporations. A railroad corporation is chartered to conduct the business of a common carrier, and is subject to the provisions of the act. If the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private. The question whether railroad corporations are subject to be dealt with under the provisions of the bankrupt act is not one of which the solution is dependent upon the special provisions of the statutes of the several States regulating the transfer of the corporate property or franchises, or the mode applying them to the payment of the corporate debts. As the system of bankruptcy is to be uniform throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several States. (*Adams v. Railroad Company*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30; *Sweatt v. Railroad Co.* 5 B. R. 234; s. c. 1 L. T. B. 273; *in re Southern Minn. R. R. Co.* 10 B. R. 86; *contra*, *Tucker v. Opelousas & Great Western R. R. Co.* 3 B. R. quarto, 31.)

Railways are created for the purpose of carrying passengers and freight, and they are everywhere regarded as common carriers, when engaged in transporting merchandise and the baggage of their passengers. Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are undoubtedly commercial corporations. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination, and are properly included in the same classification. All such corporations contract immense amounts of business, and may, perhaps, in view of that fact be well enough called business corporations, but their true legal and constitutional denomination is that of commercial corporations, as they are created for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Every corporation which transacts business for gain as its chief and ultimate purpose is, in a general sense, a business corporation. The word business as applied to corporations has a broader meaning than the word commercial as used in the same clause, but it was not the intention of Congress to give such a scope to the word business as to supersede the words moneyed and commercial, and leave them without any practical signification. Railways are private corporations just as much as steamship and steamboat companies, or canal corporations, where the stock belongs to the corporators, or as much as moneyed, manufacturing or business corporations. Doubtless some such corporations are

more convenient and useful than others, but the question is not affected by the degree of importance which attaches to the corporation. (*Sweatt v. Boston R. R. Co.* 5 B. R. 234; s. c. 1 L. T. B. 278; *Alu. & Chat. R. R. Co. v. Jones*, 5 B. R. 97; *Winter v. R. R. Co.* 7 B. R. 289; s. c. 2 Dillon, 487; *in re Greenville & Col. R. R. Co.* 6 A. L. J. 422; s. c. 5 C. L. N. 124; *in re California Pacific R. R. Co.* 11 B. R. 193; s. c. 3 Saw. 240.)

The business of insurance is included within the definitions of the section. (*In re Merchants' Ins. Co.* 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243.)

Inasmuch as the general bankrupt law has not yet expressly repealed the specific provisions relating to the administration of the affairs of insolvent national banks, and does not necessarily contradict them, it must be presumed that it was the intention of Congress to except this class of corporations from the operations of the law. (*Smith v. Manuf. Nat'l Bank*, 9 B. R. 122; s. c. 5 Biss. 499.)

The jurisdiction of the bankrupt court is not ousted because the State is a creditor. (*In re Greenville & Col. R. R. Co.* 6 A. L. J. 422; s. c. 5 C. L. N. 124.)

### Voluntary Petition.

No other petition on behalf of the corporation can be recognized under the act than one which has been duly authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. A "corporator," as understood both in the law respecting corporations and in common speech, is one who is a member of a corporation; that is to say, one of the constituents or stockholders of the corporation. Congress has power to prescribe the conditions upon which the benefits of the act may be attained, and the mode of procedure for their attainment, and when prescribed, these conditions must be complied with. The action of a board of trustees which, by the laws of the State, has the management of the ordinary business of the corporation, can not be regarded as the action of the corporators. The corporators themselves must act in a meeting called for that purpose. (*In re Lady Bryan Mining Co.* 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349; *Ansonia Brass Co. v. Chimney Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

The only fair and reasonable construction of the words "majority of the corporators" is to so interpret them as that the holders of a majority of the shares of the capital stock may authorize the filing of a petition. When a corporation seeks to avail itself of the provisions of the bankrupt act, it can do so only in the mode prescribed by the act, and the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock, given at a legal meeting called for that express purpose. Where the commencement of proceedings was unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid. It is not a matter of agency but of jurisdiction. (*In re Lady Bryan Mining Co.* 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349.)

Where all practicable measures have been taken to have a fair stockholders' meeting, the vote will be deemed sufficient although there was an irregularity in the call on account of the contumacy of some of the directors. (*Davis v. Railroad*, 13 B. R. 258; s. c. 1 Woods, 661.)

If a stockholder dies intestate and no letters of administration are taken out on his estate, his stock can not be counted. (*Freeman's Nat'l Bank v. Smith*, 13 Blatch. 220.)

When the petition of a corporation has been filed without the consent of the corporators legally obtained, an attaching creditor may file a petition asking to have the proceedings dismissed. (*In re Lady Bryan Mining Co.* 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349.)

If the petition is filed by virtue of a resolution of the directors alone, it will not be dismissed at the instance of a corporator who, with full knowledge of all the facts, delayed making his application for more than a year. (*In re Baltimore County Dairy Association*, 11 B. R. 253; s. c. 2 Md. L. R. 297; *in re Jefferson Ins. Co.* 11 B. R. 287.)

The proof of his claim does not estop a creditor from setting up the invalidity of the proceedings on the ground that the petition was filed by the officers without the consent of the corporators, for consent can not give jurisdiction. (*Ansonia Brass Co. v. Chimney Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

Whether the president was duly authorized to file the petition or not, is a question of fact to be determined by the district court. If there is a total defect of evidence to prove the essential fact and the court finds it without proof, the action of the court is void, but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. (*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.)

Whether the officers who filed the petition were duly authorized to do so by a proper vote of the stockholders, is a question that cannot be raised in a collateral action. (*Davis v. Railroad Co.* 13 B. R. 258; s. c. 1 Woods, 661.)

Even though the petition is filed upon the authority of a vote of the directors and not of the corporators, yet the funds in the hands of the assignee can not be attached under a writ of attachment issued upon a judgment rendered in a State court against the corporation. The question whether the petition was filed by an officer of the corporation legally authorized by the act to do so, is one which belongs to the bankrupt court; and whilst the proceedings in bankruptcy are *in fieri*, its judgment and the grounds upon which it was rendered are not matters of review in a State court. The assignee holds the property by virtue of his appointment by the bankrupt court, and to that court alone is he responsible for its custody and disposition. (*Newman v. Fisher*, 37 Md. 259.)

In cases of involuntary bankruptcy, it is not necessary that there shall be a previous vote of the shareholders or corporators in order to authorize an attorney to appear for the corporation, and admit the alleged acts of bankruptcy and consent to an adjudication. (*Leiter v. Payson*, 8 B. R. 317; s. c. 9 B. R. 205; s. c. 6 C. L. N. 157.)

### Effects of Bankruptcy.

The creditors have a right to all the property of the corporation which is all that they acquire by bankruptcy, and the provision in the law declaring that it shall not be discharged, is based upon that proposition, and the ulterior remedy which they may have predicated upon the personal responsibility of the stockholders, officers, or members, and which would be destroyed if the debt itself were discharged. (*Allen v. Soldiers' Bus. Mes. & Dispatch Co.* 4 B. R. 537; s. c. 2 L. T. B. 158.)

A corporation for all essential purposes is as effectually dissolved by the commencement of proceedings in bankruptcy, as if a solemn judgment were pronounced to that effect. It is such a dissolution as will afford creditors a remedy against the individual shareholders where they are made liable upon dissolution of the corporation. (*State Savings Association v. Kellogg*, 52 Mo. 588.)

A bankrupt corporation is not liable for an injury caused by the negligence of an assignee or receiver. (*Metz v. Buffalo, Corry & P. R. R. Co.* 12 B. R. 559; s. c. 58 N. Y. 61.)

The purchasers of a franchise of a bankrupt corporation do not, by the purchase, take the place of the pre-existing stockholders, and thereby become the corporators acquiring the corporate entity. (*Metz v. Buffalo, Corry & P. R. R. Co.* 12 B. R. 559; s. c. 58 N. Y. 61.)

### Suits Against Stockholders.

Before recovery can be had in an action at law from the stockholders of an insolvent corporation in respect of the unpaid balances on their stock subscriptions, there must be either corporate action to fix, or a judicial ascertainment of, the defendant's liability. (*Payson v. Brooke*, 1 W. N. 89.)

It is not competent for the assignee of a bankrupt corporation of his own motion to make an assessment on unpaid balances or instalments on stock in such corporation. (*Payson v. Brooke*, 1 W. N. 89.)

The assignee can not file a bill in equity against the stockholders for the purpose of having an account of the assets taken, and a call made for unpaid subscriptions. (*Myers v. Seeley*, 10 B. R. 411; s. c. 1 Cent. L. J. 451.)

The district court has the power to call in the unpaid stock for the purpose of paying the debts of the corporation. (*In re Republic Ins. Co.* 3 Biss. 452; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65.)

If the certificate of stock provides that the balance unpaid thereon shall be paid on the call of the directors when ordered by a vote of the majority of the stockholders themselves, the bankrupt court may make or direct any assessment or call necessary or preliminary to the collection of the assets, as fully to all intents and purposes as the stockholders or directors could have done if the company had not gone into bankruptcy. After the commencement of the proceedings in bankruptcy, neither the chartered officers nor stockholders had any right to interfere with the collection or distribution of the estate. All power over the estate and the assets of the company became thereby vested in the bankrupt court, which then had the power and control over the assets that was previously vested in either the chartered officers of the company, or the stockholders, or both collectively. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.)

Although the right to make an assessment does not arise under the charter, except in case of "losses exceeding the means of the corporation," yet the clause does not limit the right of the company or court to make an assessment for the payment of losses only. When the funds are exhausted by losses, and an assessment becomes necessary, it may be made for all purposes, either to pay debts already contracted or to create a new fund for the purpose of a business basis. (*In re Republic Ins. Co.* 3 Biss. 452.)

Every stockholder is bound to take notice of what the bankrupt court does in winding up the affairs of the company, and it is in the discretion of the bankrupt court whether to direct notice to be given to the stockholders or not before or during an assessment upon the stock. (*Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.)

If the order is made without notice, they may be considered as *quasi* parties to the bankruptcy proceedings to such an extent as to be bound by it in a collateral action. If they are dissatisfied with it, they have such a standing in the bankrupt court as to enable them to move in that court to set aside the order if improvidently made, or to apply for a review in the circuit court. If they omit to do so, they are concluded in a collateral action. Neither can the question whether the call is for a larger amount than is necessary be inquired into collaterally. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417; *Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56; *Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.)

Not only the corporation, but its entire constituency, is before the court, and full justice can be done not only to creditors but between stockholders. If a part of the stockholders have paid more than their fair proportion, the others who have not paid can be compelled to pay enough to adjust the account between stockholders. The district court, having all the powers of a court of equity in the premises, can compel each stockholder to pay what in equity and good conscience he ought to pay, and distribute the proceeds of such payment among those entitled to receive it, whether creditors or stockholders who have paid more than their ratable share. (*In re Republic Ins. Co.* 3 Biss. 452.)

An assessment may be made to pay the unearned premiums, to cancel policies yet unexpired. (*In re Republic Ins. Co.* 3 Biss. 452.)

An assessment may be made to pay the expenses of closing the affairs of the company. This is incident to the administration of the law, and the item is one to be provided for out of the unpaid stock. (*In re Republic Ins. Co.* 3 Biss. 452.)

An assignee of a bankrupt corporation may sue at law to recover the balance due on subscription for stock. (*Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.)

An exemplification of a decree authorizing an assessment of the stockholders by the assignee is not admissible if parts of the records of the proceedings that culminated in the decree are not certified and there is no offer to prove their contents. (*Payson v. Brooke*, 1 W. N. 89.)

An assessment by the bankrupt court does not preclude a policy holder from making a defense to an action on the premium note which shows that it is void. (*Lamb v. Lamb*, 13 B. R. 17; s. c. 6 Biss. 420.)

If a party pays part of a subscription for stock and accepts a certificate in blank, he is liable for the unpaid balance due thereon. (*Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.)

A premium note given to a foreign insurance company whose agent has not complied with the law in regard to filing his commission is void. (*Lamb v. Lamb*, 13 B. R. 17; s. c. 6 Biss. 420.)

Misrepresentation at the time when the subscription was taken, is no defense to an action by the assignee if the stockholder has been guilty of laches in discovering the fraud. (*Farrar v. Walker*, 13 B. R. 82; s. c. 2 Cent. L. J. 670.)

If a party has taken his certificate of stock and received a dividend thereon, he can not defeat an action for his subscription by proving a representation in regard to the establishment of a local office which was never carried out. (*Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.)

A plea that a subscription was obtained by a fraudulent misrepresentation must show that the defendant made use of reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is claimed, and when and how he repudiated the contract, and that he offered to surrender the certificate promptly upon discovering the fraud. (*Upton v. Englehart*, 3 Dillon, 496.)

A misrepresentation by an agent of the effect of the laws of another State, will not be a defense to an action by an assignee to recover the amount due on the subscription, if the subscriber has been guilty of any laches in discovering the fraud and repudiating the subscription. (*Upton v. Englehart*, 3 Dillon, 496.)

Where papers having color of compliance with the State statutes have been filed with the proper State officers, which meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the State, they are against a subscriber to its capital sufficient to constitute a corporation

*de facto* if supported by proof of user. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.)

A resolution releasing the stockholders from liability for the balance due on their stock is fraudulent and inoperative when not made public. (*Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.)

No fraud or misconduct by the managers of a corporation can be set up by stockholders to defeat their liability to creditors on unpaid stock. (*In re Republic Ins. Co.* 8 Biss. 452)

A representation made by an agent at the time of taking a subscription that no more than twenty per cent. would be called for, will not release the subscriber from his agreement. (*Payson v. Withers*, 5 Biss. 269.)

Stockholders are liable to be compelled to pay whatever remains unpaid upon their stock, whenever it becomes necessary that such payment should be made for the purpose of discharging the debts of the company, although the words "non-assessable" are written or printed across the face of the certificate. As between the company and its stockholders, this contract may be binding. (*Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Webster v. Upton*, 91 U. S. 65.)

To a certain extent, the terms of a grant are subject to the control of the legislature, and every stockholder takes his shares subject to that control, and subject also to the control of those who manage its affairs—namely, the board of directors. When the legislature merely declares that, instead of the stock being increased by the corporation at the discretion of the stockholders, the stock shall be increased by the resolution or act of the board of directors, there is not such a change as will authorize a stockholder to say that his subscription is at an end. (*Payson v. Withers*, 5 Biss. 269; *Payson v. Stoeve*, 2 Dillon, 427.)

When a citizen of one State subscribes to the stock of a foreign corporation, he is presumed to know what are the terms of the act which created that corporation. They are created by the law of another State, and he, for the purpose of assuming his obligation, in a certain sense, goes into another State, and casts off, for the time, the vesture which his own State throws around him, and puts on that of the other State, and is bound by the obligations which the legislature of that State has imposed upon the corporation, and the privileges which it has granted, and the conditions and terms of the grant. All these he is presumed to know, just as much as when he makes any contract to be executed by him in another State. (*Payson v. Withers*, 5 Biss. 269.)

The mere assignment of the certificate does not, of itself, constitute the assignee a stockholder, or create a liability upon the part of such transferee to pay assessments upon the stock. (*Upton v. Burnham*, 3 Biss. 431.)

The transferee of stock on the books of the corporation is liable for calls for the unpaid portion made during his ownership without proof of any express promise made by him to pay such calls. (*Webster v. Upton*, 91 U. S. 65.)

The vendor has a right to request that the stock shall be transferred on the books of the company, and when it is made at his request the purchaser becomes liable for subsequent calls. (*Webster v. Upton*, 91 U. S. 65.)

A certificate to a party, or registry of his name upon the stock register, is not absolutely necessary to constitute the legal relation or privity. The purchaser may waive it, and be held liable, without either a certificate or registry of his name. (*Upton v. Burnham*, 3 Biss. 431.)

An indebtedness on stock subscription is a debt that prevents a transfer of the stock. (*In re Bachman*, 12 B. R. 223; s. c. 2 Cent. L. J. 119)

A transfer by the officers of a corporation while a debt remains unpaid, is void. (*In re Bachman*, 12 B. R. 223; s. c. 2 Cent. L. J. 119.)

Authority to an officer to make the transfer, is not sufficient where the by-



law requires that the transfer shall be on the books of the corporation. (*In re Bachman*, 12 B. R. 223; s. c. 2 Cent. L. J. 119.)

The provision requiring the transfer to be upon the books of the company is for the benefit of the company, and the company can waive it; and if it is waived at the request of the holder of the certificate, or with his consent, express or implied, he is liable directly to the company for future assessments. (*Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 431, 520.)

If the certificate is indorsed in blank, and passed from the original subscriber to others, the entry of the name of the holder upon the stock books is a waiver. The holder of a stock certificate, by assignment and blank transfer to him, becomes thereby clothed, not only with all the rights, but with all the obligations of a stockholder. (*Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520.)

If a dividend is paid to an officer at a time when a prudent officer should have known that there were no profits to be divided, the assignee may recover the amount. (*Main v. Mills*, 6 Biss. 98.)

SEC. 5123.—Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Statute Revised—Feb. 3, 1873, ch. 135, 17 Stat. 436.

The State laws relating to insolvent corporations are superseded by the bankrupt act. A State court has jurisdiction of an action taken by the State attorney-general to forfeit the charter of a corporation; but with the degree of forfeiture the jurisdiction ends. It can not go on and administer upon the property of the corporation, for the insolvent laws of the State touching insolvent corporations, by virtue of which the court can alone act, are no longer in force. The fact that the corporation has expired, and become extinct by the forfeiture of its charter, and that in consequence thereof no proceedings can be had against it, is no defense to an action to recover its property. The court will lay hold of such property wherever it can find it; and persons in possession of the same, whether claiming in open wrong or under a show of title, are parties proper to be made defendants in such a proceeding. Its property may be taken from a receiver appointed by a State court in an action to forfeit its charter. (*Thornhill v. Bank*, 3 B. R. 435; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; s. c. 2 C. L. N. 157.)

A State court which has a general equitable jurisdiction to settle the affairs of an insolvent corporation, does not lose it because proceedings in bankruptcy

are instituted against the corporation. Until there is an adjudication of bankruptcy, the State court preserves its jurisdiction. (*Watson v. Citizens' Savings Bank*, 9 B. R. 458; s. c. 5 Rich. [N. S.] 159.)

An attorney of a corporation who advises it to apply for the benefit of the bankrupt law, after the passing of an order by a State court restraining it from disposing of its funds, is guilty of a contempt to the State court. (*Watson v. Citizens' Savings Bank*, 9 B. R. 458; s. c. 5 Rich. [N. S.] 159.)

The jurisdiction of a State court over an insolvent corporation is at an end the moment the corporation is adjudged a bankrupt, and in this respect there is no difference between the proceedings of a State court under a particular statute relating to insolvent corporations and its proceedings under its general powers as a court of equity, to wind up the affairs of an insolvent corporation. (*Watson v. Citizens' Savings Bank*, 11 B. R. 161.)

The district court may take jurisdiction of the affairs of an insolvent corporation, even after the filing of a bill in a State court, to wind up its affairs, if no receiver has been appointed, although the officers may have been enjoined from disposing of its property. (*Watson v. Citizens' Savings Bank*, 11 B. R. 161.)

This section applies only to such orders relating to the ratable distribution or payment of dividends as the State courts may have passed prior to the commencement of proceedings in the district court, or prior to the adjudication in bankruptcy. (*Watson v. Citizens' Savings Bank*, 11 B. R. 161; *in re* National Life Ins. Co. 6 Biss. 35.)

A voluntary assignment is not a proceeding duly commenced against a corporation for the purpose of winding up its affairs, and does not prevent an adjudication of bankruptcy. (*In re Harris, Rice & Co.* 2 Cent. L. J. 224)

Until the assignee is appointed, the action of the receivers, who are officers of a State court, and the validity of arrangements made with them will not be affected by the commencement of proceedings in bankruptcy against a corporation. (*Adams v. Railroad Company*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30.)

The costs and commissions of the receiver should be paid before the balance is paid to the assignee. (*Loudon v. Blanford*, 56 Geo. 150.)

If the assignee applies for the funds in the hands of a receiver, the State court may first direct that the fees for the defendants' counsel shall be paid. (*Clark v. Binninger*, 1 Abb. [N. C.] 421.)

A receiver of an insolvent corporation is not entitled to an allowance for the expense incurred by him in employing counsel to resist a suit brought by the assignee to recover the property. (*Platt v. Archer*, 13 Blatch. 351.)

A receiver can not be allowed for the expense of the services of an attorney in accounting before a State court after the commencement of the suit by the assignee to recover the property. (*Platt v. Archer*, 13 Blatch. 351.)

A receiver may be allowed the expense for the services of counsel which benefited the estate and were not hostile to the commencement of the proceedings in bankruptcy. (*Platt v. Archer*, 13 Blatch. 351.)

A receiver of an insolvent corporation is not entitled to an allowance for the expense incurred by him in resisting the proceedings in bankruptcy. (*Platt v. Archer*, 13 Blatch. 351.)

## CHAPTER SEVEN.

### FEES AND COSTS.

SEC.	SEC.
5124.—Fees.	5127.—Justices of the Supreme Court
5125.—Traveling and incidental ex- penses.	may change tariff of fees.
5126.—Marshal's fees.	5127A.—Reduction of fees.
	5127B.—Returns.

SEC. 5124.—In each case there shall be allowed and paid, in addition (*a*) to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers :

First. For issuing every warrant, (*b*) two dollars.

Second. For each day in which a meeting (*c*) is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this Title,\* one dollar.

Seventh. For every day's service while actually employed under a special order (*d*) of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate; and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars, (*e*) as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel the payment to the register.

Statutes Revised—March 2, 1867, ch. 176, § 47, 14 Stat. 540; July 27, 1868, ch. 258, § 2, 15 Stat. 228. Prior Statutes—April 4, 1800, ch. 19, §§ 46, 47, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 13, 5 Stat. 448.

(*a*) The fees for necessary services performed by the clerk in bankruptcy proceedings, which are not provided for by the bankrupt act or the rules, but are

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\* So amended by act of 18 February, 1875, ch. 80, 18 Stat. 320.

provided for by section 828, may rightfully be taxed and allowed under the latter. (*In re A. Alexander*, 3 B. R. quarto, 20.)

The register is not entitled to fees of clerk in addition to the fees given by the act to the register. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *in re A. Alexander*, 3 B. R. quarto, 20.)

The order of reference is not a process, and the clerk is not entitled to a fee of one dollar for issuing it. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

Form No. 45 is a process. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

(b) The register is not entitled to any fee for the list of creditors that accompanies the warrant. (*In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

(c) Where two meetings are held in the same case on one day, the register is only entitled to three dollars. (*In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

The word "meeting," wherever used in this section and elsewhere, means a meeting of creditors, such as is spoken of in sections 5033, 5092, 5093. (*In re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277; *contra*, *in re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.)

Whenever the register orders the creditors to meet, he is entitled to this fee. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *contra*, *in re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

The register is not entitled to this fee for making an order for the bankrupt to appear for examination. (*In re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277.)

Nor making the order to show cause against the bankrupt's discharge. (*In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

(d) The register is entitled to five dollars a day while acting under an order to examine the papers and report upon their regularity. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *in re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

The register is entitled to five dollars a day while acting under a special order of court to take charge of the bankrupt's property, and superintend sales thereof. (*In re Loder Brothers*, 3 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.)

The order of reference is not a special order, and the register is not entitled to five dollars a day while acting under it. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *in re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25; *in re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.)

Where the bankrupt appears in pursuance of an order for his examination, and the examination is postponed without doing anything, the register is not entitled to five dollars as for a day's service. (*In re I. Clark*, 1 B. R. 188; s. c. 2 Ben. 72.)

(e) The whole \$50 must be immediately handed over to the register to whom the case is referred. (Anon. 1 B. R. 24.)

When a petition is dismissed for want of jurisdiction, the money deposited as security for the fees of the clerk and register must be returned to the petitioner. (*In re Magie*, 1 B. R. 522; s. c. 2 Ben. 369.)

The balance that remains after deducting the fees of the register is to be paid to the assignee. (*In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461; *in re Appold*, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; Anon. 1 B. R. 123; *in re James*, 2 B. R. 227; s. c. 1 L. T. B. 121.)

If the assets are insufficient in an involuntary case, the court may order the bankrupt to pay the fees of the clerk and the register. (*In re McBride*, 1 W. N. 42.)

When the register applies for an order for the payment of his fees in excess of the deposit where there are no assets, it will be set down for hearing upon notice to the petitioning creditors and the bankrupt. (*In re McBride*, 1 W. N. 16.)

The following list shows the decisions that have been made in regard to fees in the most important cases. The following abbreviations have been used, to wit: a, *allowed*; d, *disallowed*; r, *reduced*; B, *not charged against the estate, but to be paid by the bankrupt*;

(*In re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.)

#### REGISTER'S FEES.

Examining schedules and certifying same correct.....	\$5 00 d
Certified copy of adjudication of bankruptcy.....	0 45 r to 0 35
Application for first meeting of creditors.....	1 00 d
Certified list of creditors for warrant.....	0 95 d
Supplemental warrant.....	2 00 a
Certified copies of schedules for assignees.....	4 45 a
One day's service under special order of reference upon petition for final discharge.....	5 00 a
Application for meeting at the same time.....	1 00 d
Order to show cause and certifying copy for clerk....	1 00 d
Application for second and third meetings.....	2 00 r to 1 00
Deposition of assignee on his return.....	0 65 a
Service under special order to show cause why the bankrupt should not be discharged.....	5 00 a
Second and third meeting of creditors.....	6 00 r to 3 00
Services, examination of bankrupt and proceedings, and for making a certificate of conformity.....	5 00 a
Discharge without opposition.....	2 00 a

(*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

#### REGISTER'S FEES.

Examining schedules and certifying same correct.....	\$5 00 d
Certified copy of adjudication of bankruptcy.....	0 45 r to 0 35 B
Certified copy of memorandum.....	0 45 r to 0 35
Certified list of creditors who have proved their debts, for clerk.....	0 35 a
Certified list of creditors who have proved their debts, for assignee, not to be furnished except for dividend.....	0 35 d
Order, Form No. 15.....	not stated. d
Order appointing assignees and notice.....	not stated. d
Assignment of bankrupt's effects.....	not stated. d
Certified copy of schedules for assignee.....	not stated. a
Making bond of assignee.....	2 00 a
Applications for second and third meetings.....	2 00 r to 1 00
Final meeting under order to show cause.....	3 00 d
Second and third meetings.....	6 00 r to 3 00
Final examination, 10 folios at 20c., certificate at 25c., charge for certificate.....	r to 0 15
Examination of papers and certificate of conformity.....	5 00 a
Discharge.....	2 00 a
Stationery, postage, rent, incidental expenses, clerk hire, &c....	not stated. d

## CLERK'S FEES.

Filing and entering petition and schedules, and oaths A and B, at 10c.....	\$0 80 a
Issuing order, Form No. 4.....	1 00 d
Drawing assignment and affixing seal of court.....	0 65 a
Issuing order, Form No. 45.....	1 00 a
Certificate of discharge and seal.....	not stated. a
Entering on six papers, certificate of day and hour of filing, at 15c. a folio.....	not stated. a B.
Clerk's certificate and seal to judge's signature....	not stated. a B.
To certificate of discharge.....	not stated. a B.

## ASSIGNEE'S FEES.

Services rendered. Actual disbursements and.....	\$19 00 a
<i>(In re A. Alexander, 3 B. R. quarto, 20.)</i>	

## CLERK'S FEES.

Filing certificate, and entry of order to record assignment....	\$0 40 a
Filing, certifying, and entry of assignment.....	1 05 a
Certified copy of assignment.....	1 00 d
Issuing warrant.....	1 50 a

## REGISTER'S FEES.

Filing three papers, viz. petition, assignment, and order of reference.....	\$0 75 r to 0 45
Certifying correctness of petition and schedules.....	0 55 a
Issuing orders of adjudication.....	1 00 {
Certifying same to clerk. . . . .	1 00 } r to 1 00
Entering case and proceedings in docket.....	1 00 d
Certifying abstract of same to clerk.....	0 25 a
Certifying copy of petition and schedules.....	6 50 a
One hour's employment order special order.....	0 40 a
One day's service at meeting of creditors.....	5 00 r to 3 00
Oath upon return of warrant.....	0 50 a
Issuing order appointing assignee.....	1 00 {
Certifying same to clerk.....	1 00 } r to 1 00
Application for meeting of creditors.....	1 00
Issuing order calling the same.....	1 00 {
Certifying same to clerk.. . . .	1 00 } r to 1 00
Affidavit to order calling meeting.....	0 50 a
Affidavit to assignee's report.....	0 50 a

*(In re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461.)*

This case was attended to in a county remote from the residence of the register. The services performed were not rendered under any *special* order of the court, except, perhaps, those rendered on the first day's attendance of the bankrupt. For this day three dollars were allowed. Also three dollars for every day employed, subject to the conditions imposed by Rule VI. The traveling expenses were apportioned among the several cases attended to at the same time, and allowed. Three dollars for each day consumed in going and returning might be allowed, but should be apportioned like the traveling expenses. Five dollars for each day employed at the following three stages, to wit: the time preceding the issuing of the warrant, the first meeting, and the final discharge, might be a reasonable allowance. As the cause was *ex parte*, the last two points were not definitely settled.

SEC. 5125.—The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the supreme court, and paid out of the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

Statute Revised—March 2, 1867, ch. 176, § 5, 14 Stat. 519.

Where the services in the case are all rendered in the office of the register, he is not entitled to an allowance for traveling and incidental expenses. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.)

The expenses of the register should be apportioned among all the cases attended to at the same time. (*In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.)

SEC. 5126.—Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

Statute Revised—March 2, 1867, ch. 176, § 47, 14 Stat. 540.

The marshal has the right to charge mileage for serving the order to show cause, the injunction, and the adjudication. The travel so charged for must be necessary travel. The language of the act precludes all constructive mileage whatsoever. Hence it is essential that the marshal should state the place of service in his return, in order that the correctness of the mileage charged may appear upon its face. If he has two or three processes in his hand at the same time, and in the same matter or proceeding, which may be served at the same time and place, he can charge mileage but once. If the service of any one of such processes makes additional travel necessary, he may charge for such additional travel, but no more. (*In re Donahue et al.* 8 B. R. 453; *contra, in re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.)

It is probable that in framing Rule XII the judges understood that the first clause of this section, providing a fee of two dollars for service of warrant, without adding, "and travel," would preclude any charge for travel in serving that particular process, but that the payment of the marshal's actual and neces-

sary expenses in making such service were intended to be provided for by the fourth clause, under the phrase "and other services." (*In re Donahue et al.* 8 B. R. 453.)

The warrant is the warrant provided for by section 5019 and 5028 to be issued after adjudication, and may perhaps include the provisional warrant provided for by section 5024. (*In re Donahue et al.* 8 B. R. 453.)

The distance by the nearest traveled route from the place of service to the place of return is the "necessary travel" meant by the act. The marshal may charge for mileage although the process is sent by mail to a deputy at the place of service, and returned in the same manner. The manner of getting the process there and back is a matter purely of the marshal's own concern, and something with which the court has nothing to do so long as there is no complaint of any consequent failure of official duty. (*In re Donahue et al.* 8 B. R. 453.)

When the notices are served by mail, the marshal can not charge for constructive mileage. (*In re A. Alexander*, 3 B. R. quarto, 20.)

The marshal is not entitled to ten cents per folio for copying the notices to creditors. The notices are not copies. Each notice is an original paper. (*In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; *in re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.)

The amount paid to the printer for printing these notices may be allowed as expenses for other services provided for by Rule XII. (*In re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.)

The word "expenses" implies an expenditure or payment and nothing can be allowed as expenses under this section which is not shown affirmatively to have been necessary and just and reasonable in amount, and to have been actually paid. The sum actually paid a keeper to watch property in custody, not exceeding \$2 50 a day, may be taxed, upon proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it, that the keeper actually continued in charge of it for the time specified, and that the sum charged therefore is reasonable for the service, and has been actually paid by the marshal. (*In re Lowenstein et al.* 3 B. R. 269; s. c. 3 Ben. 422; *in re Anon.* 4 C. L. N. 210; *in re Eugene Comstock*, 9 B. R. 88.)

The marshal may appoint a watchman, although the goods could be safely stored. (*In re Hare*, 43 How. Pr. 86.)

Something beyond the ordinary duties which a marshal is called upon to discharge in all cases, is contemplated by the provision for a further allowance. (*In re Hare*, 43 How. Pr. 86.)

There is no rule of law or practice authorizing the marshal to charge a commission upon his own cost bill. (*In re Anon.* 4 C. L. N. 210.)

Neither this section nor rule XII specifies all the services which the marshal as messenger may be called upon to perform, and, therefore, no tariff of fees, covering all the acts which he may be called upon to perform, has been prescribed either by Congress or the Supreme court, but the taxation of such fees is left to the discretion of the court. It was not the intention of Congress to limit his fees for all services which he might probably render to the four items enumerated in this section. The rules to be observed in taxing the costs of the marshal are: 1st. To allow him such fees as are specifically enumerated by law; and, 2d. Such other fees, not included in the enumerated fees, as he may show himself to have earned, the items to be determined by analogy to those allowed for similar services rendered by him in the district court in cases at common law and in chancery. If he sends process by mail to his deputy in a distant county for service, he is entitled to mileage on that process; and if he sends a deputy to such county, he is entitled to be paid the reasonable expenses of such deputy, but, in that event, he is not entitled to mileage. (*In re Anon.* 4 C. L. N. 210.)

Mileage may be allowed without an affidavit that the same was necessary and



actually performed. All that is necessary is, that the place of service be stated in the return, so that the correctness of the distance charged for may be ascertained if disputed. The marshal's travel fees are not included among the items as to which he is required to make oath. Those requirements relate exclusively to disbursements of money by the marshal in the manner and for the purposes named. In all other respects his official return is *prima facie* sufficient. (*In re Donahue et al.* 8 B. R. 453.)

Interest can not be allowed on the marshal's fees for services before they have been duly taxed and allowed. His expenditures, however, stand upon a different footing. They are often necessarily large, and far beyond the amount required to be deposited, and it is a matter of but simple justice that he should be compensated by way of an allowance at the usual rate of interest or otherwise for such advances. (*In re Donahue et al.* 8 B. R. 453.)

The following list shows the decisions that have been made in the most important cases. These abbreviations have been used to wit: a, allowed; d, disallowed.

Service of warrant.....	\$2 00	a	} Necessary expenses alone.
Necessary travel, 592 miles, at 5c.....	29 60	d	
Notices to creditors, 27, at 10c.....	2 70	a	
Actual and necessary expenses in publication of notices —advertising \$4, preparing same, 90c., postage, envelopes.....	4 98	a	
Preparing 27 notices, 118 folios, at 10c.....	11 80	d	
Stamps and envelopes, 27 notices, at 4c.....	1 08	a	
Furnishing two copies of advertisements, at 5c.....	0 10	a	
Making affidavit to warrant.....	0 50	a	
Draft and copy costs, 1 folio.....	0 10	a	
Attendance.....	1 50	d	

(*In re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.)

Serving five defendants and parties in Mercer Co. with order.....	\$10 00	a
Three copies of petition on defendants, \$6 00; copies \$2 25.....	8 25	a
Warrant of seizure, \$2 00; one copy, \$1 50.....	3 50	a
Expenses of deputy sent to Mercer Co., \$29 30; telegrams.....	31 90	a
Wages of deputy in possession 9 days after seizure, at \$2 00.....	18 00	a
Serving order of adjudication on two parties, \$4 00; copy, 50c.; mileage, \$17 00.....	21 50	a
Preparing notice publication, 40c.; paid printers, \$9 60.....	10 00	a
Preparing notice 1st meeting, \$7 60; services, \$3 00; postage, \$1 00.....	11 60	a
Serving orders on two keepers to deliver, \$4 00; copy, 50c.....	4 50	a
Copies of inventories.....	5 76	a
90 days keepers' fees, at \$2 00.....	180 00	a

(*In re Anon.* 4 C. L. N. 210.)

Service of warrant.....	\$2 00	a
Each written notice to creditors in schedules, at 10c.....	6 90	a
Necessary expenses in publication of notices.....	4 00	a
Postage.....	1 97	a
Copying notices, 483 folios, 10c. per folio.....	48 30	d

(*In re A. Alexander*, 3 B. R. quarto, 20.)

Sec. 5127.—The enumeration of the forgoing fees shall not prevent the justices of the Supreme Court from prescribing a

tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

Statute Revised—March 2, 1867, ch. 176, §47, 14 Stat. 540.

The authority conferred upon the justices is to prescribe a tariff of fees for all "other services," that is, for services other than those for which provision is made in this section. It is also limited to reduction only, and does not extend to the entire abolition of the fees for which provision is so made. (*In re Donahue et al.* 8 B. R. 453.)

SEC. 5127A (22 June, 1874, ch. 390, § 18, 18 Stat. 184).—That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, that the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections *four thousand nine hundred and ninety* [ten] and *five thousand one hundred and twenty-seven* [forty-seven] of said act, and no longer, which duties they shall perform as soon as may be.

The reduction applies to the fees of the clerk. (*In re Hunt*, 1 Cent. L. J. 359.)

SEC. 5127B (22 June, 1874, ch. 390, § 19, 18 Stat. 184).—That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices,

*First*, the number of cases in bankruptcy in which the warrant prescribed in section *five thousand and nineteen* (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

*Secondly*, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

*Thirdly*, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

*Fourthly*, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

*Fifthly*, a summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk, of,

*First*, the number of voluntary cases in bankruptcy coming before him during said year;

*Secondly*, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

*Thirdly*, the amount and rate per centum of all dividends declared;

*Fourthly*, the disposition of all such cases;

*Fifthly*, the number of compulsory cases in bankruptcy coming before him, in the same way;

*Sixthly*, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

*Seventhly*, the disposition of all such cases;

*Eighthly*, the amounts and rate per centum of all dividends declared in such cases;

*Ninthly*, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated.

And in like manner, every assignee shall, during said month make like return to such clerk, of,

*First*, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

*Secondly*, the amount of assets and liabilities therein, respectively and separately;

*Thirdly*, the total receipts and disbursements therein, respectively and separately;

*Fourthly*, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

*Fifthly*, the total amount of all his fees, charges, and emoluments, of every kind therein, earned or received;

*Sixthly*, the total amount of expenses incurred by him for legal proceedings and counsel fees.

*Seventhly*, the disposition of the cases respectively;

*Eighthly*, a summarized statement of both classes as aforesaid.

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

*First*, all cases in bankruptcy pending at the beginning of the said year;

*Secondly*, all of such cases disposed of;

*Thirdly*, all dividends declared therein;

*Fourthly*, the number of reports made from each assignee therein;

*Fifthly*, the disposition of all such cases;

*Sixthly*, the number of assignees' accounts filed and settled;

*Seventhly*, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

## CHAPTER EIGHT.

### PROHIBITED AND FRAUDULENT TRANSFERS.

Sec.	Sno.
5128.—Preferences by insolvent.	5130A.—Limitations in involuntary bankruptcy.
5129.—Transfers of property to defeat the act.	5131.—Fraudulent agreements.
5130.—Presumptive evidence of fraud.	5132.—Penalties against fraudulent bankruptcy.

SEC. 5128.—If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and \* knowing that such attachment † sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. ‡ And nothing in said section *five thousand one hundred and twenty-eight* [thirty-five] shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

Statute Revised—March 2, 1867, ch. 176, § 35, 14 Stat. 536. Prior Statutes—April 4, 1800, ch. 19, § 28, 2 Stat. 28; Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

#### Rules of Construction.

Sections 5128 and 5021 are very nearly related to each other in their provisions, and must be construed together in *pari materia*. Section 5128 in express language applies equally to voluntary and involuntary cases. Therefore all the qualifications and conditions prescribed by section 5128, not inconsistent with the provisions of section 5021, will apply to proceedings under the latter section; and all the qualifications, conditions, and prohibitions of section

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\* So amended by act of 22 June, 1874, ch. 390, § 11, 18 Stat. 180.

† So amended by act of 22 June, 1874, ch. 390, § 11, 18 Stat. 180.

‡ So amended by act of 22 June, 1874, ch. 390, § 11, 18 Stat. 180.

5021, so far as they relate to the same class of matters provided for by section 5128, and are not inconsistent with its provisions, will apply to proceedings under section 5128. (*In re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 282; s. c. 3 L. T. B. 221; *in re Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.)

It is the intention of the bankrupt act to prevent all preferences by an insolvent person, and, as far as possible, to insure the equal distribution of his property to all his creditors. It differs in a material point from the act of 1841. By the second section of that act, to render a transfer void it must have been made "in contemplation of bankruptcy." The present act only requires "insolvency, or contemplation of insolvency." (*In re Arnold*, 2 B. R. 160; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *in re Kingsbury et al.* 3 B. R. 318.)

It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid. (*In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75.)

### What Facts bring a Transfer within the Provisions of this Section.

This section is designed to defeat a preference to a creditor, while the next is designed to defeat any transfer of property. To make a transfer void, the following facts must concur:

1st. The debtor making the transfer must be insolvent.

2d. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.

3d. In any event, the person receiving the transfer must, at the time, have reasonable cause to believe the person making the transfer to be insolvent; and,

4th. Must also know that such transfer was in fraud of the provisions of the bankrupt act.

5th. And the payment, pledge, assignment, transfer, or conveyance must be made within four months before the filing of the petition by or against the bankrupt. (*Toof v. Martin*, 6 B. R. 49; s. c. 13 Wall. 40; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *in re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *Street v. Dawson*, 4 B. R. 207; s. c. 1 L. T. B. 369; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Scammon v. Cole*, 5 B. R. 257; *Forbes v. Howe*, 102 Mass. 427; *Dow v. Sargent*, 15 N. H. 115; *Rice v. Melendy*, 41 Iowa, 395.)

These things must concur. They must concur not only in fact but in time. The debtor must be insolvent, or contemplating insolvency, when the alleged preference is given, and he must then have in view the giving of a preference. The unlawful view to a preference must coexist with the preference. It is not enough that it precedes or follows the preference. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.)

If the debtor did not intend to give a preference, and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent. (*Mays v. Fritton*, 11 B. R. 229; s. c. 20 Wall. 414.)

This section does not render a sale *ipso facto* void. Upon an issue of title between the assignee and vendee, it is incumbent upon the former to first show a sale, and a sale within the time limited, and its unusual character. (*In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *in re Hafer & Bros.* [*in re Beck*], 1 B. R. 586; s. c. 6 Phila. 474.)

The proceedings and judgment on the petition in involuntary bankruptcy

against an insolvent debtor do not, in any manner, affect or determine any question involved in a suit brought by the assignee of that debtor's estate against a preferred creditor. (*In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *in re Dibblee et al.* 2 B. R. 617; s. c. 3 Ben. 283; *in re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28; *in re Dunkle & Dreisbach*, 7 B. R. 72; *Lewis v. Sloan*, 68 N. C. 557; *Love v. Love*, 21 Pitts. L. J. 101; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

A conveyance may be an act of bankruptcy in the grantor, although no fraudulent intent is known to or participated in by the grantee. There is an important difference between our statute and the English law in this respect. In our system the title of the assignee relates only to the filing of the petition, and not to the act of bankruptcy, except when that act is the filing of a voluntary petition. It follows that an adjudication does not, *per se*, affect the title of a purchaser. (*In re Williams & Co.* 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.)

When there is no transfer or conveyance from the bankrupt to the holder of the property, the assignee will derive no aid from this clause. (*Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377.)

### Insolvency.

The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and its popular meaning. But it is also used, in a more restricted sense, to express the liability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and, as applied to them, it is the sense intended by Congress. With reference to other persons not engaged in trade or commerce, the term may, perhaps, have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency in every case. (*Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 13 Wall. 40; s. c. 1 Dillon, 203.)

Insolvency, as used in the bankrupt act, does not mean an absolute inability to pay one's debts, at a future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do. (*Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; *Merchants' National Bank of Hastings v. Truax*, 1 B. R. 545; s. c. 1 L. T. B. 73; *in re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; *in re J. B. Wright*, 2 B. R. 490; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Anon.* 1 Pac. L. R. 173; *in re Forsyth & Murtha*, 7 B. R. 174; *in re Walton*, 1 Deady, 442; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Webb v. Sachs*, 15 B. R. 168; s. c. 9 C. L. N. 156; s. c. 13 Pac. L. R. 28; *Platt v. Stewart*, 13 Blatch. 481; *Stanley v. Sutherland*, 16 A. L. Reg. 298.)

So far as a case depends upon proof that a debtor was insolvent in fact at the time of giving a preference, it is not enough to show that there was danger of insolvency as a coming result. (*Beals v. Quinn*, 101 Mass. 262.)

Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the bankrupt law, and there is no better general rule to govern courts when they are considering

the facts of a case. It is neither too broad nor too narrow; while it would be quite too narrow and restricted to hold that failure to pay some one debt when due is evidence of insolvency in all cases under the act. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. A different course would ignore the usage and course of business recognized between the debtor and creditor class in that particular locality, and would present the spectacle of the mercantile class saying the trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas, in the latter localities, it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere. (*Driggs v. Moore, Foote & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Lakin v. First Nat'l Bank*, 15 B. R. 476; s. c. 13 Blatch. 83.)

A debtor is legally insolvent when he has not sufficient property subject to execution to pay all his debts if sold under legal process, and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business. (*Harrison v. McLaren*, 10 B. R. 244; *Smith v. McLean*, 10 B. R. 260.)

Although there may be outstanding claims against a person which he has not the money in hand wherewith to pay, yet he can not be declared insolvent when, on the other hand, it does not appear that any of these were then due under the arrangements and understanding between him and his creditors, while it does appear that all the property and effects, in procuring which these debts have been contracted, and some \$5,000 of his own earnings which had been expended, are still in his possession, uninjured and undecayed; that his health is as vigorous, his skill as unquestioned, his character as untarnished, his credit as good, his friends as numerous and zealous, and, finally, the business enterprise in which he has just engaged as promising, *in prospectu*, as ever before. (*Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75.)

A merchant having no property but his stock in trade, who, when pressed for a debt admitted to be just, gives as a reason, that he is unable to pay it, and suffers judgment to be rendered against him, is insolvent within any accepted or sound definition of that term as used in the bankrupt act, although the stock in trade may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

The commission of an act of bankruptcy is considered as a test of insolvency, showing conclusively the inability of the debtor to pay his debts or carry on his trade. (*Shawhan v. Wherritt*, 7 How. 627.)

Suspension of commercial paper for more than fourteen days, is, of itself, in the case of a merchant, proof of insolvency. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

The statute does not require that the debtor should know that he is insolvent at the time of making the transfer to invalidate the transaction. It only requires the existence of the fact of insolvency to bring it within the scope of this section, if the other elements contemplated by the statute to render the transaction a nullity coexist. (*Hughey v. Albin*, 2 B. R. 399; s. c. 2 Bond,



244; s. c. 2 L. T. B. 47; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re Clark & Daughtrey*, 10 B. R. 21.)

The fact that a paper secured by a deed of trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan or consent given, and does not, therefore, necessarily, subject the debtor to the penalties of the act. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.)

A bank suspending payment, and closing its doors against its creditors, makes to the world a proclamation of its insolvency. (*Markson v. Hobson*, 2 Dillon, 327.)

When a composition agreement contains a provision that it is not to be binding on any one unless it shall be agreed to and signed by all of the creditors, it is not binding on any of the creditors unless all accept it, and will not relieve the debtor from insolvency. (*Kinzing v. Bartholew*, 1 Dillon, 155.)

In estimating the liabilities of the bankrupt, the mere fact that some of them have been merged in judgments since the transfer will not affect the validity of the transfer, for the judgment is neither a payment nor satisfaction of the debt. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

Contemplation is not used in the sense of meditation merely. It refers to the condition a debtor who knows he will not be able to pay his debts as they become due, or who does not expect or intend to do so. (*Paige v. Loring*, 1 Holmes, 275.)

But little reliance can be placed by the court upon the statement of the bankrupt that, at the time of the transfer he had no reason to believe himself insolvent, for he may not be aware of the legal definition of insolvency. (*Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103; *Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 Blatch. 493.)

The question whether or not the preference was made at a time when the bankrupt was insolvent, should be submitted to the jury. (*Pierce v. Evans*, 61 Penn. 415.)

If the quantity and value of the bankrupt's assets did not materially diminish from the time of the transfer till the commencement of the proceedings in bankruptcy, the jury may find that he was insolvent when he made the transfer. (*Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

The bankrupt may be asked whether on the day of the transfer he believed himself insolvent. (*Otis v. Hadley*, 112 Mass. 100.)

Evidence of the amount of property in the possession of the bankrupt within a few days after the transfer is admissible. (*Otis v. Hadley*, 112 Mass. 100.)

Evidence of the general signification of the word "insolvent" in the place where the transaction occurred is not competent. (*Stanley v. Sutherland*, 16 A. L. Reg. 298.)

Statements made by the bankrupt in regard to his condition at the time of getting the money are not admissible in favor of the defendant. (*Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.)

### Limitation as to Time.

The acts mentioned in this section are not such as were forbidden by the common law or generally by the statutes of the States. Nor are they acts which, in their essential nature, are immoral or dishonest. Although a preference of creditors of an insolvent may sometimes be unjust to other creditors,

is not morally wrong. But the framers of the bankrupt act were about to re-  
 pare a system of law, the main feature of which was to provide for the  
 istribution of the property of an insolvent debtor among his creditors, and  
 ey adopted, wisely, as the general and prevailing rule of distribution,  
 quality among the creditors. But they found that the general principle  
 ould not, without hardship, be made of universal application. When a  
 reditor had obtained, by fair means, a lien upon any property of the bank-  
 upt, that lien ought to be respected. If he had so obtained payment of the  
 hole or a part of his debt, the payment ought to stand. These exceptions  
 o the general rule of distribution were, however, liable to be abused, and  
 ight be used to defeat the purpose of the bankrupt law. Congress, there-  
 ore, adopted a conventional rule to determine the validity of preferences.  
 n all cases where an insolvent pays or secures a creditor to the exclusion of  
 thers, and that creditor is aware that it is so when he receives the preference,  
 e must run the risk of the debtor's continuance in business for four months. If  
 he law which requires equal distribution is not called into action for four months,  
 he transaction, being otherwise honest, will stand; but if, by the debtor him-  
 elf, or by any of his creditors, that law is invoked within four months, the trans-  
 ction will not stand, but the money or property received by the party becomes  
 part of the common fund for distribution. (*Bean v. Brookmire et al.* 4 B. R.  
 96; s. c. 1 Dillon, 24.)

After the lapse of four months, the preferences—simple preferences—which  
 n insolvent debtor may have made, are to be held valid as against all the  
 world, so far as the preferred creditor is concerned. In this respect there is  
 o difference between cases of voluntary and cases of involuntary bankruptcy.  
*Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 101; s. c. 1 Holmes, 75; *in re*  
*Vynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *in re* Price Fuller, 4  
 B. R. 115; s. c. 1 Saw. 243; *Bean v. Brookmire*, 4 B. R. 196; s. c. 1 Dillon,  
 4; *in re* Butler, 4 B. R. 303; s. c. Lowell, 506; *Maurer v. Frantz*, 4 B. R.  
 31; s. c. 8 Phila. 505; *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch.  
 84; *Hall v. Hayner*, 3 C. L. N. 402; *Collins v. Gray*, 4 B. R. 631; s. c. 8  
 Blatch. 483; *Israel v. Ayer*, 2 Rich. [N. S.] 244; *Hilop v. Hoover*, 68 N. C. 141;  
*in re* G. H. Lane & Co. 10 B. R. 135; *Sidener v. Klier*, 4 Biss. 391; *Dennet v.*  
*Mitchell*, 6 Law Rep. 16; s. c. 1 N. Y. Leg. Obs. 356; *Shearman v. Bingham*, 1  
 Holmes, 272.)

The assignee may have a preference set aside which was given by the direc-  
 ors of an insolvent corporation to a firm of which a director was a member, al-  
 though it was given more than four months before the commencement of the  
 proceedings in bankruptcy. (*Bradley v. Furwell*, 1 Holmes, 433.)

A deed of trust executed prior to, but recorded within the period of four  
 months before the commencement of proceedings in bankruptcy, is valid. Al-  
 though it did not take effect until the time of record as against creditors, it is  
 ot for that reason void. The recording of the deed was not the act of the bank-  
 upt. The deed, as against him, was operative from its date. It was then that  
 ll his interest in the property described in it became vested by way of security  
 n the grantee. It was then that he delivered the deed and parted with all con-  
 rol of it. If the beneficiary was satisfied with the security afforded by the deed  
 nrecorded, there was neither necessity nor obligation to record it. To record  
 t was only necessary to make it a valid security against other creditors; and it  
 as not for the bankrupt but for the creditor secured, to determine whether it  
 ould be recorded or not. The delivery of it for record was in no sense his act,  
 ut theirs. The preference which the law condemns is a preference made  
 rithin the limited time by the bankrupt, and not a priority lawfully gained by a  
 reditor; and the preference gained by the record was not a preference made by  
 he bankrupt. Moreover, the law which makes deeds of trust void "until and  
 xcept from" the time of record clearly makes them valid from that time. (*In*  
*re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Seaver v. Spink*,  
 B. R. 218; s. c. 65 Ill. 441; *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dil-  
 n, 519; *Folsom v. Clemence*, 111 Mass. 273.)

A deed made and delivered before, but acknowledged within four months prior to the commencement of proceedings in bankruptcy, is valid when it is valid under the State laws without an acknowledgment after it is recorded. (*Seaver v. Spink*, 8 B. R. 218; s. c. 65 Ill. 441; *Gibson v. Warden*, 14 Wall. 244.)

If a deed is sealed and delivered on one day, and acknowledged on a subsequent day, the time begins to run from the day of the delivery, and not from the time of the acknowledgment. (*Wood v. Owings*, 1 Cranch, 239.)

If an insolvent debtor conveys property to a creditor to hold in trust for such uses as shall be designated before a certain time in any composition between the debtor and the other creditors, but if no composition is made before that time, then absolutely to his own use, whereby the debt is to be discharged, the limitation runs only from the time so stipulated if no composition is made. (*Haskill v. Frye*, 14 B. R. 525.)

The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. If the depository of a bond appropriates it to his own use, and substitutes other property in its place, without the authority of the bailor, the latter may ratify the act, although the bailee is insolvent at the time of the ratification. The ratification will be of the whole transaction, taken together, of the appropriation and substitution—not a part without the rest—not of the appropriation without the substitution. (*Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332.)

If the debtor, without the knowledge of the creditor, places the amount of the debt in bank, and takes a certificate therefor in the name of the creditor, the ratification by the creditor will not relate back to the time of the deposit, if he is informed of the debtor's insolvency and of the deposit at the same time, for the rights of other creditors intervene as soon as the notice is given. (*Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

If the president of a corporation executes a deed without authority, the time will run from the ratification, and not from the date of the deed, for the law will not feign a fiction to make valid an invalid act, and the act of ratification to relate must take place at a time and under circumstances when the ratifying party may himself lawfully do the act which he ratifies. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

If the creditor has previously agreed to receive grain in payment of his debt, the transfer dates from the time when the warehouse receipt is mailed to him. (*Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

If the creditor has not previously agreed to receive grain in payment of his debt, the transfer dates from the time when the receipt sent by mail is received and accepted by him. (*Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

A preference given by a firm, of which only one member subsequently goes into bankruptcy, can not be avoided by the assignee of the bankrupt partner. The preference is not void unless given within the prescribed time before the commencement of proceedings in bankruptcy; and, being a joint act, the bankruptcy of both members must follow within the specified period, or the preference becomes merely the payment of a just debt. (*Forsaith v. Merritt et al.* 3 B. R. 48; s. c. Lowell, 336; s. c. 1 L. T. B. 168; *in re T. S. Shepard*, 3 B. R. 172; s. c. 3 Ben. 347.)

If the surviving partners are put into bankruptcy without the firm's being declared bankrupt, the assignee can not set aside a preference made by the firm. (*Withrow v. Fowler*, 7 B. R. 339; s. c. 5 Pac. L. R. 102.)

If four months elapse after the giving of a firm note by a partner to pay a separate debt, before the bankruptcy of the firm, but less than four months before the bankruptcy of the partner, the transfer is valid. (*In re G. H. Lane & Co.* 10 B. R. 135.)

### Intent to Prefer.

The present bankrupt act avoids a sale made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy. Under this statute the phrase "with a view to give a preference," must be construed so as to include an intent to give one creditor any advantage over others in respect to payment or security of his debt. (*Forbes v. Howe*, 102 Mass. 427; *in re George & Proctor*, Lowell, 409.)

Every one is presumed to intend what are the necessary and unavoidable consequences of his acts. (*Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Ahl et al. v. Thorner*, 3 B. R. 118; s. c. 2 Bond, 287; s. c. 1 L. T. B. 129; *Brock v. Terrell*, 2 B. R. 643; *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 1 Holmes, 251; s. c. 91 U. S. 114; *in re Forsyth & Murtha*, 7 B. R. 174; *in re George & Proctor*, Lowell, 409; *Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364; *Everett v. Stone*, 3 Story, 446; *Peckham v. Burrows*, 3 Story, 544; *Dennet v. Mitchell*, 1 N. Y. Leg. Obs. 356; s. c. 6 Law Rep. 16; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156; *vide Jones v. Howland*, 49 Mass. 377.)

Every man is presumed to know the law, and he is bound to know what are the legal results of his acts. His mere private intention can not overcome the legal intention and purport of his acts. (*Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364.)

When a debtor is insolvent and knows it, any payment then made by him to a creditor in full must be made with intent to prefer. (*Driggs v. Moore, Foote & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *in re Gregg*, 4 B. R. 456.)

The intentions of parties are to be judged by the legal effect of their acts. (*Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; 14 Wall. 87.)

The intent to prefer may be inferred from the fact of preference. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.)

It is not necessary that there should be an actual intent in the mind of the debtor. The intent may be inferred from circumstances. (*Linkman v. Wilcox*, 1 Dillon, 161; *Giddings v. Dodd*, 4 B. R. 657; s. c. 1 Dillon, 115.)

The intent with which an act is done is not ordinarily a matter of direct evidence, but of inference from the act and the surrounding circumstances. (*In re George & Proctor*, Lowell, 409.)

Motive and intent are not identical. An intent often exists where motive is wholly wanting and indifference exists. (*Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 Blatch. 493; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.)

It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee. (*Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 1 Dillon, 203; s. c. 13 Wall. 40.)

The general legal proposition is true that, where a person does a positive act the consequences of which he knows beforehand, he must be held to intend those consequences. But it can not be inferred that a man intends, in the sense of desiring, promoting, or procuring, a result of other persons' acts when he

contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall, 473.)

If the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting. Where a judgment is obtained by means of a power of attorney, the inquiry as to his intent must be limited to the time when he executed the power. (*Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.)

Some payments may be preferences though made in what seems to be the ordinary course of business, and others may not be though made out of it. It is a question of intent in each case. The mode in which payments are made is usually important, but only as evidence of intent. (*In re George & Proctor*, Lowell, 409.)

The act does not require the debtor to know his insolvency or believe it. It treats of insolvency as a condition of fact, not of belief. He can not set up his ignorance of that condition to defeat the operation of this section. He is presumed to know and is chargeable with knowledge of it, and neither ignorance nor wilful blindness will exonerate him from the operation of its provisions. When he is insolvent in fact, he is chargeable by law with knowledge of such condition, and it follows as a logical sequence, that if he pays or secures one creditor in full, not having enough to pay all, the transfer or payment necessarily operates as a preference, and he is held liable to intend the natural and logical consequences of his acts. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall, 584.)

Every person is presumed to know his pecuniary condition. The presumption, however, may be rebutted, and a person may show that he was innocently mistaken as to his true condition, but the burden is upon the person setting up such a claim. (*In re S. P. Warner*, 5 B. R. 414; *Sedgwick v. Sheffield*, 6 Ben. 21.)

The intent may be inferred from the conduct of the debtor, and the circumstances of the transaction. (*Beattie v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479.)

The presumption that a man intends the natural and probable consequences of his acts is only one element of proof to establish the fact of actual intent. (*Rice v. Grafton*, 13 B. R. 209; s. c. 117 Mass. 228.)

The fact that the information in regard to the debtor's insolvency came from the debtor is no evidence of any wish or design on his part to give a preference, or of affording the creditor any facility for obtaining a judgment where the information was not given with that view or design. (*Britton v. Payen*, 9 B. R. 445; s. c. 7 Ben. 219.)

It is immaterial whether other debts were due and payable at the time when the preference was given or not. (*Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 Blatch. 493.)

The inevitable consequence of a mortgage upon a debtor's stock in trade is to put an end to further credit to him and break up and terminate his business. The natural and inevitable effect of thus incumbering his property is to give the secured creditors a fraudulent preference. (*Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103.)

A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt, is such an apparent preference that it would be almost impossible to explain it away. (*In re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561.)

When the debtor is in point of fact insolvent, it will require strong proof to repel the legal presumption that payments made by turning out and transferring an open account and delivering goods upon an order in favor of a third party,

and also by delivering goods to be applied on the same order, not to the third party, but to the creditor himself, and which necessarily and obviously had the effect to give a preference to a creditor, was not intended to have that effect. (*In re Kingsbury et al.* 3 B. R. 318.)

The giving of a note payable one day after date, with a warrant to confess judgment, importing the right to an execution without delay and a consequent levy, affords the strongest grounds for the presumption that the debtor intended that the creditor should make a levy, and thus obtain a preference. (*Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *in re Hafer & Bro.* [*in re Beck*] 1 B. R. 586; s. c. 6 Phila 474; *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

It is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney and gives it to his creditor, the effect of which is to enable the creditor to enter the judgment, issue execution, and levy upon his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words, and the conclusion necessarily follows, from such a state of facts, that he does intend to do what is the necessary consequence of what he does; or according to the oft repeated statement of the books, a man is supposed to know what is the necessary consequence of his acts. (*Trader's National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

The fact that the debtor did not consider that he was giving a preference by a judgment note, since he did not believe that a judgment and execution would be available as a preference over other creditors, does not affect the case, for the legal consequence of the note with warrant to confess judgment was an execution, levy and sale of the property to the exclusion of other creditors. (*In re Terry & Cleaver*, 4 B. R. 126; s. c. 2 Biss. 356.)

In order to give a struggling debtor the right to pay pressing debts or suffer some of his property to be levied on, he must know that his means are ample, his assets sufficient to pay all his debts, and his condition not one of merely technical insolvency. His struggle to meet his debts must not only be honest, but made with reasonable ground for expecting a successful issue. (*Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121; *in re Gregg*, 4 B. R. 456; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.)

It does not rebut the intent to prefer to show that the debtor has also another motive to the proceeding, namely, expectation of future benefit to himself, by means of future loans of money, and being enabled thereby to continue his business. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.)

A conveyance to secure an extension of indebtedness without any intention to give a preference is valid. (*Booth v. Neely*, 12 B. R. 398.)

The fact that the debtor was induced to give security for debts previously contracted, by the hope and expectation of thereby obtaining further credit and means for the continued prosecution of his business, does not make it any the less a preference. The fact that the debtor was influenced by some other consideration or inducement, beyond and aside from the purpose to secure an existing debt, is not such a circumstance as will repel the inference that he intended to give his creditor a preference. (*Forbes v. How*, 104 Mass. 427.)

It may be true that the bankrupt hoped to work out, and that one means to this end was to obtain time in which to pay his debts. But it is wholly untenable to say that a trader who knows himself to be insolvent can mortgage his property to secure a pre-existing debt without entertaining the view that such action is a preference. The court must judge of the bankrupt's standing at the time of the transfer, and, if it appear that his condition was such that a mortgage must operate as a preference, it can not be declared that there was no intention or view to give a preference because there was a possibility of his earning, in the future, enough to pay all his debts, and hoped to do so. It matters

not what was his principal motive, if he was actually insolvent, and knew it, he will not be allowed to pledge all his property, or any part of it, to one creditor, leaving the other creditors dependent, in whole or in part, upon his subsequent good or ill fortune in business enterprises. This view is in harmony with the spirit and intention of the bankrupt act. Any other view renders its provisions as worthless as a rope of sand, and opens a door to evade one of its most salutary requirements. (*Driggs v. Moore, Foote & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Hyde v. Corrigan*, 9 B. R. 466; 7 Pac. L. R. 121.)

The purpose of the act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption that is permissible, according to well settled rules of law, to secure the full benefit of the cardinal principle of the law. The act ought not to be construed to prevent the exercise of a reasonable *bona fide* effort on the part of an energetic and hopeful debtor struggling with an honest intent to pay all his debts; but to allow every embarrassed debtor to go on and sustain his acts because he says he thought he could go through, and hold as valid his payments and securities, would be to defeat altogether the objects and provisions of the bankrupt act. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re S. P. Warner*, 5 B. R. 414; *Jones v. Howland*, 49 Mass. 377; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.)

The transfer by a debtor who is insolvent of his property or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee, and must be taken as *prima facie* evidence that a preference was intended, unless the debtor or transferee can show that the debtor was, at the time, ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.)

The question being in each case whether there is an intent to prefer, there may be many cases in which the evidence of a real and honest intention not to stop payment may make valid a security, which is partly given for money previously advanced, if coupled with sufficient present advantages to the debtor; and there may even be cases where the purpose and expectation to keep on are so manifest that no intent to prefer can be found, though the insolvency is well known to both parties. (*In re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 651.)

The mere omission by an insolvent debtor, when he is sued for a just debt to file a petition in bankruptcy, is not sufficient evidence of as intent to prefer or defeat the operation of the act. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

To make an effort by dilatory and false pleas to delay a judgment in a State court, when he is sued for a just debt and has no defense, is a moral wrong and fraud on the due administration of the law. There is no obligation on him to do this, either in law or in ethics. If the debtor neither hinders nor facilitates a creditor in the prosecution of his suit, an intent to prefer can not be inferred from his conduct. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

There is no legal or moral obligation upon an insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file a petition in voluntary bankruptcy. The voluntary clause is wholly voluntary. No intimation is given that the bankrupt must file a petition under any circumstances. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

It is wholly immaterial whether the preference was voluntary, or by reason of threats and coercion. The voluntary or involuntary character of the transaction is not important. It is a conclusive presumption of the English law that

a debtor who pays an honest debt with a part only of his assets does not commit a technical fraud which will render the payment void, if the act is done in consequence of threats or demands on the part of the creditor. Our law does not adopt this presumption as conclusive. It defines a preference in the statute itself; or, rather, it has language which is inconsistent with the English definition. It makes the intent to prefer or give an advantage to one creditor the important thing, and this may, evidently, concur with pressure on the part of the creditor. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193; *in re Batchelder*, 3 B. R. 150; s. c. Lowell, 373; *Giddings v. Dodd*, 4 B. R. 657; s. c. 1 Dillon, 115; *Sawyer v. Turpin*, 5 B. R. 399; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; *in re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561; *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156; *vide Ashley v. Steere*, 2 W. & M. 347; *McMechen v. Grundy*, 3 H. & J. 185; *Taylor v. Whitthorn*, 5 Humph. 340; *Phoenix v. Ingraham*, 5 Johns. 412; *Wilkinson's Appeal*, 44 Penn. 284.)

An agreement for a future security is a mere executory contract, and not a conveyance, and the validity of such security will depend entirely upon the circumstances under which it is made, and the state of things existing at that time. An agreement to give security for a debt due or to be contracted, imposes no higher legal obligation upon the debtor than his promise of payment involved in the contracting of the debt. His fulfilment of the one is equally open to objection as a preference as is his fulfilment of the other. (*Forbes v. Howe*, 102 Mass. 427; *Second National Bank v. Hunt*, 4 B. R. 616; s. c. 11 Wall. 391; *Sawyer v. Turpin*, 5 B. R. 399; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; *contra, in re J. P. Wood*, 5 B. R. 421; *in re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561; *in re Connor & Hart*, Lowell, 532; *vide McMechen v. Grundy*, 3 H. & J. 185.)

When an agreement is made that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advance is considered as a present consideration for the conveyance. (*Gattman v. Honea*, 12 B. R. 493; s. c. 7 C. L. N. 395; s. c. 10 Pac. L. R. 4.)

A mortgage upon real estate executed immediately before the commencement of proceedings in bankruptcy, in pursuance of a parol agreement made long before that time, is not a preference, and is valid as against the assignee of the mortgagor. (*Burdick v. Jackson*, 15 B. R. 318; s. c. 14 N. Y. Supr. 488.)

A conveyance of land in pursuance of a previous agreement, when there has been an actual possession under the agreement, and performance of it, can not be set aside, although the consideration was paid prior to the transfer. (*Post v. Corbin*, 5 B. R. 11.)

If the promise to give security was merely general, without relating to any specific property, a transfer in pursuance thereof would be a preference. (*In re Jackson Iron Manuf. Co.* 15 B. R. 438; s. c. 2 C. L. B. 154.)

Where the contract of sale contemplates that the payment and transfer shall be synchronous, the vendee does not receive a preference by accepting a transfer immediately after making the payment, although the vendor in the interval becomes insolvent. (*Sparhawk v. Richards*, 12 B. R. 74.)

A security fairly given as part of the same transaction is valid, as the loan can not be invalidated by a change of the borrower's situation *re infecta*; as if the money were advanced while the mortgage was in course of preparation, and the debtor fails in the mean time. (*In re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561; *in re Connor & Hart*, Lowell, 532; *in re Perrin & Hance*, 7 B. R. 283.)

As a mortgage of property to be acquired after the date of its execution is



not a valid mortgage, but merely an authority to take possession, the right of creditors under the bankrupt law must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking of possession under the license contained in the mortgage. It is not competent for a party to give his authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankrupt law, because, literally, he has not made a transfer. That would be a facile method of evading the scope and spirit of the law. In legal effect the transaction was a continuing act from the date of the authority to the taking of possession, the last act being the consummation of the transfer. It must be treated as if a mortgage were made of the after acquired property at the time the mortgagee took possession. (*In re Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362; *Smith v. Ely*, 20 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 32 Wall. 513.)

A mortgagee who has omitted to record his mortgage obtains a preference if he takes possession of the goods with the assent of the debtor, for he has no greater right to take possession than any general and unsecured creditor. (*Kane v. Rice*, 10 B. R. 469.)

If a bill of sale under the laws of the State vests a complete title in the grantee, although it is not recorded or attended by possession, subject, however, to be defeated by any intervening right before record is made or possession taken, it will constitute a valid consideration for a mortgage, although there was an agreement that it should be kept secret and not recorded. (*Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.)

A mortgage is not a preference where the debt is secured by a prior mortgage covering goods subsequently acquired, if both mortgages cover the same goods. (*Brett v. Carter*, 14 B. R. 301.)

Where a subsequent and a prior mortgage do not cover the same goods, the former is liable to be set aside as a preference as to all goods not included in the latter. (*Brett v. Carter*, 14 B. R. 301; *Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.)

A chattel mortgage is not rendered invalid as against the assignee by failure to file the same or take possession of the property until a month before the commencement of proceedings in bankruptcy, although the mortgagee then knew the mortgagor to be insolvent, and that the instrument gave him a preference. (*In re Abram Barman*, 14 B. R. 125.)

Where the consequences of an act are penal and a fair and honest motive is as consistent with the act as a fraudulent one, the former is to be presumed to be the real and true one. (*Ashby v. Steere*, 2 W. & M. 317.)

If the payment is received in pursuance of an offer to compromise made to all the creditors, the intent to prefer may be shown by evidence that he was either unable or unwilling to carry out the compromise. If he is able and willing to treat all alike the intent is not made out. (*Clark v. Skilton*, 20 I. R. R. 175.)

If the bankrupt has procured one of his debtors to execute a mortgage, and transfer property to a creditor, the transaction will be deemed a preference, although there was no express agreement that the indebtedness due to the bankrupt should constitute the consideration therefor. (*Smith v. Little*, 9 B. R. 11; s. c. 5 Biss. 269.)

A preference, within the meaning of the act, is an advantage in the payment of the debt due to him acquired by one creditor over the other creditors of the debtor. (*In re Joseph Horton et al.*, 5 Ben. 562.)

Where the by-laws of a stock board provide that the seat of any member who has failed to comply with his contracts with other members of the board for six months shall be sold, and the proceeds of the sale applied to the payment

of his creditors in the board, an assignment of the seat before the expiration of the six months, for the purpose of facilitating such payment, is not a preference, because the general creditors can not obtain any greater rights of property than the debtor himself possesses. (*Hyde v. Woods*, 10 B. R. 54; s. c. 15 B. R. 518; s. c. 2 Saw. 655.)

A release of the equity of redemption to the mortgagee, who agrees to take the property at a fair price, and credit the amount on the mortgage debt, for the purpose of saving the expense of a foreclosure, is not a preference, when the property is worth less than the mortgage debt. (*Coze v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.)

Where the lien is greater in amount than the value of the property, the more reasonable inference is that money paid by the lien creditor at the time of the conveyance was paid to obtain the conveyance rather than as a consideration for the property. (*Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.)

The preference at which the law is directed can only arise in case of an antecedent debt. The giving of security when the debt is created, is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain it until the debt is paid. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204; *Bentley v. Wells*, 61 Ill. 59; *in re Thomas Morrison*, 10 B. R. 105; s. c. 6 C. L. N. 110; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316.)

The exchange of one set of securities for another of equal value is not a preference. (*Burnhisel v. Firman*, 11 B. R. 505; s. c. 22 Wall. 170.)

A creditor and debtor have a right to state an account and strike a balance, although the former may know that the latter is then insolvent. A mere accounting between the parties does not prefer the creditor or diminish the assets of the debtor. (*In re Comstock & Co.* 12 B. R. 110; s. c. 3 Saw. 320.)

The giving of a check on deposits in a bank, to be applied on a note held by the bank, is not payment, but an adjustment of accounts, and does not constitute a preference. (*Hough v. First Nat. Bank*, 4 Biss. 349.)

If a mortgage is executed to secure an indorser at the time of the discounting of a note by a national bank, an assignment of the mortgage to the bank is not a preference, for the bank in equity was entitled to the benefit of the mortgage from the time of discounting the note. (*First Nat'l Bank v. Haire*, 36 Iowa, 443.)

If a creditor has a lien on the property of the debtor to the full amount of his debt, there is no preference in paying money to discharge it. (*Livingston v. Bruce*, 1 Blatch. 318.)

The mere consent of the debtor to the revival of a judgment so as to continue the lien thereof, does not constitute reasonable cause to believe him to be insolvent. (*Kemmerer v. Tool*, 12 B. R. 334; s. c. 78 Penn. 147.)

Where goods are sold for cash on the receipt of the invoice, the non-payment of the price warrants a rescission, and such rescission is not a preference. (*In re Norman B. Foot*, 11 B. R. 153; s. c. 11 Blatch. 530)

The surrender of a pledge by another creditor upon a promise by the preferred creditor to pay him out of the proceeds of the property, does not affect the validity of the transfer. (*Ogden v. Jackson*, 1 Johns, 370.)

A mortgage upon a homestead or other exempt property can not be set aside by the assignee, although it would have been a preference if put upon other property. (*Rix v. Capitol Bank*, 2 Dillon, 367; *Schlitz v. Schatz*, 2 Biss. 248.)

If the individual property exceeds the individual liabilities, a mortgage to an individual creditor can not be set aside, although the firm is insolvent. (*Hewitt v. Northrup*, 16 B. R. 27; s. c. 16 N. Y. Supr. 277)

The assignee of the firm may assail a transfer of property purchased by one partner in the name of his wife, with the firm money, and conveyed to a firm creditor, with the intent to give a preference. (*Patrick v. Bank*, 1 Dillon, 303.)

A transfer of property to a factor, with intent to give him a preference by enabling him to claim a factor's lien thereon is void. (*Nudd v. Burrows*, 13 B. R. 289; s. c. 91 U. S. 426.)

A transfer of property within the United States to prefer an alien creditor may be set aside in the courts in the United States. (*Olcott v. McLean*, 14 B. R. 379; s. c. 50 How. Pr. 455.)

If an insolvent debtor conveys his property to another, and the latter executes a mortgage thereon to a creditor, the transfer may be set aside, for the legal effect is the same as if the mortgage had been given directly by the debtor himself. (*Gibson v. Dobie*, 14 B. R. 157; s. c. 5 Biss. 198.)

If a depositary of a bond, at the time of appropriating it to his own use, puts other property in its place, the transaction is not a preference of one creditor over another, within the meaning of the bankrupt act. There is no loan made or credit given. It is a case of an exchange of one species of property for another, made by one party without authority from the other, or of the conversion to his use by the depositary of property in his hands, and substituting property equivalent in value as the investment of the property converted. (*Oook v. Tullis*, 9 B. R. 483; s. c. 18 Wall. 332.)

An agreement at the time of discounting a note that a part of the proceeds shall be held to meet the note at maturity, is not a preference, or void under the bankrupt law. (*First National Bank of Mount Joy v. Wilson*, 72 Penn. 13.)

A contract for a conditional delivery of goods gives no just cause of complaint to the creditors of the vendee. (*Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.)

A change in the form, or even in the substance, of securities will be protected, if no greater value is put into the creditor's hands than he had before. (*Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.)

When an insolvent bank holds a protested note, and has on deposit funds of an indorser sufficient to pay it, the money may be appropriated on the note, and the note delivered to the indorser. The fact that the indorser subsequently collects the amount from the maker is immaterial. Creditors can not question the right of the indorser to take up the note by payment or set-off, and they have no interest in his remedy over against the maker. (*Winslow v. Bliss*, 3 Lans. 220.)

It is well settled that payment in full to a creditor of a bankrupt by a third person, as a friendly act, is not an illegal preference as between the creditor so paid and the other creditors, because it in no way affects the other creditors. The fund to which they looked for payment is in no way diminished by it. (*Replier v. Bloodgood*, 1 Sweeny, 34; *Winsor v. Kendall*, 3 Story, 507.)

One person has the right to transfer his property to pay or secure the debt of another. Such a preference is not a preference given by the debtor, but is that of the owner for the debtor's benefit. Creditors have no reason to complain of such preference or payment, for in the property transferred they have no manner of interest. (*Winslow v. Clark*, 2 Lans. 377; s. c. 47 N. Y. 261.)

A mortgage once paid can not be revived by a parol agreement, or continued for a demand other than the one it was given to secure, for the purpose of giving a preference thereby. The policy and object of the bankrupt law are to seize and appropriate the property of the bankrupt for the benefit of his creditors. The debts are made a lien upon it, and it is disposed of for the purpose of satisfying them. To permit a bankrupt, after he knows that he is insolvent, to revive satisfied liens, in order to pay a part of his creditors, would be as fatal to the rights of his other creditors—as palpable a violation of the objects, as well as of the

etter of the act—as if he was permitted to create new liens for the same purpose. The bankrupt law itself, as well as the general principles alluded to, prohibit any such revival. (*Winslow v. Clark*, 2 Lans. 877; s. c. 47 N. Y. 261.)

The acts, knowledge, and intentions of the agent are, in law, the acts, knowledge, and intentions of his principal. (*Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Beatty v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479.)

The burden of proof is on the assignee. (*Parsons v. Topliff*, 14 B. R. 547; s. c. 119 Mass. 245.)

A witness may testify as to what the defendant stated to be the contents of a letter without notice to produce the letter. (*Paige v. Loring*, 1 Holmes, 275.)

If payment is made in the ordinary course of dealing between the parties, the circumstance tends to show that some other motive actuated the debtor, rather than an intent to prefer. (*Ashby v. Steere*, 2 W. & M. 347.)

If the debtor goes to a particular creditor, hunts him up, picks him out from the rest, and pays him more in proportion than he can pay others, or if he elects to pay a relative to whom he is indebted, or if the transfer or conveyance is done secretly, or if it is out of the usual course of business, in a new, extraordinary, or unusual manner, or if payment of a debt is made before it becomes due, the circumstance tends to show an intent to prefer. (*Ashby v. Steere*, 2 W. & M. 347; *Atkinson v. Farmers' Bank*, Crabbe, 529.)

Testimony of the parties as to their intention is inexpressibly weak, and can rarely avail against the stronger proof which the transaction itself affords. (*Oxford Iron Co. v. Slaughter*, 14 B. R. 380; s. c. 13 Blatch. 455.)

If the bankrupt delivered goods to the workmen of a creditor upon the credit of the creditor, with the expectation that they would be paid for at the next pay lay, there is no preference, although the creditor subsequently applies the amount to a pre-existing debt. (*Rice v. Grafton*, 13 B. R. 209; s. c. 117 Mass. 28.)

Evidence of other transfers about the same time may be considered in determining whether there was an intent to prefer. (*Atkinson v. Farmers' Bank*, Crabbe, 529.)

An entry in the books of a party, or the absence of it, may be evidence against him of more or less weight, owing to the circumstances, but is not conclusive. (*In re Comstock & Co.* 12 B. R. 110; s. c. 3 Saw. 320.)

Legal advice given to the debtor that he would be liable to a criminal prosecution unless he paid the debt will not make the payment valid. (*Strain v. Tourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

A transfer of firm property with the intent to prefer an individual creditor may be set aside. (*Anchor v. Levy*, 3 Strobb. Eq. 197.)

If a transfer of firm property to one partner is made with the intent to give preference to his individual creditors, it is void. (*Collins v. Hood*, 4 McLean, 86.)

If mortgaged property is sold, with the permission and consent of the mortgagee, and another mortgage is subsequently taken to secure the same debt, it is a new security, and not a mere substitution of securities. (*Forbes v. Howe*, 102 Mass. 427.)

The word "conveyance" in the bankrupt act is a generic term, including all proceedings to dispose of or incumber property in derogation of the equality of creditors, with intent by such disposition to give a preference, or to defeat or delay the operation of the act. It includes mortgages. (*Bingham v. Frost*, 6 B. R. 130.)

The assignee may maintain a bill to have a mortgage declared void as a preference, although the bankrupt conveyed away the equity of redemption prior

to the commencement of proceedings in bankruptcy. (*Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.)

The right to recover property transferred by the insolvent, which is given by this section, is in no sense a penalty imposed upon the party receiving it. The transfers and titles based thereon are thereby made void. Hence the right of recovery. (*Cook v. Whipple*, 9 B. R. 155; 55 N. Y. 150; *Tinker v. Van Dyke*, 14 B. R. 112; s. c. 8 C. L. N. 235.)

The declarations of the bankrupt in regard to a transfer made as a preference, are competent evidence against the preferred creditor, if the conspiracy to give the preference is established, although they were not made in the presence of, or brought to the knowledge of the preferred creditor. (*Nudd v. Burrows*, 13 B. R. 289; s. c. 91 U. S. 426.)

The declarations of an alleged partner of the bankrupt are not admissible in favor of a preferred creditor. (*Nudd v. Burrows*, 13 B. R. 289; s. c. 91 U. S. 426.)

### Judgments.

The statute being within the express powers of Congress is supreme, and overrides all State legislation on the subject. If therefore a judgment is entered in contravention of the law, it is void. (*Atkinson v. Purdy*, Crabbe, 551.)

The amount received as a preference may be recovered, although it was received by virtue of a sale under an execution. (*Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

If the property of the bankrupt has been sold under process from a State court issued on a judgment which is void as a preference, the creditor is liable to refund the money thus received to the assignee. (*Shawhan v. Wherritt*, 7 How. 627.)

There is nothing in this section which expressly or impliedly prohibits the taking or obtaining of a mere judgment against an insolvent debtor. The judgment alone only serves to establish the claim of the creditor and fix its amount, and if obtained without fraud or collusion with the debtor, is as conclusive evidence of those facts as if the debtor had been solvent. Where the authorities speak of a judgment as an illegal preference or an attempt to get one, it will be found in every instance that there was also a lien acquired upon the property of the debtor by means of the judgment, and that the illegal preference consisted in this lien, and not in the mere judgment itself. (*Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.)

Merely allowing a creditor to obtain a judgment by default in an action for a debt to which there is no defense, does not, as a conclusion of law, arise an implication of a motive or an intent to prefer. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; *in re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; *in re J. B. Wright*, 2 B. R. 490; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *in re Moulton et al.* 4 Pac. L. R. 127; *Ballou v. Minard*, 2 Brews. 560; *Britton v. Payen*, 9 B. R. 445; s. c. 7 Ben. 219; *Partridge v. Dearborn*, 9 B. R. 474; *Clarke v. Piet*, 3 McLean, 494; *in re Uriah Krum*, 7 Ben. 5; *Platt v. Stewart*, 13 Blatch, 481; *contra*, *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; McGie [*ex parte Sanger*], 2 B. R. 531; s. c. 2 Biss. 163; s. c. 2 L. T. B. 80; *Kohlsaat v. Hoguet*, 5 B. R. 159; s. c. 4 Ben. 565; *in re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; *Linkman v. Wilcox*, 1 Dillon, 161; *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.)

Something more than the passive non-resistance of an insolvent debtor to regular judicial proceedings in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor or a purpose to defeat or delay the operation of the bankrupt law. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

Very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, may be sufficient to invalidate the whole transaction. Such evidence may be sufficient to leave the matter to a jury or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act will color acts or decisions otherwise of no significance. The cases must rest on their own circumstances. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Beattie v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193; *Ford v. Keyes*, 15 I. R. R. 59; *in re Dunkle & Driesbach*, 7 B. R. 72; *Shaffer v. Fritchery*, 4 B. R. 548; *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *in re Jerome E. Baker*, 14 B. R. 433.)

If the debtor does anything before suit which will secure the creditor a judgment with priority of lien, with intent to do so, this will render the preference void. (*Little v. Alexander*, 12 B. R. 134; s. c. 21 Wall. 500.)

If a person who knows that he is insolvent, substitutes small notes for a large note, whereby the creditor is enabled to recover summary judgments, the executions thereon may be set aside. (*Loudon v. First Nat. Bank*, 15 B. R. 476.)

Though a judgment creditor, who has obtained a judgment by default through the mere passive non-resistance of the debtor, may know the insolvent condition of the debtor, his levy and seizure under such circumstances are not void nor any violation of the bankrupt law. (*Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.)

There is no distinction in this respect between involuntary and voluntary bankruptcy. (*Haskell v. Ingalls*, 5 B. R. 205; *in re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10.)

If a judgment is confessed at a time when the debtor is solvent, an execution may be subsequently issued when the debtor is insolvent. (*Field v. Baker*, 11 B. R. 415; s. c. 12 Blatch. 436.)

If a confession of judgment by an insolvent debtor is actually followed by an execution and seizure of his property, it is an unlawful preference if made with a view to prefer. (*Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.)

Where the preference is obtained by a judgment and execution, there must be guilty collusion to constitute the fraudulent preference condemned by the statute. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.)

The slightest solicitation on the part of the creditor will protect the judgment. Unless it clearly appears that the act originated with the debtor, and that he took the first step to have the judgment rendered, it is valid. (*Halderman v. Michael*, 6 W. & S. 128; *Wilkinson's Appeal*, 4 Penn. 284.)

A security or priority gained by a suit in a State court has no better claim to protection than a payment by the debtor himself. (*Shawhan v. Wherritt*, 7 How. 627.)

A creditor may reduce his claim to a sum within the jurisdiction of a magistrate, take a judgment by default thereon, and obtain priority by issuing an execution for the same. (*Witt v. Hereth*, 13 B. R. 106; s. c. 6 Biss. 474.)

The mere filing of an affidavit and issue of an execution on the day of the commencement of the proceedings in bankruptcy, do not establish collusion between the creditor and the bankrupt. (*Witt v. Hereth*, 13 B. R. 106; s. c. 6 Biss. 474.)

A party who claims that a levy was void under the bankrupt law must allege the facts necessary to make the levy invalid. (*O'Hara v. Stone*, 48 Ind. 417.)

In an action at law, actual collusion in obtaining a judgment is always a question for the jury. (*Loucheim v. Henszey*, 77 Penn. 305.)

A preference may be set aside, although it is obtained by virtue of a warrant to confess judgment. (*Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

The mere entry of a judgment by virtue of a warrant of attorney given when the debtor was solvent, is not such a preference as the statute avoids, although it is entered just before the commencement of the proceedings in bankruptcy, and when the creditor knows that the debtor is insolvent, and though it is followed by an execution. (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204; *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316; *Sleek v. Turner*, 10 B. R. 580; 76 Penn. 142; s. c. 1 A. L. T. [N. S.] 485; *in re J. B. Wright*, 2 B. R. 490; *Armstrong v. Riekey & Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145; *Love v. Love*, 21 Pitts. L. J. 101; *Watson v. Taylor*, 21 Wall. 378; *contra*, *Golson v. Neihoff*, 5 B. R. 56; s. c. 2 Biss. 434; *Hood v. Karper*, 5 B. R. 358; 8 Phila. 160; s. c. 2 L. T. B. 201; *in re F. C. Lord*, 5 B. R. 318; *in re Terry & Cleaver*, 4 B. R. 126; s. c. 2 Biss. 356; *Vogel v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *Zahn v. Fry*, 9 B. R. 546; s. c. 31 Leg Int. 197; s. c. 21 Pitts. L. J. 155.)

The execution under the warrant of attorney will be valid, although the creditor's son was the bankrupt's book-keeper, and gave his father balance sheets from time to time, showing the bankrupt's condition. (*McCormick v. Buckner*, 2 W. N. 480.)

If the bankrupt was insolvent at the time of the giving of the warrant of attorney and the creditor knew it, the preference obtained by a subsequent execution may be set aside, although the proceedings in bankruptcy are instituted against him more than two months after the giving of the warrant of attorney. (*In re August Herpich*, 15 B. R. 426; s. c. 9 C. L. N. 253.)

This section defines acts that may render other persons liable to actions at the suit of the assignee for the recovery of assets. Section 5021 only defines the acts of a debtor for which he may be involuntarily adjudged a bankrupt. The latter section makes the mere giving, under certain circumstances, of a warrant to confess judgment an act of involuntary bankruptcy. This applies to the debtor only. This section, which affects other persons, does not mention the warrant at all. Thus, the creditor who has the warrant of attorney is never affected injuriously by merely having received it. The reason for the difference is obvious. The subsequent use of the warrant of attorney can alone give rise to any question so far as the creditor is concerned. (*Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201.)

If a judgment, taken merely as an auxiliary security, and embodying the amount of other judgments, is void as a preference, it will not infect and vitiate them, because this section abrogates only the instrumentality by which a preference is sought to be obtained, and all interests or advantage acquired by its use, and the creditor may himself annul the void judgment by a release on the record and hold the valid judgment. (*Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253.)

The lien of a judgment upon real property binds it for the payment of the claim for which the judgment was given as effectually as a mortgage made by the debtor for that purpose. Indirectly, it works, causes or makes a transfer of the property upon which it operates from the judgment debtor to the judgment creditor. (*Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.)

If a creditor sues to recover a debt before it is due, the lien acquired by his judgment will be set aside as fraudulently obtained through the use of improper means. (*Partridge v. Dearborn*, 9 B. R. 474)

An agreement discontinuing several suits in a State court, and transferring the claim for litigation in another suit pending between the same parties, for the purpose of enabling a creditor to shelter and protect any sum that he may recover by the attachment issued in the latter suit, is void. A debtor and a creditor can not be allowed, on the very eve of bankruptcy, to enter into any arrangement by which they can control the course of future litigation in the State court in suits there pending to which the debtor is a party. The assignee has the right to be substituted as a party in the place of the bankrupt, and he may and should exercise that right. It is the duty of the district court to grant an effectual relief against the use of such agreement, and secure to the assignee the free and untrammelled exercise of all the rights which the bankrupt act confers upon him with reference to such litigation, whether in the prosecution or defense of such suits. (*Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.)

The mere fact that the property taken on an execution has been turned into money, does not prevent it from still remaining the debtor's property under the bankrupt act. (*Mills v. Davis*, 10 B. R. 340; s. c. 35 N. Y. Sup. 355.)

Evidence that the entry of a judgment under a warrant to confess judgment was a surprise on the bankrupt, is immaterial and inadmissible. (*Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

When property of the bankrupt has been sold under judgment confessed, with a view to give fraudulent preferences, the assignee may apply in the State court for permission to come in at any time before a final decree, and claim the fund against the creditors, and have a trial of the facts. It is unnecessary that the judgment should be opened. The act of Congress operates directly upon the rights of the creditors, and makes their preferences void. The assignee claims, not upon an adverse title, but under and through the bankrupt by virtue of the bankrupt act. His claim is adverse to the creditors only in the sense that they are postponed, and he supersedes them, and comes in upon the fund, and not the property, on account of the rightful jurisdiction of the State court, at the time to seize and sell the property. (*Rohrer's Appeal*, 62 Penn. 498; *Jordan v. Downey*, 12 B. R. 427; s. c. 40 Md. 401; *Chan v. Chan*, 1 Penn. L. J. 175.)

### Reasonable Cause.

The bankrupt act does not require that the party receiving the transfer shall know, &c., but that he shall have reasonable cause to believe—such reasonable cause as would induce the belief in the mind of an intelligent, capable business man. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Sedgwick v. Sheffield*, 6 Ben. 21; *Otis v. Hadley*, 112 Mass. 100.)

It is sufficient if the creditor had reasonable cause to believe the debtor to be in contemplation of insolvency, although he did not have reasonable cause to believe him to be insolvent in fact. (*Paige v. Loring*, 1 Holmes, 275.)

It is not necessary that the creditor shall know or be aware of the debtor's intent to give a preference. (*Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.)

It should be averred that the creditor, at the time of the transfer, had reasonable cause to believe, &c. (*In re Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.)

"Reasonable cause to believe," means a state of facts or circumstances which would lead any prudent man to make inquiries. It will not do to ask protection on account of ignorance, when a small amount of inquiry would have given all necessary information. (*In re J. B. Wright*, 2 B. R. 490; *in re Arnold*, 2 B. R. 160; *White v. Raftery*, 3 B. R. 221; s. c. 1 C. L. N. 361; s. c. 16 Pitts. L. J. 110; *Merchants' National Bank v. Truax*, 1 B. R. 545; s. c. 1 L. T. B. 73.)

The statute does not require that the creditor shall have absolute knowledge



on the point, nor even that he shall, in fact, have any belief on the subject. It only requires that he shall have reasonable cause to believe, and he must be considered to have reasonable cause to believe when such a state of facts is brought to his notice, in respect to the affairs and pecuniary condition of the debtor, as would lead prudent business men to the conclusion that the debtor can not meet his obligations as they mature in the ordinary course of business. (*Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 1 Dillon, 203; s. c. 13 Wall. 40; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re Clark & Daughtrey*, 10 B. R. 21; *Burpee v. National Bank*, 9 B. R. 314; s. c. 5 Biss. 405; *Platt v. Stewart*, 13 Blatch. 481.)

Actual belief is not made the criterion of proof, nor is it necessary that it should appear that the creditor actually believed that the debtor was insolvent; but the true inquiry is, whether the creditor, as a business man acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to him at the time he received the transfer of the property. If it appears that the debtor was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor as clearly put him on inquiry, he had reasonable cause to believe that the debtor was insolvent. Ordinary prudence is required of a purchaser in respect to the title of the seller, and if he fails to investigate, when put upon inquiry, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party, under such circumstances, omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. (*Scammon v. Cole*, 5 B. R. 257; s. c. 3 B. R. 393; s. c. 2 L. T. B. 103; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.)

Knowledge of a trader's inability to pay his debts in the ordinary course of business, derived from his failure to pay the debt due to the preferred creditor himself, is at least sufficient to put a party upon the inquiry as to the debtor's solvency. (*In re Forsyth & Murtha*, 7 B. R. 174.)

Willing ignorance, as where a party wilfully shuts his eyes to the means of information which he knows are at hand, is regarded as equivalent to actual knowledge. (*Scammon v. Cole*, 5 B. R. 257; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Peckham v. Burrows*, 3 Story, 544.)

If other creditors institute inquiries, shortly after the making of the transfer, and find no difficulty in learning that the debtor owes more than the value of his property, this shows that the means of ascertaining his condition were at hand. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.)

The proposition of "reasonable cause to believe" is one of fact, to be established by proof, and found by the jury. The intent to prefer may be inferred from the fact of preference, and it is competent for the jury that this intent is so plainly inferable, from the acts of the debtor known to the creditor, as to amount to reasonable cause to believe. (*Forbes v. Howe*, 102 Mass. 427.)

The actual belief of the creditor as to the solvency of the debtor is wholly immaterial. The only inquiry which, under the statute, is relevant to the issue is, whether the creditor had reasonable cause to believe the debtor insolvent; that is, whether, in view of all the facts and circumstances which were known to the creditor, concerning the business and pecuniary condition of the debtor, in connection with the time and mode of the transfer of the property taken, he, as

a reasonable man, acting with ordinary prudence, sagacity and discretion, had good ground to believe that the debtor was insolvent. This is the only legitimate subject of inquiry. It was not intended by the statute to make the actual belief of the party concerning the solvency of the debtor one of the standards by which to test the validity of the transfer of property to him. Such a belief might, or might not, be well founded. It would be an uncertain and fluctuating standard. That which would satisfy one man, would be wholly insufficient to convince another; and those facts which would fall far short of producing belief in a person who was disinterested and impartial might have a different effect upon the same person when acting under a strong influence of self-interest. In the place of a test so uncertain and unsatisfactory as the belief of a party, formed under a great bias, the statute has established one much more safe and definite, applicable to all persons alike, and easily understood and readily applied—the belief of a reasonable man taking a transfer of property under like circumstances. (*Scammon v. Cole et al.*, 3 B. R. 393; s. c. 2 L. T. B. 103.)

Instructions which confine the plaintiff to proof of reasonable cause of belief as to the debtor's actual financial condition, instead of permitting him to prove reasonable cause of belief on the defendant's part as to the debtor's purposes and ultimate intentions are erroneous. It is undoubtedly true, that the distinction here pointed out is usually of not much practical importance. The question usually submitted to the jury, as the turning point in the trial, is, as to the preferred creditor's reasonable cause to believe the debtor to be insolvent, in fact at the time of making the payment, or giving the security complained of, as constituting an unlawful preference. But when the evidence has a tendency to show that there were apparent indications that insolvency was a probable and approaching event, it is material to instruct the jury that the plaintiff is entitled to recover, if his proof as to the defendant's reasonable cause of belief goes no further than cause to believe that the debtor, at the time, was acting in contemplation of insolvency. (*Beals v. Quinn*, 101 Mass. 262.)

Evidence tending to prove that the creditor had reasonable cause to believe the debtor to be insolvent is not competent unless it is brought home to his personal knowledge before or at the time of his purchase. (*Crump v. Chapman*, 15 B. R. 571.)

Where the defendant admits that a statement made by the bankrupt on examination in his presence is true, the statement may be proved by any one who heard it. (*Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.)

Evidence of the debtor's financial condition and reputation a year previous to the giving of the security is competent upon the question of his solvency or insolvency a year later, and as tending to show what means the creditor had to know, or cause to believe, that the debtor was insolvent. (*Forbes v. Howe*, 102 Mass. 427.)

Evidence that it was a general custom and within the ordinary course of business for persons engaged in the same business to make sales like the one in controversy, and that this custom was well known to the trade, is competent. (*Otis v. Hadley*, 112 Mass. 100.)

Evidence that such a sale would not be a suspicious circumstance that would affect the bankrupt's reputation for solvency is inadmissible. (*Otis v. Hadley*, 112 Mass. 100.)

The defendant can not prove that he has made similar purchases from others in the same trade. (*Otis v. Hadley*, 112 Mass. 100.)

Evidence as to the creditor's actual belief is inadmissible, for, if he had reasonable cause to believe, it is immaterial whether he did in fact believe or not. (*Forbes v. Howe*, 102 Mass. 427.)

The declarations or acts of the debtor subsequent to the transfer are not admissible as against the creditor. (*Phoenix v. Ingraham*, 5 Johns. 412.)

The creditor is not of necessity affected by a misrepresentation or deceit of

the bankrupt in regard to the transaction. (*Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

Any serjeous and intentional misstatement, or attempt to mislead or deceive other creditors in regard to the transaction, when made by the creditor, casts suspicion on the transaction. (*Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

The validity of a preference does not depend on the moral good faith with which it was accepted by the creditor. (*Alderdice v. State Bank*, 11 B. R. 398.)

The creditor's belief that he is entitled to the preference is not material. The intent to receive a preference should not be confounded with corrupt motive. (*Bingham v. Richmond*, 6 B. R. 127.)

The bankrupt act disarms the vigilance of creditors generally, by declaring that no vigilance can be rewarded by a preference, if obtained contrary to its provisions within four months prior to the filing of the petition in bankruptcy. It undertakes to disable creditors from procuring preferences within that period by attachment, mortgage, or confession of judgment. It must be so administered as to suppress illegal preferences, or it necessarily operates as a fraud upon the rights of the mass of creditors who in good faith refrain from seeking advantages contrary to its provisions and policy. (*Markson v. Hobson*, 2 Dillon, 327.)

All experience shows that positive proof of fraudulent acts between debtor and creditor is not generally to be expected, and it is for this reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.)

If a merchant debtor in a mercantile community is so straitened that, without pretense of any defense, he is under the pressure of suits to compel payment of debts maturing in his current business, this is very high evidence of his inability to pay. (*Mayer v. Hermann*, 10 Blatch. 256.)

The existence of a financial crisis constitutes of itself a reasonable cause for believing doubtful men to be insolvent. (*In re Clark & Daughtrey*, 10 B. R. 21.)

A creditor may be affected by rumors which he has heard about the debtor's embarrassment. (*Post v. Corbin*, 5 B. R. 11; *Golson v. Niehoff*, 5 B. R. 56; s. c. 2 Biss. 434; *Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121.)

A payment received in the ordinary course of business, without any reasonable cause to believe the debtor to be insolvent, is valid. (*Coze v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.)

A conveyance out of the ordinary course of business is sufficient evidence, if uncontrolled, to establish a knowledge of the debtor's insolvency. The purchaser is put upon the inquiry, and should take steps to ascertain the condition of the debtor, or at least his general reputation as to solvency. (*Tuttle v. Truax*, 1 B. R. 601; *in re Palmer*, 3 B. R. 283; s. c. 1 L. T. B. 139; *in re E. Meyer*, 2 B. R. 422; s. c. 1 C. L. N. 210; *in re Colman*, 2 B. R. 563; *Dean & Garrett*, 2 B. R. 89; *in re Hafer & Bro.* [*in re Beck*], 1 B. R. 586; s. c. 6 Phila. 474; *Scammon v. Cole*, 5 B. R. 257; *North v. House*, 6 B. R. 365.)

Independent of the express provisions of the bankrupt act, the general rule of law is, that the transfer or delivery of property will be considered fraudulent when it is not delivered in the usual course of trade, or of the accustomed dealings between the parties. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.)

A creditor who has before him what the bankrupt act declares shall be *prima*

*facie* evidence of fraud must, in law, be deemed to have reasonable cause to believe in the existence of such fraud, unless this legal presumption is overborne by opposing evidence. (*In re Kingsbury et al.* 3 B. R. 318; *Wilson v. Stoddard*, 4 B. R. 254; s. c. 2 C. L. N. 161.)

This *prima facie* evidence is present to every creditor who accepts a security in any case to which the provision is applicable; and unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the bankrupt act. This will necessarily prevent any security voluntarily given by an insolvent to a favored creditor from being held valid, simply because it proceeded from the voluntary act of the debtor, and was prepared without any previous communication with the creditor, either in regard to the giving of the security, or the financial condition of the debtor. A creditor can not, by shutting his eyes when this statutory *prima facie* evidence of fraud is placed before him, escape the consequences of this provision. When he accepts a security, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect; and no masterly inactivity, no self-imposed ignorance of what the circumstances call upon him to ascertain, however intense, and however closely guarded that ignorance may be, can make fraudulent preferences valid and binding as against the assignee. (*Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520.)

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures, and in the usual mode of paying debts, are *prima facie* valid. On the other hand, whenever a creditor is in possession of such facts and circumstances in reference to his debtor's standing, as arouse suspicion with regard to his solvency or ability to meet his indebtedness, the creditor is so far put upon inquiry that he will not be allowed to shut his eyes to those facts and circumstances, and obtain payment of a debt otherwise than as it matures, or take security or a transfer of property from the debtor to the prejudice of other creditors. Not paying debts in the usual and ordinary course of a trader's business, from a lack of present means, and want of ability to raise means, must be regarded as *prima facie* evidence of insolvency, and the creditor who has knowledge of such facts must act in view of them. (*Driggs v. Moore, Foot & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440.)

It is a sound rule that, when a person suspects the solvency of a debtor, and, in consequence of that suspicion, obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, he may be said to be in the predicament contemplated by the bankrupt law; he has reasonable ground to believe that his debtor is insolvent, and so can not avail himself of the payment made, or security obtained. Courts ought not to prevent or interfere with the ordinary business operations between man and man, and do not attempt to do so unless there is something in the transaction indicating that the man who makes it has reason to believe that he is getting what ought to belong to creditors generally, and if so, the bankrupt law declares he can not avail himself of money or property thus obtained. But, when a man acts without knowledge of the condition of the party, or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, then the bankrupt law will not interfere with it. (*Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

Although the consideration for an assignment of a claim to a third person is paid out of the funds of the debtor by such third person, yet the assignee is not entitled to recover unless it appears that the creditor at the time clearly understood that he was dealing directly with the debtor's agent for a conveyance, security, transfer or payment from or out of the funds of the debtor. The creditor is entitled to retain the money if he was misled by such third person into the belief that the transaction was a mere assignment of the debt to himself for his own benefit, and to be paid for out of his own funds. (*Windsor v. Kendall*, 3 Story, 507.)

Mere knowledge that a claim of less than one hundred dollars remains unsettled does not constitute reasonable cause to believe that a fraud on the act is being committed by accepting a payment. (*Castle v. Lee*, 11 B. R. 80.)

The small amount of means used to carry on the business can not affect the validity of the transfer, for the statute can not be graded by any system of minimums in its application to the various trades, professions and callings of individuals. (*McAllister v. Richards*, 6 Penn. 133.)

No creditor, after exacting a deed of trust so stringent as to destroy the credit of an insolvent debtor, has a right to claim that he did not have reasonable cause to believe the debtor to be insolvent. (*In re Clark & Daughtrey*, 10 B. R. 21.)

The taking of a debtor's property on legal process is not in the ordinary course of his business. When a creditor makes repeated demand for payment, and is compelled to resort to legal process to obtain satisfaction, he has reasonable cause to believe the debtor to be insolvent. (*Haskell v. Ingalls*, 5 B. R. 205.)

The confession of a judgment can not be considered as an act done in the ordinary course of the debtor's business. It is therefore *prima facie* contrary to the provisions of the act, both as to the debtor and the creditor receiving it. The burden of proof is upon the creditor to overcome this presumption. (*In re Walton et al.* 1 Deady, 442.)

When an execution must necessarily stop the debtor's business, the execution creditor, in general, has reasonable cause to believe the debtor to be insolvent. (*Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.)

Creditors issuing executions on judgments obtained on demands long overdue, against a bankrupt who has been pressed in repeated instances to pay or secure the demands, and has failed to do so because of his inability, must be held to have had reasonable cause to believe that the debtor was insolvent. (*Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.)

Payments by a banker, whose doors are closed, in checks upon another bank in the same place, is not in the ordinary course of his business. (*Markson v. Hobson*, 2 Dillon, 327.)

If the bank is not the general banker of a bankrupt, the case is not one for the application of the cautionary rule which requires transactions between them to be scrutinized with care. (*Rankin v. Third Nat'l Bank*, 14 B. R. 4.)

The debtor's remonstrances, that the giving of the security will injure his credit, is sufficient to put the creditor upon inquiry. (*Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121.)

If a transfer was not in the usual and ordinary course of business of the bankrupt, that fact is *prima facie* evidence that a fraud was committed upon the bankrupt act by the transfer, and the burden of proof will be upon the creditor receiving it to show the validity of the transaction as respects a fraud on the act. But if the transfer was made in the usual and ordinary course of business of the bankrupt, then the burden of proof will rest upon the assignee. (*Collins et al. v. Bell et al.* 3 B. R. 587; *Seammon v. Cole et al.* 8 B. R. 393; s. c. 2 L. T. B. 103.)

A transfer of the whole of the debtor's property is not in the usual and ordinary course of business. A conveyance of part may be public, fair and honest, but a conveyance of all must either be fraudulently kept secret or produce an immediate absolute bankruptcy. Nothing remains for the creditors in any shape. The debtor is therefore insolvent, of course, the moment he executes the deed, for there is nothing at all left for his creditors. (*Grow v. Ballard*,

2 B. R. 254; s. c. 1 L. T. B. 111; *Brook v. Terrell*, 2 B. R. 648; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *in re Batchelder*, 3 B. R. 150; s. c. Lowell, 373; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480; *Walbrun v. Babbitt*, 6 B. R. 539; s. c. 9 B. R. 1; s. c. 16 Wall. 577; *Peckham v. Burrows*, 3 Story, 544.)

A conveyance of all the debtor's property to a creditor who has no knowledge that there are any other creditors is valid. (*Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.)

The transfer will stand if nothing was brought to the attention of the creditor which would reasonably have induced him to believe the debtor to be insolvent. (*Rankin v. Third Nat'l Bank*, 14 B. R. 4.)

The transfer of all the goods of a debtor and the lease of the storehouse in which they are kept, and putting others in possession with authority to sell all his stock and apply the proceeds to the payment of debts in execution, is not in the usual course of business; does break up his business; and is not only some, but very strong evidence of an intent to prefer his creditors, he being at the time insolvent. What is the usual course of a retail merchant's business? It is to sell his goods at his usual place of business to customers as they come, to keep up an ordinary stock, and continue in business in the usual way that such merchants do. Certainly it is not in the usual course of a retail merchant's business when in a state of actual insolvency, to confess judgment to certain creditors, suffer executions to be levied by them, and then to assign over to them all his stock, and his place of business, put them in possession, and provide that the surplus over the payment of their claims shall be returned to himself. Such a state of facts undoubtedly justifies the court in saying that it is required to be rebutted by some evidence that the transaction was not intended as an undue preference contrary to the provisions of the bankrupt law. (*Pierce v. Evans*, 61 Penn. 415; *Mayer v. Hermann*, 10 Blatch. 256.)

When a party is aware that all demands for which he could be held liable, as well for the individual members as for the firm itself, and whether the same had matured or not, were to be paid, whilst other demands known to him are left unsecured, and that by the arrangement debts not due are anticipated, and thereby the discount which has been paid is lost, he has reasonable cause to believe that a preference is intended. Knowledge of overdue debts, and the fact that a large amount of firm property is applied to the discharge of the personal liabilities of the partners, and not to the firm debts, are circumstances that call for plenary proof that the transfer was not designed as a preference. (*Seammon v. Cole et al.*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103.)

A transfer of all the debtor's property subject to execution, leaving other creditors to obtain payment out of the debts due to him, constitutes a reasonable cause to believe him to be insolvent. (*Smith v. McLean*, 10 B. R. 260.)

The rule that insolvency consists in present inability to pay debts might apply if the debtor is present and the negotiations are with him. But when he is absent, and that absence is alleged as the sole reason for the non-payment of the debt, and the reasons given for such absence are not such as would excite any suspicion of insolvency or present inability to pay, it has no application. Clerks and agents are not supposed to have entire control of the resources of their principal to such an extent as to make their failure to meet an obligation of their principal an act of bankruptcy against him. Security given by an agent after demand and non-payment of a debt under such circumstances will be valid. (*Jenkins v. Meyer*, 3 B. R. 776; s. c. 2 Biss. 303.)

When a merchant fails to pay his notes or rather mercantile obligations as they become payable, the immediate presumption of inability to pay arises. There may be reasons in a particular case why payment at maturity is not made. There may be a defence to the apparent debt; the non-payment may be

caused by accident or carelessness or inattention, or it may be the result of some other special temporary cause entirely consistent with amplest solvency. Nevertheless, where no such cause exists, non-payment *prima facie* imports inability to pay in due course of business. (*Mayer v. Hermann*, 10 Blatch. 256; *Dunning v. Perkins*, 2 Biss. 421; *Bartholow v. Bean*, 10 B. R. 241; s. c. 18 Wall. 635; *Shaffer v. Fritchery*, 4 B. R. 548; *Golson v. Niehoff*, 5 B. R. 56; s. c. 2 Biss. 484; *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; *Warren v. Del. L. & West. R. Co.* 7 B. R. 451; s. c. 10 Blatch. 493; *Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 10 Blatch. 498; *Harrison v. McLaren*, 10 B. R. 244.)

Notice of the non-payment of a judgment note is not notice of the insolvent condition of the maker. (*Love v. Love*, 21 Pitts. L. J. 101; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316.)

The non-payment of an account for goods sold when there is no circumstance warranting any other inference than that the debtor can not pay for the want of means, indicates insolvency, and affords a reasonable cause to believe him to be insolvent. (*Mayer v. Hermann*, 10 Blatch. 256.)

The existence of the required reasonable cause for belief may be inferred from all the circumstances of the transaction. (*In re Gregg*, 4 B. R. 456; *Stranahan v. Gregory & Co.* 4 B. R. 427; *Anon.* 1 Pac. L. R. 173; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Alderdice v. State Bank*, 11 B. R. 398; *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.)

The making of subsequent advances does not negative the existence of a reasonable cause to believe the debtor to be insolvent, when it was for the interest of the creditor to make such advances. (*Harrison v. McLaren*, 10 B. R. 244.)

To confess knowledge of the facts which constitute insolvency, and at the same time deny knowledge of the bankrupt's insolvency, is simply a denial of law rather than of fact. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 13 Wall. 40; s. c. 1 Dillon, 203; *Warren v. Del. L. & West. R. Co.* 7 B. R. 451; s. c. 10 Blatch. 493.)

Equity pays no regard to the forms resorted to by parties in fraud of the law. (*Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 13 Wall. 40; s. c. 1 Dillon, 203.)

The principal is chargeable with all the knowledge which his agent had at the time of the transaction. (*In re E. Meyer*, 2 B. R. 422; s. c. 1 C. L. N. 210; *Ungewitter v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *Markson v. Hobson*, 2 Dillon, 327; *Mayer v. Hermann*, 10 Blatch. 256; *contra, in re J. B. Wright*, 2 B. R. 490.)

Where a creditor places his claim in the hands of a collection agent to forward for collection, the creditor is not chargeable with the knowledge of a sub-agent employed by the latter if he does not receive the proceeds of a judgment by confession obtained by him, although the proceeds were remitted to the collection agent. (*Hoover v. Wise*, 14 B. R. 264; s. c. 61 N. Y. 305; s. c. 91 U. S. 308.)

Where the attorney of a creditor is prosecuting a debtor to enforce payment of a debt, and by reason thereof the debtor discloses to him that he is insolvent and asks his advice, and he assumes to give it, he can not by accepting such retainer evade the operation of the rule that the knowledge of the agent acquired in the conduct of his employer's business is knowledge of his principal. In every step of the prosecution of the claim to collection, he is the agent of the creditor, the performance of his duty to that creditor involves the gaining of knowledge of the debtor's insolvency, and no proffered confidence put in him by the adverse party can make that information less his client's property, or less

information acquired in his agency, and imputable to such client. (*Mayer v. Hermann*, 10 Blatch. 256.)

A general authority, with subsequent tacit acquiescence, is sufficient proof that an agent had authority to accept a preference. (*In re Colman*, 2 B. R. 568.)

A corporation is chargeable with the knowledge of its officers. (*Loudon v. First Nat'l Bank*, 15 B. R. 476.)

The mere fact that the creditor was not present when the transfer was made and knew nothing of the transaction, does not affect its character. If, when informed of it, he does not repudiate it, but accepts benefits under it, he is as much bound by the acts of his agent in accepting the transfer as if he had accepted himself. (*North v. House*, 6 B. R. 365.)

Where there is collusion between the creditor and the debtor, or delay in issuing the execution, or a use of the judgment for the purpose of preventing and obstructing other creditors in the collection of their claims, the judgment will be declared void. (*McGie [ex parte Sanger]*, 2 B. R. 531; s. c. 2 Biss. 163; s. c. 2 L. T. B. 80; *in re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72.)

Knowledge on the part of the creditor of the commission of an act of bankruptcy by the debtor constitutes a reasonable cause to believe him to be insolvent, and the creditor must be held to the just and reasonable inferences from such act. (*Warren v. Tenth Nat'l Bank*, 7 B. R. 481; s. c. 5 B. R. 479; s. c. 42 How. Pr. 169; s. c. 5 Ben. 395; s. c. 10 Blatch. 493.)

Money received upon notes of third parties accepted by a creditor as conditional payment of his debt is, in contemplation of law, received at the time of the delivery of the notes, without regard to the time when the money was actually paid. In other words, the actual receipt of the contents of the note relates back to the conditional payment, and converts it into an absolute one. The question of preference in the receipt and collection of the note would have to be determined by the facts as they existed when the conditional payment was made. If the creditor was justifiable in receiving the notes when he did, in payment of his debt, then he became the owner of them, and his right to collect and receive the money on them at any subsequent time can not be affected by the fact that the debtor has since become insolvent, or that he has since learned, or has good reason to believe, that the debtor was insolvent at the time of the transfer. (*In re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47.)

When there is sufficient evidence to raise a legal presumption that a transfer was made, with a legal or actual intent to give, or to obtain a preference, in fraud of the policy and provisions of the bankrupt law, the transfer can only be sustained upon very clear and satisfactory proofs to repel such presumption. (*Warren v. Del. L. & West. R. Co.* 7 B. R. 451; s. c. 10 Blatch. 493.)

The mere fact that the preferred creditor may have paid a valuable consideration, or advanced money on the deed, will not validate it, if he had reasonable cause to believe the debtor insolvent at the time of its execution. (*North v. House*, 6 B. R. 365.)

### Knowledge.

There is a difference between "knowing" and "having reasonable cause to believe." (*Singer v. Sloan*, 11 B. R. 433; s. c. 12 B. R. 408; s. c. 3 Dillon, 110; *contra*, *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Biss. 167; *Brooke v. McCracken*, 10 B. R. 461; s. c. 8 Pac. L. R. 102; s. c. 7 C. L. N. 10; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.)

The amendment to this section does not apply to transactions that occurred prior to December 1st, 1873. (*Oxford Iron Co. v. Slafiter*, 14 B. R. 350; s. c. 13 Blatch. 455; *Tinker v. Van Dyke*, 14 B. R. 112; s. c. 8 C. L. N. 335; *Barne-*



*wall v. Jones*, 14 B. R. 278; *in re John F. Lee*, 14 B. R. 89; *Slafter v. Sugar Refining Co.* 13 B. R. 320; *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Biss. 167; *Brooke v. McGracken*, 10 B. R. 461; s. c. 7 C. L. N. 10; s. c. 8 Pac. L. R. 102; *Warren v. Garber*, 15 B. R. 409; *contra*, *Booth v. Neely*, 12 B. R. 398; *Singer v. Sloan*, 11 B. R. 433; s. c. 12 B. R. 208; s. c. 3 Dillon, 110.)

The creditor's knowledge of the fraud may be established by circumstantial evidence. (*Gattman v. Honea*, 12 B. R. 493; s. c. 7 C. L. N. 395; s. c. 10 Pac. L. R. 4; *Loudon v. First Nat'l Bank*, 15 B. R. 476.)

The circumstances attending a transaction may be such that the creditor will not be justified in relying on the debtor's false statement as to his condition. (*Bucknam v. Goss*, 13 B. R. 337.)

The burden of proving knowledge rests on the assignee. (*Crump v. Chapman*, 15 B. R. 571.)

### Definition of Fraud upon the Act.

The act was designed to secure an equal distribution of the property among the creditors, and any transfer made with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a transfer in fraud of the act. (*Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 1 Dillon, 203; s. c. 13 Wall. 40; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Shawhan v. Wherritt*, 7 How. 627; *in re Rufus Hoyt*, 1 N. Y. Leg. Obs. 132; *Locke v. Winning*, 3 Mass. 325; *Wakeman v. Hoyt*, 5 Law Rep. 309; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Kingsbury*, *et al.* 3 B. R. 318.)

It is immaterial whether the parties have the provisions of the bankrupt act in contemplation or not. (*Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137.)

Ignorance of the provisions of the statute constitutes no excuse. (*Lewis v. Sloan*, 68 N. C. 557.)

An act which directly and manifestly tends to defeat the purpose and policy of the bankrupt act, and which is done in contravention of and with the intent to defeat such purpose and policy, is fraudulent and void. A fraudulent contrivance, with a view to defeat the bankrupt law, is void. When a person has shown his inability to meet his engagements, one creditor can not, by collusion with him, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally and therefore equitably. (*Beattie v. Gardiner*, 4 B. R. 323; s. c. 2 Ben. 479; *in re Gregg*, 4 B. R. 456; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.)

### Recovery where there is a Surety.

Although the term "indorser" is not specifically used in this section, it is the clear intention of the law to make any payment or preference to an indorser or other surety, fraudulent and void, where the other elements in the transaction exist to give it that character. The payment of an indorsed note before maturity, by an insolvent debtor, is a preference to the indorser, and the money may be recovered from him. It is true that the legal liability as indorser can not be legally enforced until the maturity of the note, and demand of the maker, and notice of non-payment; yet, in the statutory sense of the term, there is a liability of the indorser from the date of the indorsement. When the indorser is solvent, the payment does not give a preference to the holder. The holder is not benefited, as he would have been paid at once by the indorser when the note became due. (*Ahl et al. v. Thorner*, 3 B. R. 118; s. c. 2 Bond, 287; s. c. 1 L. T. B. 129.)

When the surety or indorser is innocent of all participation in any scheme by the principal debtor to contravene the law, and the debt is paid at or before maturity without any action on his part, he is not liable. (*Bean v. Laflin*, 5 B. R. 333.)

A mortgage given to secure money loaned to the debtor for the purpose of taking up certain notes upon which the mortgagee was liable as indorser can not be sustained as a mortgage given for a present consideration. If it could be, all an indorser or surety need do to obtain valid security for his liability would be to lend his principal the amount with which to pay the debt, and receive back a mortgage as security for the loan. Such a proceeding, within the purview of the bankrupt act, is nothing more than an exchange or substitution of securities—a mere attempt and contrivance to relieve or protect an indorser or surety; and, whatever means may be adopted to accomplish this purpose, it will prove invalid under the bankrupt law when it is designed and used to obtain a preference for the party who is under a liability for the bankrupt. Under such circumstances, the security would, in all respects, have been equally valid if it had been so drawn as, in terms, to indemnify the indorsers or sureties on the notes for which they were liable. (*Scammon v. Cole*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103; *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480.)

Property which has been mortgaged to a creditor who is fully secured by an indorsement, may be recovered from the creditor, and the mortgage may be declared void. (*Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520.)

The payment of an overdue note to the holder may be avoided as a preference, although the indorser was solvent. The statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety, or indorser, from the right to receive payment from an insolvent debtor. It is forbidden. It is made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such payment. (*Bartholow v. Bean*, 10 B. R. 241; s. c. 18 Wall. 635.)

If an accommodation indorser merely induces the bankrupt to give a check on the bank which holds the note in order to pay it, he is not liable to the assignee. (*Blair v. Allen*, 3 Dillon, 101.)

If a *feme covert* indorses a note for the accommodation of the bankrupt, without expressly making the debt a charge upon her separate estate, she is not liable for money paid as a preference to the holder. (*Flanders v. Abbey*, 6 Biss. 16.)

If the money received by the holder of a note signed by the bankrupt, and a surety from the bankrupt is recovered by the assignee as a preference, the holder may recover the full amount from the surety. (*Watson v. Poague*, 15 B. R. 473; s. c. 42 Iowa, 582.)

### Transfer merely Voidable.

Until the debtor becomes amenable to the bankrupt court by the commencement of proceedings in bankruptcy, the question whether a conveyance is in violation of the provisions of the bankrupt law can not be raised. (*Atkins v. Spear*, 49 Mass. 490.)

A judgment or attaching creditor is entitled to take under his levy or attachment all that then rightfully belongs to his debtor, and no more, inasmuch as he stands merely in the place of the debtor. If the property is then covered by a conveyance which is valid under the State laws, but void only under the bankrupt law, the title of the assignee, as soon as he is appointed, goes back by relation to the time when the conveyance was executed, so that his title will overreach that derived from any levy or attachment subsequent to that time. (*Everett v. Stone*, 3 Story, 446.)

When the property upon which a mortgage was given by the debtor has been sold by the assignee, the preferred creditor can not foreclose the mortgage, even though he was not made a party to the proceedings for a sale, for he can not show a right superior to that of the purchaser. (*Whipps v. Ellis*, 7 Bush, 268.)

A party who has received a transfer of goods from the debtor may maintain an action against the sheriff for a levy thereon, although the transfer is void under the bankrupt law. (*Eathaway v. Brown*, 18 Minn. 414.)

The maker of a promissory note can not set up as a defense that the payee assigned it to the holder in fraud of the bankrupt law, with the intent to prefer his creditor. (*Frenzel v. Miller*, 37 Ind. 1.)

A mortgage given for a consideration passed at the time of its execution, and also to secure a pre-existing debt, being void in parts as to the pre-existing debt, is void as to the whole. (*Tuttle v. Truax*, 1 B. R. 601.)

If the mortgagee gave a full present consideration at the time of the execution of the mortgage, but consented to include therein a claim due to another, the mortgage will be valid as to his claim. (*In re Stowe*, 6 B. R. 429.)

If the mortgage is made in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to prefer another creditor, it is entirely void. (*Bucknam v. Goss*, 13 B. R. 337.)

If a creditor advances the money to pay off a prior execution, and then takes a judgment for the advance and his own debt, his execution will be good to the extent of the advance. (*Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.)

If the assignee elects to avoid a transfer, he takes the property subject to any prior liens held by the creditor and not abandoned in accepting the transfer. (*Avery v. Hackley*, 11 B. R. 241; s. c. 20 Wall. 407.)

A bailee who receives the possession of property from a preferred creditor can not, in an action of replevin by the bailor, set up a title subsequently acquired by him from the debtor's assignee. (*Nudd v. Montanze*, 38 Wis. 511.)

If a preference given upon the surrender of a valid security is set aside, the surrender may in equity be deemed to be annulled, and the security revived. (*Burnhisel v. Firman*, 11 B. R. 505; s. c. 22 Wall. 170.)

If a purchase by a mortgagee of the mortgaged property is set aside as a preference, he has the right to assert his lien by virtue of his mortgage so far as that is valid. His purchase does not impair his rights under the mortgage, but on the failure of the title which he supposed that he got by the purchase, he will be restored to his rights as mortgagee as they existed before he attempted to purchase. He will lose his title under the purchase, and nothing more. (*In re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383.)

### **Bona fide Purchaser.**

A *bona fide* purchaser for value at a sale under an execution, without notice of the invalidity of the judgment, has a good title as against the assignee. Where the judgment is apparently a valid lien under the State law, constructive notice of the pendency of proceedings in bankruptcy will not affect his title. (*Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.)

A person who purchases from a preferred creditor will not be protected unless he is a *bona fide* purchaser without notice and for value. He is not a *bona fide* purchaser without notice, if he knows facts sufficient to put a man of ordinary care and prudence upon inquiry. He must, however, not only have no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities. Executing notes for the whole amount which are overdue and still remain in the

hands of the payee, is not sufficient. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.)

Where the security for a note is void under the bankrupt law, an indorsee for value obtains no better right than the payee if the security is not of a negotiable character. The security passes with the note only as an incident, and is subject to the same defense in the hands of the indorsee as it would have been in the hands of the payee. (*In re Kansas City Manuf. Co.* 9 B. R. 76.)

A purchaser who takes only the "right, title and interest" of the grantee, without any covenants as to title, takes the property subject to all the infirmities of the original title, and can claim as against the assignee no more than the grantee himself could. (*Morse v. Godfrey*, 3 Story, 364.)

A party who pays no new consideration upon the faith of the transfer, but merely takes it as an auxiliary security for an antecedent debt or liability, is not a purchaser for a valuable consideration. (*Morse v. Godfrey*, 3 Story, 364.)

The pendency of the proceedings in bankruptcy is constructive notice thereof to all purchasers from the grantee, and they are affected thereby. (*Morse v. Godfrey*, 3 Story, 364.)

### What may be Recovered.

The language of the statute, authorizing the assignee "to recover the property, or the value of it, from the person so receiving it, or so to be benefited," does not create a qualification or limitation of power. The words are those of caution merely, and give the assignee no power that he would not possess if they had been omitted from the statute. (*Fox v. Gardner*, 12 B. R. 137; s. c. 21 Wall. 475.)

Although the act declares that the assignee may recover the property or its value, yet it is to be construed as giving a right to recover the latter only as a substitute for the former, in cases where the property has been destroyed, or has passed beyond the control of the creditor, or been constructively converted to his own use by a refusal to deliver the same upon the demand of the assignee. (*Schuman v. Fleckstein*, 15 B. R. 224; s. c. 9 C. L. N. 174)

When property is levied upon and sold under execution, before the proceedings in bankruptcy begin, the State court has a rightful jurisdiction at the time to seize and sell the same, and the assignee can not follow the property, but must resort to the State court to lay in his claim as the rightful owner of the fund against the preferred creditors. (Rohrer's Appeal, 62 Penn. 498.)

The amount which the assignee is entitled to recover from a creditor who has received a preference by means of a judgment is the gross amount obtained on execution, without any deduction for the costs and expenses of the creditor. The sum appropriated as costs and fees for attorney must be considered as having been paid by the creditor, after it was received under the judgment. (*Street v. Dawson*, 4 B. R. 207; *Bill v. Beckwith*, 2 B. R. 241; *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Sedgwick v. Milward*, 5 B. R. 347.)

The measure of the damages is the value of the property and not the amount realized by a sale under an execution. (*Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. [N. S.] 135.)

If the creditor, upon being released from the effect of an injunction, chooses to sell the property under an execution, he does so at his own risk, and may be held liable for the value, if that exceeds the proceeds of the sale. (*Anderson v. Strasburger*, 6 Ben. 372.)

If the evidence does not show what the value of the property was, the assignee, where the property has been sold by the sheriff, can only recover the amount indorsed upon the execution. (*Christman v. Haynes*, 8 B. R. 528; *Anderson v. Strasburger*, 6 Ben. 372.)

When the proceedings are in the nature of equity proceedings, the court may in its discretion, make a decree for the net, instead of the gross, amount received. (*Wilson v. Brinkman et al.* 2 B. R. 468; s. c. 1 C. L. N. 133; *Brock v. Terrell*, 2 B. R. 643.)

The court can not allow, by way of reduction, the amount paid to other unpreferred creditors out of the proceeds of property conveyed in fraud of the bankrupt act, nor so much thereof as they would have been entitled to receive on an equal distribution of the estate. The direction of the law is, that the assignee may recover the property or its value. The debtor can not be allowed to make the distribution of his estate. (*White v. Raftery*, 3 B. R. 221; s. c. 1 C. L. N. 361; s. c. 16 Pitts. L. J. 110; *Bill v. Beckwith*, 2 B. R. 241; *North v. House*, 6 B. R. 365.)

Money paid by a check drawn on the creditor himself, and money held by an attachment laid by the creditor in his own hands, may be recovered. If the creditor had stood on his right of set-off, it might possibly have been available; but when he treats it as the bankrupt's property, and endeavors to secure an illegal preference, by getting the bankrupt to make a payment in the one case and seizing it by attachment in the other, both appropriations will be void. (*Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

The creditor is also liable for the interest from the time of the receipt of the money. (*Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.)

The creditor is only liable to the assignee for what came into his hands from or through the bankrupt, and was not returned to him or his representative, the assignee. He may employ the debtor at a reasonable compensation to take charge of the property transferred, and deduct the amount actually paid from the sum that comes into his hands. In case of a void assignment, he may also deduct compensation for his own services. (*Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.)

The assignee holds the title to the property conveyed by way of preference, and the bankrupt law entitles him to recover it, or the value of it. If a conveyance has been made, or incumbrance imposed on the property by the person claiming it as purchaser under the bankrupt, the law permits the assignee to sue for and recover the value. It thus enables the assignee to ratify and confirm the sale, prevents litigation, and at the same time fully secures the rights of creditors. He may release or quitclaim to the purchaser his interest as assignee, so as effectually to cure any defect there might be in the title by reason of the proceedings in bankruptcy and the assignment to him. (*Winslow v. Clark*, 2 Lans. 377; s. c. 47 N. Y. 261.)

If a transfer is set aside on technical or other grounds entirely consistent with good faith in the transferee, and he appears to have acted under an honest mistake, it may be proper to allow him the amount of the liens which he has paid in order to obtain the benefit of the transfer, but no such allowance will be made where he obtains the property by means which are a clear fraud upon the bankrupt act, and under circumstances which make it a fraud upon other creditors, and afford a presumption of an unlawful intent on his part. (*Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480.)

When the circumstances of the case and a doubt of the *bona fides* of the transaction make it reasonable that the assignee should file the bill, it may be dismissed without costs to either party. (*Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.)

Where a commission merchant continues to deal with the debtor after he has reasonable cause to believe him to be insolvent, he may be compelled to account for the excess of the consignments over the advances subsequent to that time. (*Harrison v. McLaren*, 10 B. R. 244.)

Where usury has been exacted of the bankrupt, the excess above the legal rate of interest may be recovered, although the debt has been merged in a judgment in a State court. (*Shaffer v. Fritchery*, 4 B. R. 548; *Tiffany v. Boatmen's Saving Institution*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

When the transfer includes articles exempt from levy and sale on execution, the assignee can not recover them or their value. They do not pass to the assignee, nor can their proceeds be distributed as assets, nor can any creditor have any claim to or interest in them. (*Grow v. Ballard et al.* 2 B. R. 254; s. c. 1 L. T. B. 111; *Brock v. Terrell*, 2 B. R. 643.)

The assignee is entitled to recover the full amount, although the creditor previous to the payment had drawn a check for a part thereof, which had not been presented or accepted or paid, for the simple drawing of a check does not transfer the fund. (*Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.)

SEC. 5129.—If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and\* knowing that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this Title,† or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

Statute Revised—March 2, 1867, ch. 176, § 35, 14 Stat. 536. Prior Statute—Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

This and the preceding sections differ mainly in their application to two different classes of recipients of the bankrupt's property or means. The preceding section is limited to a creditor or person having a claim against the bankrupt, or who is under any liability for him, and who receives the money or property by way of preference; and this section applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him. That the preceding section is confined to persons of that character named can not well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That this section has reference to another class of persons, and is governed by other rules, seems to be strongly sustained by these considerations: 1st. The sale, or other transfer of property mentioned in it, need not be in preference of a creditor or person liable for the bankrupt to render it void. 2d. It need not be made to a person of that character. 3d. In the preceding section the transfer may still be valid, although within all other conditions of the clause, if made more than four months before the filing of a petition in bankruptcy, while the transfer described in this section requires that it shall have been made more than

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\* So amended by act of 22 June, 1874, ch. 390, § 11, 18 Stat. 180.

† So amended by act of 18 February, 1875, ch. 80, 18 Stat. 320.

six months before the filing of the petition to have the same effect. Congress seems to have thought that in case of a creditor who had parted with his money or property to the insolvent party, and whose reasons for further dealing with him were more pressing, in order that he might be saved from an impending loss, the time which should secure the transaction from the effect of the bankrupt act should be less by two months than in the case of one who has no such incentive to action, because he is a voluntary purchaser of an insolvent's property, with knowledge of his insolvency. (*Bean v. Brookmyer et al.* 4 B. R. 196; s. c. 1 Dillon, 24.)

The preceding section was intended to refer to the past, and this section to the present. The language employed in the preceding section imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that this section must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. It is only by this construction that the two sections can be made to harmonize, and full and distinct effect be given to each. A mortgage for a present consideration is within this section. (*Gibson v. Warden*, 14 Wall. 244.)

This and the preceding sections must be construed together, and a scope of operation given to each of them if possible. Some effect must be given to the four month's limitation. This section, with its six month's limitation, is to be held to cover every case, as well that of a preference to a creditor, as all other cases, the preceding section is useless, and might as well have been omitted. But the partial clause precedes the general clause. The preceding section provides for the case of a transaction done with a view to give a preference to a creditor or person having a claim against the debtor, or who is under any liability for him. In such case, if the transaction takes place within four months before the filing of the petition in bankruptcy, and the other circumstances specified exist, the transaction is made void. This section must be held to be intended to provide for any disposition of property that is not provided for by the preceding section—that is, for any disposition that does not give such a preference as the preceding section provides for. But whenever a case falls within the preceding section, it must, although it may be also in terms within this section, be tested as to its validity, and as to the limitation of time prescribed exclusively by the provisions of the preceding section. (*Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch. 284; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75; *Babbitt v. Walbrun & Co.* 4 B. R. 121; s. c. 6 B. R. 359; s. c. 1 Dillon, 19.)

This limitation does not, *per se*, determine what property shall vest in the assignee. There are transfers that may be impeached, even though they were made more than six months before the filing of the petition. (*Smith v. Ely*, 10 B. R. 553.)

A sale made by a debtor will be fraudulent if the following facts concur :

- 1st. If the debtor is insolvent, or contemplates insolvency or bankruptcy.
- 2d. If the purchaser, when he buys the goods, has reasonable cause to believe the debtor to be insolvent, or to be acting in contemplation of insolvency.
- 3d. And knows that the sale was made by the debtor with a view to prevent, etc., or to defeat, etc., or to evade, etc., the provisions of the bankrupt act.

Sales so made are void, and in fraud of creditors and their rights under the bankrupt law. And, as against the immediate vendee, and all actual participants, such sales, if made out of the usual and ordinary course of business—as when an insolvent merchant sells out all his stock and property—are *prima facie* evidence of fraud; that is, of the foregoing elements constituting a fraudulent sale. But it is only *prima facie*, and the presumption may be rebutted by evidence *aliunde* to be produced by the vendee. An instruction to the jury which omits some of the essential elements of frauds, or declares a sale out of

the ordinary course of the debtor's business necessarily, instead of presumptively, fraudulent, is erroneous. (*Babbitt v. Walburn & Co.* 4 B. R. 121; s. c. 6 B. R. 359; s. c. 1 Dillon, 19; *Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.)

The presumption of fraud arising from the usual nature of the sale can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means pursued in good faith must be used for this purpose. Merely inquiring the object of the debtor in selling is not sufficient. (*Walburn v. Babbitt*, 6 B. R. 359; s. c. 9 B. R. 1; s. c. 16 Wall. 577.)

The degree of inquiry which devolves as a duty upon a person who proposes to make a purchase out of the usual course of business of the seller depends upon the circumstances of the particular transaction. Such a person must in all cases make a reasonable inquiry as to the right of the seller to make the proposed sale. (*Schulenberg v. Kabureck*, 2 Dillon, 132.)

Where the circumstances are very suspicious, the purchaser may be held to make diligent inquiry. (*Schulenberg v. Kabureck*, 2 Dillon, 132.)

The mere fact of sales at low prices does not make them sales out of the usual and ordinary course of business of the vendor, and so *prima facie* evidence of fraud. The business of a purchaser is to buy as cheaply as he can. Many men relieve themselves from temporary embarrassments when money is dear, by sacrificing property at low prices to meet their obligations. Such acts are often praiseworthy and successful, and much to be preferred for their own interests and those of their creditors to the incurring of new obligations at exorbitant rates of interest. (*Sedgwick v. Lynch*, 8 B. R. 289; s. c. 5 Ben. 489.)

A debtor whose failure is ultimately caused by his inability to collect debts due to him, can not be said to have been insolvent or in contemplation of insolvency merely because he was selling his goods at a sacrifice, if he at the time had reasonable cause to believe that he would be able to avoid a failure. (*Sedgwick v. Lynch*, 8 B. R. 289; s. c. 5 Ben. 489.)

The fact that the debtor put his paper on the street through brokers, is not conclusive evidence that he is insolvent, for a man may sell his paper on the street at a great sacrifice to effect a purpose deemed beneficial by him, and still not be insolvent. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.)

The presumption is that street brokers act for others and not themselves. Where a note is offered for discount by a street broker, with the indorsement of a party who is known to have no occasion to go on the street to get paper discounted, the purchaser, in the absence of other evidence, will be presumed to know that it is accommodation paper. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

The admission in a deed of trust of the inability of the grantor to meet his debts, is sufficient notice of the fact to the grantee. (*Stobaugh v. Mills*, 8 B. R. 361; s. c. 5 C. L. N. 526.)

A person advancing his own money to a trader or other person in business, and taking security from him out of the ordinary course of business, is liable to reconvey the security, although the only fraud intended by the debtor is the payment of a creditor by way of preference. As the assignee can recover from the creditor, who is the party benefited, the court, upon application of the mortgagee, may, on proper terms, direct the assignee to bring an action against the creditor. (*In re Butler*, 4 B. R. 303; s. c. Lowell, 506.)

If security is taken for a loan made for the purpose of extinguishing liens upon the debtor's property, and the money is actually so applied, it is valid. (*Gaffney v. Signaigo*, 1 Dillon, 158.)

If the debtor's father-in-law, when the debtor is known by him to be insolvent, purchases his property, and applies the purchase money to pay off a mort-



ge upon the property of the debtor's wife, the transaction is a transfer of the debtor's property to his wife in fraud of his creditors, through the agency of his mother-in-law, for the benefit of his wife and the mortgagee. (*Andrews v. Graves*, B. R. 279; s. c. 1 Dillon, 108.)

The bankrupt law, conceived and enacted in the belief that it provided the best mode of administering the estate of an insolvent, will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor permit such an attempt to be justified by the excuse that they thought such other plan wiser or better. (*Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Atch. 480.)

An assignment is not absolutely void. It is merely voidable, and can not be impeached unless proceedings in bankruptcy are commenced within six months after its execution. (*Maltbie v. Hotchkiss*, 5 B. R. 485; s. c. 38 Conn. 80; *in re Fledge*, 1 B. R. 644; *Beck v. Parker*, 65 Penn. 262; *Hobson v. Markson*, 1 Dillon, 421; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209; *in re Pierce & Albrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; *in re J. S. Cohn*, 6 B. R. 379; *dgwick v. Place*, 1 B. R. 673; s. c. 3 B. R. 139; s. c. 3 Ben. 360; s. c. 1 L. B. 97; *in re Hawkins et al.* 2 B. R. 378; s. c. 34 Conn. 548; *in re Broome*, 3 B. R. 348; s. c. 3 Ben. 488; *Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 3; *Thrasher v. Bentley*, 2 N. Y. Supr. 309; s. c. 59 N. Y. 649; s. c. 1 Abb. C. 39; *McLean v. Meline*, 3 McLean, 199; *McLean v. Johnson*, 3 McLean, 2; *Cornwell's Appeal*, 7 W. & S. 305; *in re Charles W. Holmes*, 1 N. Y. Leg. ss. 211; *Weiner v. Farnum*, 2 Penn. 146; s. c. 3 Penn. L. J. 440; *in re Anon*, Penn. L. J. 323; *Sparhawk v. Drexel*, 12 B. R. 450; *McLean v. Ihmsen*, 1 est. L. J. 189.)

An assignment made for the benefit of all creditors equally in good faith, and without any actual fraud or intent to defeat the operation of the statute, is valid. (*Haas v. O'Brien*, 52 How. Pr. 27.)

An assignment for the benefit of creditors made more than six months before the commencement of the proceedings in bankruptcy is valid as against the assignee. (*Mayer v. Hellman*, 13 B. R. 440; s. c. 91 U. S. 496.)

An assignment by one partner of his individual estate for the equal benefit of his individual creditors first, and the excess, if any, to be paid to his partnership creditors, may be set aside under this section. (*Barnewall v. Jones*, 14 B. R. 278.)

An assignment for the benefit of creditors by an insolvent debtor, is conclusive evidence of an intent to defeat the operation of the bankrupt law, and may be set aside at the instance of the assignee. (*Jackson v. McCulloch*, 13 B. R. 3; s. c. 1 Woods, 433.)

The trustee and all persons claiming under an assignment are chargeable with knowledge of the terms thereof, and consequently with knowledge of the solvency of the debtor, and his purpose to evade the operation of the bankrupt law. (*Jackson v. McCulloch*, 13 B. R. 283; s. c. 1 Woods, 433.)

As the intent of an assignment is to be legally inferred from its necessary tendency, the words, "with intent to delay or defeat the operation of this act," include such a conveyance. They are words of like import with "puts his estate into a course of distribution different from that prescribed by the act," which has been the substance of the language of Lords Mansfield, Eldon, and Ensleydale. In the absence of actual fraud, an assignment, though constructively fraudulent under the bankrupt law, is not void, but voidable; and is voidable only at the suit of the assignee in bankruptcy. In the United States, the reasons for considering an assignment an act of bankruptcy are stronger than those which prevailed in England. During more than three-quarters of a century, since the constitution enabled Congress to establish uniform laws on the subject of bankruptcies throughout the United States, there has not been such a law in force, except in two short intervals; and the usages and legislation, as

to voluntary assignments for the benefit of creditors, have, in the mean time, become various in the several States. The abrogation of such local differences at the election of any non-assenting creditor is an essential part of "an act to establish a uniform system of bankruptcy throughout the United States." (*Barnes v. Rettew*, 8 Phila. 133.)

A trustee claiming under an assignment made within two months before the commencement of proceedings in bankruptcy against the debtor, can not maintain an action against a judgment creditor who levied on the property after the execution thereof and the commencement of such proceedings. (*Dolson v. Kerr*, 52 How. Pr. 481.)

If a receiver has possession of property which has been assigned for the benefit of creditors, the State court will not pass an order allowing the assignee to sue him. (*Ex parte John H. Platt*, 41 N. Y. Sup. 513; s. c. 52 How. Pr. 468.)

Acts done under it previously in good faith may be sustained. An injunction under such a bill may be refused when it would prevent the working out of an equity beneficial to the creditors or the completion of a beneficial sale. (*In re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; *Barnes v. Rettew*, 8 Phila. 133.)

If the trustee has filed a bill in chancery to enforce a right claimed under the assignment, the assignee may elect to come in and prosecute the suit in his name. (*Freeman v. Deming*, 3 Sandf. Ch. 327.)

When an assignment is set aside, it is usual and proper for the decree to contain a direction for a reconveyance by the trustee to the assignee in bankruptcy. Although the decree annuls the assignment, and orders a surrender of the estate, yet the conveyance, by a deed of surrender, may effectuate or facilitate the purposes of the decree. (*Burkholder v. Stump*, 4 B. R. 597; s. c. 8 Phila. 172.)

The assignee may apply to the State court for an order upon the trustee to surrender the estate to him. (*Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513.)

If the trustee surrenders the property to the assignee, he should be protected in so doing by the State court. (*Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513.)

A surrender of a part of the property to the debtor prior to the commencement of proceedings in bankruptcy will not relieve an assignee from the legal effect of the deed of trust, and he must account therefor. (*Stobaugh v. Mills*, 8 B. R. 361; s. c. 5 C. L. N. 526.)

Where the assets have been changed by the trustee, the assignee may receive the money or other proceeds in lieu thereof. (*McLean v. Johnson*, 3 McLean, 202.)

Money paid by the trustee to discharge valid liens on the property, in pursuance of the terms of the trust, can not be recovered from the secured creditor. (*Livingston v. Bruce*, 1 Blatch. 318.)

The trustee is entitled to be credited with the payments to lawful creditors made by him in accordance with the terms of the assignment, before the institution of a suit by the assignee, and is not liable to the assignee therefor. (*Jones v. Kinney*, 4 B. R. 649; s. c. 5 Ben. 259; *Cragin v. Thompson* 12 B. R. 81; s. c. 2 Dillon, 513.)

The trustee is liable for the balance that remains in his hands undistributed. (*Jones v. Kinney*, 4 B. R. 649; s. c. 5 Ben. 259; *Everett v. Stone*, 3 Story, 446.)

A creditor who has received a payment under an assignment is liable to the assignee therefor. (*Jones v. Kinney*, 4 B. R. 649; s. c. 5 Ben. 259; *Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513.)

The expenses of converting the property into money may be allowed to a trustee under an assignment. (*In re J. S. Cohn*, 6 B. R. 379; *Stobaugh v. Mills*, 8 B. R. 361; s. c. 5 C. L. N. 526; *Macdonald v. Moore*, 15 B. R. 26; s. c. 1 Abb. N. C. 53; *contra, in re Stubbs*, 4 B. R. 376.)

Every person receiving an assignment, ought to know that it is liable to be set aside, if a bankruptcy follows, and the allowance to him of his charges and expenses ought to be refused where it can not be so guarded as to prevent any injurious duplication of charges. In some of the judicial districts the allowance is refused wholly. No allowance can be made for the expense of a future settlement of the trustee's account in the court of a State under its laws relating to assignments. (*Burkholder v. Stump*, 4 B. R. 597; s. c. 8 Phila. 172.)

The trustee can not be allowed for any disbursements or expenses which he made or incurred by virtue of the assignment, or to maintain his title or possession thereunder. (*Clark v. Marx*, 6 Ben. 275.)

An assignment for the benefit of creditors, which gives priority to certain creditors, is not void except as against the assignee in bankruptcy. (*Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82. Penn. 159.)

As assignments is valid as against a judgment creditor who lays an attachment in the hands of the trustee. (*Cook v. Rogers*, 13 B. R. 97; s. c. 31 Mich. 391; s. c. 14 A. L. Reg. 633.)

A creditor can not levy upon the property transferred by an assignment, although it is void under the bankrupt law, for it is void only as to persons claiming in virtue of proceedings under the statute. (*Dodge v. Sheldon*, 6 Hill, 9.)

An assignment is void only as against the assignee. The trustee who has received the property in trust, to apply it to the payment of creditors, can not allege that the assignment was void under the bankrupt law, without showing that the property has been recovered from him by the assignee. (*Seaman v. Stoughton*, 3 Barb. Ch. 344.)

If an action by the assignee against the trustee to vacate the assignment is pending, and there is no collusion, the trustee can not be compelled to account by a creditor until a definite result is reached. (*In re Bowery Nat'l Bank*, 1 Abb. N. C. 404.)

If the debtor, after making an assignment, takes the benefit of a State insolvent law, which merely protects the person from imprisonment, and does not affect contracts, the property will pass to the insolvent trustee, and can not be recovered by an assignee appointed in bankruptcy proceedings subsequently commenced. (*Sullivan v. Hieskill*, Crabbe, 525; s. c. 4 Penn. L. J. 171.)

A levy under an execution issued upon a judgment obtained in the regular course of judicial proceedings is valid, although it is made after an assignment which is void under the bankrupt law. (*McLean v. Meline*, 3 McLean, 199.)

The money paid by a trustee to an attorney can not be allowed. (*In re J. S. Cohn*, 6 B. R. 379.)

Where a judgment is obtained after the execution of an assignment, but before the commencement of proceedings in bankruptcy, the creditor should be permitted to sell the real estate, and try his right in an action of ejectment. (*Reeser v. Johnson*, 10 B. R. 467; s. c. 76 Penn. 313.)

When a transfer is made void as to the assignee, his title relates back to the time of the transfer, and no judgment or execution obtained or levied after the transfer and before the commencement of the proceedings in bankruptcy is a lien on the property. (*In re Solomon Biesenthal*, 15 B. R. 228; *contra, Macdonald v. Moore*, 15 B. R. 26; s. c. 1 Abb. N. C. 53)

A mortgage made to a person who indorses a note for the debtor is valid if

the debtor never becomes bankrupt, although it was made to the indorser to evade the provisions of the bankrupt law. (*Boyd v. Parker*, 43 Md. 182.)

A married woman can not claim a homestead out of the property of her husband, at the same time that he seeks relief and a discharge from his debts in a court of bankruptcy. He, being fully cognizant of the action his wife is taking, and offering no objection thereto, thereby showing consent on his part, is in the same condition as if he had made a transfer of the property to his wife, and she, being fully cognizant of his application for the benefit of the bankrupt act, and accepting such transfer by the action she took, is in the same condition as if she had accepted a deed of the property from him; and such a transfer is void. (*In re Askew*, 3 B. R. 575; *in re Boothroyd & Gibbs*, 14 B. R. 223.)

There is nothing in the bankrupt law which interdicts the loaning of money to an insolvent, if the purpose is honest, and the object not fraudulent; and it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure, the power to raise ready money, may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but it is commendable, for every one is interested that his business should be preserved. In the nature of things he can not borrow money without giving security for its payments, and this security is usually in the shape of collaterals. Neither the terms or policy of the bankrupt act are violated, if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376; *Bentley v. Wells*, 61 Ill. 59; *in re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561.)

Clearly all sales are not forbidden. It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction of the bankrupt which occurred within six months of bankruptcy, without any regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and can not be imputed to Congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, and not to those with an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the bankrupt act. If it were so, no one would know with whom he could safely deal, and a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulties. It is for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *in re Pusey*, 7 B. R. 45; *Gillennwaters v. Miller*, 49 Miss. 150.)

If it shall turn out on examination that the transfer was made by the bankrupt in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.)

A fair exchange of value may be made at any time, even if one of the parties to the transaction is insolvent. There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing is conducted without any purpose to defraud or delay his creditors, or give a preference to any one, and does not impair the value of his estate. His creditors can only

complain if he wastes his estate, or gives a preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously. (*Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.)

If a party who owes money to an insolvent debtor pays him in good faith, without having reasonable cause to believe that the latter intends to make fraudulent preferences or payments therewith, the assignee can not recover the sum so paid. (*Borland v. Philips*, 2 Dillon, 383.)

A party who accepts a draft with the intent thereby to enable the drawer to give a preference to the holder, can not be compelled to pay the same. (*Fox v. Gardner*, 12 B. R. 137; s. c. 21 Wall. 475.)

If a party who owes money to the bankrupt, pays it to one of the bankrupt's creditors, with the intent thereby to enable him to obtain a preference, he will be deemed to still hold the money, and is liable to the assignee therefor. (*Fox v. Gardner*, 12 B. R. 137; s. c. 21 Wall. 475.)

There is no arbitrary rule by which the good faith of a transaction can be tested. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.)

The existence on the part of the vendee of a reasonable cause to believe each of the two elementary facts, to wit, the insolvency of the debtor, and the debtor's intention to contravene the bankrupt act, must be satisfactorily proved to render a deed void. (*Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410; *Judson v. Kelty*, 6 B. R. 165; s. c. 5 Ben. 348; s. c. 2 L. T. B. 218; *Bentley v. Wells*, 61 Ill. 59.)

If a corporation, whose charter prohibits it from taking interest beyond a certain per cent. makes a loan, upon interest above the rate thus prescribed, to a party who is subsequently declared to be bankrupt, and takes securities therefor, the assignee can only recover the excess, and the securities will be valid for the principal debt, with legal interest. The line which separates that which is authorized from that which is prohibited, is plainly drawn, and the division easily made. The power of the corporation to make loans is expressly conferred, and therefore exists; the limitation is only as to the rate. Up to the limitation, all is good; beyond that, bad. The parties are not in *pari delicto*, and as to the excess above the principal and lawful interest, the corporation is under a liability to the assignee. (*Tiffany v. Boatman's Sav. Inst.* 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.)

Every case must be decided on its own facts, and it will never be possible to lay down any general formula applicable to all cases. The intent to prefer a creditor necessarily involves the idea of an expectation of paying some others less than their whole debt, and this expectation is not always proved by the proof even of a known insolvency. There must be a fear or anticipation of stopping payment, which, indeed, may often be inferred from insolvency or from acts which have a tendency to produce it, but which is to be decided as a fact in each case. A sweeping rule should not be adopted, prohibiting insolvent persons from borrowing money on a mortgage, even of their stock in trade, or requiring mortgagees to see to the application of the money they lend. (*Ex parte Packard*, Lowell, 523.)

A sale by an insolvent person, though known to be insolvent, is not therefore necessarily void, otherwise an insolvent person could not lawfully dispose of any of his property. (*Babbitt v. Walbrun & Co.* 6 B. R. 359)

A mortgage made by a debtor to secure the compensation for services to be rendered by an attorney in the preparation of his petition and schedules in bankruptcy is void. A bankrupt can no more execute a conveyance in order to secure a fee to his lawyer than to secure the claims of any other creditor. The claim of a lawyer for professional services, no matter how meritorious or neces-

sary such services may have been, is not a preferred one. (*In re Thos. C. Evans*, 3 B. R. 261; *in re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 180; *contra, in re Sidle*, 2 B. R. 220; *in re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *Triplett v. Hanly*, 1 Dillon, 217.)

If an insolvent debtor pays a fee to an attorney for the purpose of hindering, delaying, or impeding the provisions of the act, and the attorney knows that the debtor is insolvent, and that such is his purpose, the fee may be recovered by the assignee. (*Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.)

A declaration which avers that the debtor did on a certain day transfer, assign and convey certain property to the defendant, covers any transfer, assignment, or conveyance during the six months prior to the filing of the petition. (*Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.)

When the record of the proceedings in bankruptcy is produced and recognized as in evidence, and no objection is made that they are not formally read or offered in evidence, they are evidence. (*Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.)

The record of the proceedings in bankruptcy is admissible to show the fact of adjudication, and the appointment of the assignee. (*Babbitt v. Walbrun & Co.* 6 B. R. 359.)

The record of a suit for an injunction, to which the person making the payment was a party, is competent evidence to establish *mala fides* in a payment made after the service of an order for an injunction. (*Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.)

Although a register has no authority to take a deposition to be used in a controversy at law between the assignee and a purchaser, yet he has full authority to administer oaths, and when, by the assent of parties, he takes a deposition to be used as evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the party causing the same to be taken can not object. The officer ought to cause the same to be transmitted to the court for the benefit of all concerned, and the party at whose instance it was taken can not except thereto nor cause it to be suppressed on the ground of any irregularity or informality. (*Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.)

When the records are before the court, the judge may state to the jury the date of the filing of the petition in bankruptcy. (*Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.)

When it is proposed to affect a second vendee, such vendee must be shown to have participated in the original fraudulent sale, or it must be shown that he knew, or at least had reasonable cause to know, the facts which make the first sale fraudulent. The mere fact, without more, that the second vendee knew that the first sale embraced all the stock of the insolvent vendor, is not enough to make his purchase fraudulent in law. The title of the second vendee can only be impeached when it is shown that he participated in the fraudulent sale, or, if this is not shown, then by showing that his purchase was actually *mala fides*; that is, made with knowledge that the sale to the first vendee was fraudulent; and the mere fact that the second vendee knew that the sale to the first vendee was made out of the ordinary course of business, will not alone defeat the title of the second vendee. It is only a circumstance proper as evidence to go to the jury on the question of the *bona fides* of the purchase by the second vendee. The distinction is to be observed between fraud and the evidence which goes to establish fraud. (*Babbitt v. Walbrun & Co.* 4 B. R. 121; s. c. 1 Dillon, 19; *Rahilly v. Wilson*, 3 Dillon, 420; s. c. 5 C. L. N. 217)

If a mortgage is sustained, an accounting for the transactions connected with it can not take place in a suit brought to set it aside, but must take place in some other suit based upon its validity. (*Sedgwick v. Wormser*, 7 B. R. 186.)

Where the purchase is joint, the judgment should be joint, and not a separate judgment against each proportioned to the sum which they separately paid for the property. (*Schulenberg v. Kabureck*, 2 Dillon, 132)

SEC. 5130.—The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections is not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud.

Statute Revised—March 2, 1867, ch. 176, § 35, 14 Stat. 536.

The words, "sale, assignment, transfer, or conveyance," employed in this clause, are of comprehensive import, and embrace almost every disposition of the property, whether absolute or conditional. Both the antecedent paragraphs refer to and are designed to protect the property of the insolvent, and the clause as to fraud is designed to the same end. All these provisions relate to the same subject-matter, viz., the property, and all three aim to protect property of insolvents from fraudulent disposals. (*Scammon v. Cole*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103; *Driggs v. Moore, Foot & Co.* 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Babbitt v. Walbrun & Co.* 4 B. R. 121; s. c. 1 Dillon, 19.)

If a sale is made, not out of the usual course of general trade, but out of the usual course of trade of the debtor; that is, if it is unusual in the time, or place, or character, or quantity of the goods sold, or in other respects, having reference to the then business of the vendor; such facts, as against the vendee, shall be *prima facie* evidence of fraud in him. In other words, in the absence of counter testimony, it will be presumed that he, at the time of purchase, knew that the vendor was insolvent, and that the vendor was making the sale to prevent all or some portion of his property as the case may be, from passing to his assignee, and so evading and defeating the provisions of the law. But upon an issue of title between the assignee and vendee, it is first incumbent upon the former to show the unusual character of the sale before the presumption of fraud will arise against the vendee. Cases may occur involving all the elements of fraud, so far as the vendor is concerned, and yet be made valid by the palpable presence of good faith in the vendee. (*In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.)

The question is not whether such transactions are usual, in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. And if it is a departure from his usual and ordinary course of business, the statute intends that the party taking the conveyance from him shall be put upon inquiry. (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186)

To bring this clause into operation, it is necessary to show that the transfer was made out of the usual and ordinary course of business of the debtor. It is not enough to show that the general business of the debtor was to sell goods, and that a sale of land is not a sale of goods. Without reference to the general business of the debtor, the transfer must be out of his usual and ordinary course of business in respect to an article of the description of that transferred. (*Judson v. Kelty*, 6 B. R. 165; s. c. 5 Ben. 348; s. c. 2 L. T. B. 218; *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.)

A sale of a store for the purpose of curtailing business can not be regarded as a thing out of the usual course of business, so as to be *prima facie* evidence of fraud. (*Sedgwick v. Wormser*, 7 B. R. 186.)

A sale in bulk or by wholesale is not in the usual course of the business of a retail merchant, and throws upon the vendee the burden of proof to show its fairness and validity. (*Smith v. McLean*, 10 B. R. 260.)

SEC. 5130A (22 June, 1874, ch. 390, § 10, 18 Stat. 180.)—That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section *five thousand one hundred and twenty-eight* [thirty-five] of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section *five thousand one hundred and twenty-nine* [thirty-five] is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.

SEC. 5131.—Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security, from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

Statute Revised—March 2, 1867, ch. 176, § 35, 14 Stat. 536.

A note of which a part of the consideration is an agreement to dismiss proceedings in bankruptcy against the maker, is neither founded upon an illegal consideration, nor void as against the policy of the bankrupt act. (*Repplier v. Bloodgood*, 1 Sweeny, 34.)

A promise by the bankrupt to pay a note in consideration that the holder would withdraw his opposition to the maker's discharge as a bankrupt, is illegal and void. Even without the statute it would be void. [Such a promise is a fraud upon the other creditors, and is contrary to public policy. (*Austin v. Markham*, 10 B. R. 548; s. c. 44 Geo. 161; *Rice v. Maxwell*, 21 Miss. 289; *vide Bell v. Leggett*, 2 Sandf. 450.)

A note made by the wife of the bankrupt after his discharge, and passed to a creditor in pursuance of an agreement that he should be paid for assenting to the discharge, is void. (*Blasdel v. Fowler*, 120 Mass. 447.)

The payments which the law makes void are those which reduces the means of the debtor to pay his debts ratably. A change in the form of his own obligation from an account to a note, could not have the effect; neither could the accommodation indorsement with which a friend might favor him. These circumstances work no wrong to the other creditors. A note so indorsed is valid and may be enforced. (*O'Conner v. Parker*, 4 B. R. 713; s. c. 23 Mich. 22; *Noble v. Scofield*, 44 Vt. 281; *Dalrymple v. Hillenbrand*, 62 N. Y. 5; s. c. 5 N. Y. Supr. 57; *Boyd v. Parker*, 43 Md. 182.)

If a party signs a note as surety, and takes property from the principal to indemnify him for his liability, the fact that the property is subsequently taken from him by the assignee of the principal, on the ground that the transfer was void under the bankrupt law, does not constitute a valid defense to the note. (*Noble v. Scofield*, 44 Vt. 281.)



If a note is given upon the consideration or with the intent specified in this section, it is void even in the hands of a *bona fide* holder, for no exception is made in favor of innocent holders of negotiable securities made in violation of the law. (*Dalrymple v. Hillenbrand*, 62 N. Y. 5; s. c. 5 N. Y. Supr. 57.)

A note given by a third person, without the knowledge or intervention of the bankrupt, to induce a creditor to withdraw his objections to the bankrupt's discharge, is founded on an illegal consideration, and is void. (*Bell v. Leggett*, 7 N. Y. 176.)

A note given in consideration of a promise by the payee to dismiss proceedings in bankruptcy instituted by him, and to procure the assent of other creditors to a composition for a less sum than he receives, can not be enforced against the indorser if the promise is not performed. (*Claflin v. Torlina*, 11 B. R. 521; s. c. 55 Mo. 569.)

An agreement between creditors who have received preferences to contribute proportionately such sum as may be necessary to induce other creditors to forbear to put the debtor into bankruptcy, is valid. (*Perryman v. Allen*, 15 B. R. 113; s. c. 50 Ala. 573.)

An agreement by a debtor to consent to an adjudication of bankruptcy, and to procure the consent of his copartners to an adjudication against the firm, is not in fraud of the bankrupt law, and the debtor may recover the consideration therefor. (*Sanford v. Huxford*, 32 Mich. 313.)

SEC. 5132.—Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals (a) any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes, or causes to be removed, any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, transfer, or conveyance, (b) of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, willfully and fraudulently conceals from his assignee, or omits (c) from his inventory, any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense (*d*) of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, (*e*) otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

Statute Revised—March 2, 1867, ch. 176, § 44, 14 Stat. 539. Prior Statute—April 4, 1800, ch. 19, § 23, 2 Stat. 28.

(*a*) A person is not criminally liable for the payment of fair current expenses for the support of his family between the commencement of proceedings in bankruptcy against him and the final adjudication. (*In re Brooks*, 5 Pac. L. R. 191.)

If the bankrupt has been examined before the register in regard to the property which is charged to have been concealed, no demand before the indictment is necessary. (*U. S. v. Smith*, 13 B. R. 61.)

(*b*) The gist of the offense created by this clause is a conveyance with intent to keep property from an assignee in bankruptcy, and the offense can not be committed unless proceedings in bankruptcy have been commenced in a court of competent jurisdiction, in which an assignee can be appointed. An indictment for a misdemeanor must state an offense, and must convey to the accused the information necessary to enable him to make his defense. A mere averment of the commencement of proceedings in bankruptcy, pursuant to the act, without in any way describing the proceedings, except by the names of the creditors, and the words "pursuant to the act," is insufficient, for it does not state a time nor a place, nor a tribunal before which the alleged proceedings in bankruptcy were taken, subsequent to which and with reference to which the accused made the alleged conveyance of property, nor allege any adjudication or proceedings in bankruptcy before a court of competent jurisdiction, nor set forth any facts from which it can be seen that any court had jurisdiction of the proceedings alleged to. (*U. S. v. Latorre*, 8 Blatch. 134.)

(*c*) This clause is not qualified by the original limitation of time. It is a new division of the subject, and one which requires no such limitation, because the prohibited act can not be committed before bankruptcy. The offense is complete if a bankrupt fraudulently omits from his schedule any property or effects with the designated intent. It is complete without a final examination. In practice, there is no last examination in bankruptcy, nor any examination at all, unless specially ordered. When the indictment does not on its face show that the defendant was a citizen of the United States, it need not aver that he took the oath of allegiance. If the defendant was a citizen, and neglected to take the oath, he must show it in defense. (*U. S. v. Clarke*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.)

The proceeding may be by information and not indictment. (*U. S. v. Block*, 9 C. L. N. 234.)

(d) Neither as to the proceedings nor jurisdiction of the court in bankruptcy is it sufficient in an indictment, under the act, to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the district court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged case of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the petitioning creditor had a right, under the law, to commence and prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction. It must appear that the bankrupt obtained goods within three months of the bankruptcy by means of a representation, which he knew to be false, that he was carrying on business and dealing in the ordinary course of trade, and such representation must actually be made by him. The description of the goods obtained by the defendant should state a certain number of packages, instead of a large quantity. This can be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration in trover. The word feloniously should be omitted. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used. (*U. S. v. Prescott et al.* 4 B. R. 112; s. c. 2 Abb. C. C. 169; s. c. 2 Biss. 325; s. c. 2 L. T. B. 184.)

To constitute the offense the accused must—

1. Obtain goods and chattels from some person or persons on credit, under the false pretense of carrying on business and dealing in the ordinary course of trade.
2. Such credit must be obtained within three months before the commencement of proceedings in bankruptcy.
3. Such goods and chattels must be obtained on credit as aforesaid with intent to defraud.

The obvious purpose of the statute is to prevent persons from obtaining goods on credit, with the expectation on the part of those who give the credit that they will be disposed of in the ordinary course of business, when in fact, the purchaser intends to dispose of such goods in some extraordinary or unusual manner, or knows that he is insolvent, and that the goods will go into the hands of his assignee in bankruptcy, and be disposed of for the benefit of his creditors generally, and not in the usual course of trade. It was to prevent men from abusing their credit, and imposing by means of it upon others, that the act was passed to compel, so far as law will do it, the observance of good faith in commercial transactions between business men. A man's intentions can only be ascertained from his acts. Criminal intentions are not, as a rule, divulged, but are to be inferred from the conduct of the parties. From the circumstances surrounding the whole transaction, the jury are to infer what was the probable purpose and intent of the defendant at the time he obtained the goods. The short time that elapsed between the purchase and the unusual transfer of the goods, the false and conflicting statements made by him in regard to his financial condition, and the subterfuges and acts resorted to by him to keep his creditors quiet, are circumstances to be considered as tending to show a fraudulent intent. The criminal intent is not to be presumed without evidence. The law presumes every one innocent until proven guilty, and the defendant is entitled to the benefit of every reasonable doubt. The doubt must be a reasonable doubt—a doubt engendered by the insufficiency of the evidence for the prosecution to establish a belief of guilt. In other words, it must be unreasonable to believe him guilty under all the proofs in the case. (*U. S. v. Frank*, 3 B. R. quarto, 175; s. c. 2 Biss. 268; *U. S. v. Geary*, 4 B. R. 534; *U. S. v. Thomas*, 7 B. R. 188; *U. S. v. Penn*, 13 B. R. 464.)

The statute is not against obtaining goods under all false colors and pretenses, but against the single one—that of carrying on business and dealing in the ordinary course of trade. (*U. S. v. Penn*, 13 B. R. 464.)

The pretense may be by conduct as well as by words. (*U. S. v. Penn*, 13 B. R. 464.)

This section does not reach an offense which consists in a conspiracy to obtain goods under false pretenses. The adjudication of bankruptcy against one of the parties engaged in such a conspiracy does not divest the State courts of jurisdiction to try the other conspirators. (*Comm. v. Walker*, 4 B. R. 672; s. c. 108 Mass. 309.)

(e) The scope of the act is to punish frauds on the creditors generally and not on the particular creditor who sold the goods, and an indictment which charges a fraud on one creditor only can not be sustained. If the goods were obtained upon credit with the intent of disposing of them to raise money, the fraud on the seller would be the most obvious one; but the object of the statute seems to be to punish fraud on the creditors generally, and it does not refer the intent to the time of the disposing of the goods out of the usual course of the trade, and at that time the fraud would not be of one creditor more than of the rest. (*U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223; *U. S. v. Penn*, 13 B. R. 464.)

When there is a several finding on each count, the verdict can not be set aside if either of the counts is good. (*U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.)

The making of a fraudulent chattel mortgage renders a party liable under this provision. (*U. S. v. Bayer*, 13 B. R. 88.)

It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months before the commencement of the proceedings in bankruptcy. (*U. S. v. Smith*, 13 B. R. 61.)

The intent to defraud may be established by facts and circumstances. (*U. S. v. Penn*, 13 B. R. 464.)

The intent to defraud may be inferred from all the circumstances of the case. (*U. S. v. Smith*, 13 B. R. 61; *U. S. v. Bayer*, 13 B. R. 88.)

It must be shown that the intent existed in the mind of the defendant at the time the sale was made. (*U. S. v. Penn*, 13 B. R. 464.)

Every man is presumed to intend the usual and ordinary consequences of an act. (*U. S. v. Smith*, 13 B. R. 61.)

When the Government introduces evidence tending to prove that the defendant left the State with the intention of remaining absent therefrom, the defendant may prove that while on the journey he stated his intention to return. (*U. S. v. Penn*, 13 B. R. 464.)

The defendant may put in evidence his former good character in relation to the particular crime with which he stands charged. (*U. S. v. Penn*, 13 B. R. 464.)

An examination of a witness taken before a commissioner upon an issue contained in one of the counts is admissible if he has since died. (*U. S. v. Penn*, 13 B. R. 464.)

*Quere.* Can Congress legislate for frauds committed by a debtor on a single creditor within the same State, unless the act relates to bankruptcy or to some other matter within the Federal jurisdiction? (*U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.)

Among the powers of Congress enumerated in the Constitution are the powers "to establish uniform laws on the subject of bankruptcies throughout the United States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." If this clause is a law "necessary and proper" for carrying

the bankrupt law into effect, it comes within the latter power named, and is constitutional. The subject of bankruptcy, in a general sense, concerns the relation of debtor and creditor, and, in a particular and no doubt stricter sense, concerns such relation in cases where the debtor is unable or unwilling to pay his debts. Laws upon that subject have for their object the appropriation, either voluntarily or by compulsion, of the debtor's property to the payment of his debts *pro tanto* or in full, as the case may be, and the relief of honest debtors. To accomplish this object, these laws are made to operate upon, affect, and control the relations of the parties so as to limit and circumscribe the rights of the debtor in, and his control over, his property, and the rights of others dealing with him in regard thereto, in many particulars, before any proceedings in bankruptcy shall have been commenced by or against such debtor. The meaning of the words "necessary and proper" has been judicially determined by the supreme court to be "needful," "requisite," "essential," "conducive to." The end sought by a bankrupt law is the appropriation of the debtor's property to the payment of his debts. This clause is for the prevention of frauds by debtors on their creditors, by which that end may be defeated or impaired, and is clearly conducive and plainly adapted to the end sought. The proceedings in bankruptcy merely constitute the machinery by which the appropriation of the debtor's property to the payment of his debts is attained. The prevention of the fraud denounced by the clause being conducive to that end, it makes no difference whether it relates to a fraud committed before or after the machinery provided for the accomplishment of the end is set in motion. A debtor may or may not be a bankrupt. From the fact that both words "debtor" and "bankrupt," are used, and in the disjunctive, it must be held that the former is used in the clause as descriptive of a person who is a debtor, but who has not at the time of committing the offense, become a bankrupt. The "subject of bankruptcies," however, as used in the Constitution, concerns the relation of debtor and creditor. The provision in regard to the time is merely a limitation. The act which the clause purports to punish is an offense the moment it is committed. (*U. S. v. Pusey*, 6 B. R. 284; s. c. 6 L. T. B. 184.)

The duty of a commissioner is narrowed to the single inquiry, not whether there is sufficient legal evidence to convict and imprison the accused, but whether there is a *prima facie* case. If probable cause is shown to justify the belief that the accused has committed the crime charged, he should be committed for trial. (*U. S. v. Thomas*, 7 B. R. 188.)

If the bankrupt and other persons conspire to commit the acts made criminal by this section and either does any act in pursuance of such conspiracy to effect its object, they are liable to indictment under section 5440. (*U. S. v. Bayer*, 13 B. R. 400.)

# NOTES TO RULES.

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## RULE I.

THE entry required by this rule should be made on every paper filed with the clerk, whether filed with him in the first instance, or with the register first and then with him. Such entry is a certificate for which he is entitled to charge fifteen cents. (*In re* John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.)

## RULE IV.

The proceedings which are required to be had before a register are proceedings which are to take place after an adjudication in involuntary bankruptcy, or after the filing of a voluntary petition whereon an adjudication can be immediately had. (*In re* Holmes & Lissberger, 12 B. R. 86; s. c. 49 How. Pr. 142.)

When the petitioner fails to appear on the day appointed in the order of reference, he may appear at any subsequent day, but should file a written affidavit explaining the delay. (*In re* Hatcher, 1 B. R. 390.)

## RULE V.

Registers may take cognizance of uncontested petitions filed by an attorney against the assignee to compel the payment of his fees and disbursements. (*In re* Henry H. Stafford, 13 B. R. 378.)

## RULE VII.

The register's certificate of correctness is not conclusive. (*In re* W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321.)

## RULE XII.

All the effect that can be given to this rule, so far as it relates to the marshal's fees, is that he must accompany his return with vouchers whenever practicable. (*In re* Donahue, 8 B. R. 453; *contra, in re* Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15.)

Whenever vouchers are omitted, the marshal must state in his return the reason for such omission, or produce other testimony for that purpose, in order that the court may judge of the practicability of his obtaining vouchers. (*In re* Eugene Comstock, 9 B. R. 88.)

The court may exercise a discretion in the matter, and act upon the account without insisting upon the production of the vouchers, where it is made to appear that they were omitted by oversight, and it is impracticable to obtain them. (*In re* Eugene Comstock, 9 B. R. 88.)

## RULE XIII.

This rule, as far as it relates to the seizure of property by the marshal, applies only to involuntary cases. (*In re* Hasbrouck, 1 B. R. 75; s. c. 1 Ben. 402.)

This rule provides a particular course of procedure in all cases of controverted possession, both when the property has already come to the hands of the marshal as when it is in the hands of the adverse claimant, and the assignee or petitioning creditor seeks its possession. The amendment was undoubtedly made on account of the too general terms of the original rule to meet vexed questions of possession, *pendente lite*. (*In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *in re Briggs*, 3 B. R. 638; s. c. 2 C. L. N. 218.)

#### RULE XIV.

This rule prohibits the use of dots to indicate anything necessary to be stated. (*In re Orne*, 1 B. R. 79; s. c. 1 Ben. 420.)

An illegible petition can not be filed. (Anon. 1 B. R. 215; *in re Robert Malcolm*, 4 Law Rep. 488.)

Illegible schedules should be amended. (*In re Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.)

#### RULE XVI.

If no express rule were prescribed no doubt would exist as to the proper practice where the jurisdiction of two different courts, to adjudge the debtor bankrupt and administer his estate, should be invoked. The familiar practice of courts of equity acting under the same general jurisdiction would require them, when their jurisdiction should be invoked for the distribution of the same fund by different complainants, to admit the court first obtaining jurisdiction of the fund by the institution of a suit, to proceed therewith to its full and complete disposal. The district courts are Federal tribunals acting under Federal laws, constituting a single system operating alike in both jurisdictions, and necessarily governed by the same rules, and proceeding to the same identical result. There is but one bankrupt law. The authority and jurisdiction of the courts are derived from one source, and the reasons for confining the administration of the estate to a single tribunal are of great force. If the character of the case is anomalous, not precisely answering the description of the Rule or the act, the Rule, from its obvious fitness and propriety, should be the guide, to avoid complication, embarrassment and expense, if not inevitable conflict. It may not follow that the court in which the latest petition is filed must or ought to dismiss the proceeding lawfully and regularly instituted, but it should, at least, on proper application, stay the proceedings until some adjudication touching the bankruptcy be had in the tribunal in which the petition was first filed, or, if the debtor has already been adjudged bankrupt there, abstain from an apparent interference with the title of the assignee to the estate. (*In re Boston R. R. Co.* 6 B. R. 209, 222; s. c. 9 Blatch. 101, 409.)

#### RULE XIX.

Where there is litigation concerning the property to be exempted, the twenty days is to be computed from the termination of the suit. (*In re Shields*, 1 B. R. 344.)

The auxiliary "may" in this rule is not to be taken in an imperative sense. The supreme court intended to leave a discretion to the district and circuit courts, to permit them to repair accidents, correct mistakes, and prevent frauds. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.)

Where the exceptions go to the title of the exempted property, they need not be filed within the required time. (*In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279; *in re Jackson & Pearce*, 2 B. R. 508.)

Where the exceptions relate to articles included in the terms "household and kitchen furniture or other articles," they must be filed within the prescribed time. (*In re Gainey*, 2 B. R. 525.)

## RULE XXIV.

This rule is enabling, not prohibitory. A creditor who does not file his specifications within the prescribed time will lose the opportunity of doing so. But he has the right to file them at any stage of the proceedings. (*In re Baum*, 1 B. R. 5; s. c. 1 Ben. 274; *in re McVey*, 2 B. R. 257.)

Where a creditor regularly enters his appearance, but fails through inadvertence to file his specifications within the prescribed time, the court, on cause shown, will allow him to file them *nunc pro tunc*. (*In re Grefe*, 2 B. R. 329.)

## RULE XXVII.

This rule only applies to the court in which the proceedings in bankruptcy are pending. (*In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.)

## RULE XXVIII.

When an assignee fails to make a report to the court, of funds received by him, it must be assumed that no funds have been received by him, and that no deposits have been made by him. In order to warrant proceedings against an assignee for not complying with Rule XXVIII, it must be shown at least by *prima facie* evidence that he has received funds or made deposits in respect to which he ought to have made a report under Rule XXVIII. (*In re Goodwin*, 3 B. R. 417.)

## RULE XXX.

The fees must be taxed according to the rule, although the services were rendered before its adoption. (*In re Ludwig Carstens*, 15 R. R. 250.)

The following fees may be charged by the register in composition cases:

For office and incidental expenses.....	\$5 00
For general meeting of creditors.....	3 00
For service under order of court, per day.....	5 00
For filing papers not before filed with clerk, each.....	10
For examination of bankrupt, each folio.....	20
For affidavits, each.....	25
For ordering adjourned meeting.....	1 00
For holding adjourned meeting.....	3 00
For each folio in the report.....	10

(*In re Benjamin F. Spillman*, 13 B. R. 214.)

An allowance for the attention of the marshal in taking care of property can only be made when the marshal himself in person actually and necessarily gives his personal attention in taking care of the bankrupt's property, and does not cover personal attention by a deputy. (*In re Johnston & Hall*, 12 B. R. 345; *In re F. L. Hellmer*, 13 Pac. L. R. 35.)

For the custody of property the marshal is entitled to be allowed what is necessarily and actually disbursed and paid by him to a keeper or keepers, but the entire amount can not exceed two dollars and fifty cents a day. (*In re Johnston & Hall*, 12 B. R. 345.)

A party who is in the employ of the marshal, and in receipt of his usual salary, can not be allowed compensation for services rendered in making out the bankrupt's schedules. (*In re Barnes Brother & Herron*, 1 W. N. 21.)

If the keeper is employed during any part of the time in taking an inventory, and is entitled to be paid therefor, that ought to diminish his allowance as keeper. (*In re Johnston & Hall*, 12 B. R. 345.)



At the rate of \$2 50 per day the marshal can only be allowed for the services of one keeper. (*In re Johnston & Hall*, 12 B. R. 345.)

When the marshal claims compensation for personal attention in the custody of property, he must show by his oath that such services were actually rendered and the necessity for them. (*In re F. L. Hellmer*, 13 Pac. L. R. 35.)

The marshal is not entitled to a compensation of one dollar per hour for the services of persons employed to assist him in making an inventory. (*In re F. L. Hellmer*, 13 Pac. L. R. 35; *contra*, *in re Johnston & Hall*, 12 B. R. 345.)

When the marshal claims compensation for services in making an inventory, the charge must be supported by his oath as to the fact of the service and the necessity for it. (*In re F. L. Hellmer*, 13 Pac. L. R. 35.)

No allowance can be made for the time spent by the marshal in verifying the inventory with the assignee. (*In re Johnston & Hall*, 12 B. R. 345.)

The marshal may charge for a copy of the inventory furnished to the assignee at the rate of ten cents a folio. (*In re Johnston & Hall*, 12 B. R. 345.)

The copy of the involuntary petition and the order to show cause constitute but one process, and the marshal is not entitled to a distinct fee for the service of each. (*In re F. L. Hellmer*, 13 Pac. L. R. 35; *contra*, *in re Burnell Bros.* 14 B. R. 498; s. c. 3 Cent. L. J. 450; s. c. 9 C. L. N. 84.)

The marshal is not entitled to mileage on two writs served at the same time unless he had more than two writs to serve. (*In re F. L. Hellmer*, 13 Pac. L. R. 35.)

The marshal may be allowed a commission on money collected by him under the warrant. (*In re Frederick Pfaff*, 7 Ben. 61.)

The marshal is entitled to two per centum on the disbursements made by him. (*In re Johnston & Hall*, 12 B. R. 345; *in re Burnell Bros.* 14 B. R. 498; s. c. 3 Cent. L. J. 450; s. c. 9 C. L. N. 84.)

The marshal is not entitled to an allowance by way of commission on the value of property for its custody. (*In re Johnston & Hall*, 12 B. R. 345; *in re Burnell Bros.* 14 B. R. 498; s. c. 3 Cent. L. J. 450; s. c. 9 C. L. N. 84.)

Where the case is settled, the marshal is entitled to a commission of one per centum on the first five hundred dollars, and one-half of one per centum on the excess over five hundred dollars, for the custody of property and money. (*In re Johnston & Hall*, 12 B. R. 345.)

If the fees enumerated do not provide a compensation for services rendered by the assignee, the court may allow a reasonable compensation. (*In re Colwell*, 15 B. R. 92.)

When the marshal has concluded his services, he may have his bill taxed, if there is an assignee, without waiting for the presentation of the final account. (*In re Philip Rein*, 13 B. R. 551.)

Notice of the taxation may be given to the assignee, and it is not necessary to give notice to the creditors. (*In re Philip Rein*, 13 B. R. 551.)

The assignee should examine the bill, and if he is satisfied that it is lawfully taxable at a certain amount, he may consent to its being taxed at that amount. (*In re Philip Rein*, 13 B. R. 551.)

The consent of the assignee is a sufficient warrant for the clerk to tax a bill for the amount so consented to. (*In re Philip Rein*, 13 B. R. 551.)

When the taxation is made, it is conclusive on the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of his bill so taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee. (*In re Philip Rein*, 13 B. R. 551.)

## RULE XXXII.

The petitioner need only use such of the forms as are appropriate to and descriptive of the debts and property he is required to list. He should state, however, the reason why the other forms are omitted. (*Anon. B. R. Sup. 27.*)

The petitioner is not restricted to the letters printed on the schedules. He may exhaust the alphabet, and use other marks, if he can thereby set forth his property more lucidly. (*In re Sallee, 2 B. R. 228.*)

## RULE XXXIV.

If the creditor fails to appear and submit to examination, the register may expunge or diminish the claim by default. The citation throws upon the creditor the burden of supporting his claim by further proof than that already filed. If the creditor is unable to attend in pursuance of the notice, he should take steps to procure a postponement until he can attend, or the taking of the examination elsewhere before another register or commissioner if need be. (*In re Ira A. & Chas. W. Lount, 11 B. R. 315; s. c. 7 C. L. N. 155.*)

When an assignee files a petition for the re-examination of a proof, the creditor need only offer himself for cross-examination, and the assignee, if he wishes to contest the proof, must offer such opposing evidence as he may have. (*In re Wm. L. Robinson, 14 B. R. 130.*)

The exhibits annexed to the answer can not be used as evidence, unless they are proved in the usual manner. (*Canby v. McLearn, 13 B. R. 22.*)

The answer to a motion to expunge a proof, can not be used as evidence. (*Canby v. McLearn, 13 B. R. 22.*)

Where a motion is made to expunge a proof, the burden of proof rests on the party making the motion, and he is entitled to the opening and reply. (*Canby v. McLearn, 13 B. R. 22.*)

Upon a motion to expunge a proof, the testimony of the bankrupt is not competent unless he is produced as a witness. (*Canby v. McLearn, 13 B. R. 22.*)

The bankrupt court may expunge or dismiss a claim on account of matters occurring after the proof was made. (*In re J. C. Loring, 1 Holmes, 483.*)

A party who has obtained an order for forming an issue can not have it revoked if the other party did not object to the order but does object to the revocation. (*In re James S. Aspinwall, 7 Ben. 154.*)

The register has no authority to require the parties to form an issue, if either of them objects, until it appears to the register that the claim ought to be expunged or diminished, and until objection is then made to his making an order to that effect. (*In re James S. Aspinwall, 7 Ben. 154.*)

The justices of the supreme court did not intend to make this mode of proving or acknowledging letters of attorney exclusive. (*In re Butterfield & Burr, 14 B. R. 195.*)

A power of attorney which is not acknowledged before a register in bankruptcy, or a commissioner of a circuit court, is not sufficient to authorize the agent to act. (*In re Wm. C. Christley, 10 B. R. 268; s. c. 6 Biss. 155.*)

## RULE XXXVI.

This Rule is entirely prospective in its operation, and purports to refer only to proceedings for composition initiated after its adoption. (*In re Holmes & Liss-berger, 12 B. R. 86; s. c. 49 How. Pr. 142.*)



## NOTES TO FORMS.

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### FORM No. 4.

THIS form is not a special order. The authority conferred by it, "to take such other proceedings as are required by the act," means such other proceedings as the act requires the register to take. (*In re Bellamy*, 1 B. R. 113; s. c. 1 Ben. 474.)

### FORM No. 6.

The marshal has no discretion, but must serve all notices by mail, unless otherwise specially directed. It is competent for the register to strike out the words "or personally." (*Anon.* 1 B. R. 216.)

### FORM No. 15.

The register has no power to approve or confirm the choice of an assignee elected by the creditors. (*In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.)

### FORM No. 18.

The word "is" in the form before the word "possessed" is probably a misprint. The form is evidently copied almost verbatim from the form of assignment used under the Massachusetts insolvent law. (*In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.)

### FORM No. 26.

There are no general words in the power. Throughout the whole instrument there are only three things authorized to be done by the attorney: 1st. To attend meetings or sittings; 2d. To vote at the same; and, 3d. To accept for the signer of the letter of attorney, the appointment of assignee. No other power is granted; no other act is specified to do which authority is given, and there are no general words whatever, which will include any other act. (*Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166.)

### FORM No. 34.

The note to this form contemplates that a petition for the sale of property subject to a mortgage may be presented to the court by the assignee, but the assignee may sell the property subject to the mortgage without such an order. (*In re McClellan*, 1 B. R. 389.)

### FORM No. 51.

The words "other persons in interest," in the order of this form, authorizes a party having a pecuniary interest, though not a creditor who has proved his

debt, to appear and oppose the discharge. (*In re* Boutelle, 2 B. R. 129; s. c. 15 Pitts. L. J. 616; *in re* Murdock, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97.)

## FORM No. 52.

This notice is to be sent by the clerk when served by mail. (*In re* Bellamy, 1 B. R. 113; s. c. 1 Ben. 474.)

## FORM No. 53.

The recital in this form that the creditor "has proved his debt," shows that no creditors except those who have proved their debts can oppose the discharge. (*In re* Burk, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.)

# ADDENDA.

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## Article 1, Section 8.

If the debtor has not committed an act of bankruptcy, and declines to go into voluntary bankruptcy, a creditor may proceed against him under the State insolvent law, where such proceedings are in harmony with the purpose of the bankrupt law, for the State insolvent law remains in full force in respect to all persons and matters over which the bankrupt law declines to take jurisdiction. (*Geery's Appeal*, 43 Conn. 289.)

The State insolvent laws were not suspended until the 1st day of June, 1867. (*Augsbury v. Crossman*, 17 N. Y. Supr. 387.)

## Section 711.

If the assignee receives property which the marshal has taken from the possession of the sheriff and sells it, the judgment creditor can not maintain an action in a State court for the amount of his judgment, for a State court has no jurisdiction to liquidate a lien. (*Ansonia B. & C. Co. v. Pratt*, 17 N. Y. Supr. 443.)

## Section 4972.

An assignee can not maintain an action in a State court to recover the value of property exceeding five hundred dollars transferred to the defendant in violation of the bankrupt law. (*Olcott v. Maclean*, 16 B. R. 79; s. c. 17 N. Y. Supr. 277.)

If the assignee and another claim a fund, the holder may file a bill of interpleader in a State court, for the proceeding is not an action to collect the assets. (*B. & M. Ins. Co. v. Davenport*, 17 N. Y. Supr. 264.)

## Section 4979.

A judgment creditor has not such title in property taken under an execution as will enable him to maintain an action for conversion against the assignee to whom it has been delivered by the marshal after taking it from the sheriff. (*Ansonia B. & C. Co. v. Pratt*, 17 N. Y. Supr. 443.)

## Section 4986.

If the district court decides that a creditor is entitled to a lien, the assignee may file a petition for review. (*Bartlett v. Russell*, 34 Pitts. L. J. 206; s. c. 9 C. L. N. 377.)

## Section 5024.

A trustee claiming under an assignment for the benefit of creditors, may be enjoined from disposing of the property. (*In re Jacob Skoll*, 24 Pitts. L. J. 207; s. c. 9 C. L. N. 377.)

## Section 5044.

If proceedings in bankruptcy are commenced within four months after the garnishment, the garnishee who pays the money under an execution upon a judgment subsequently rendered is liable to the assignee therefor, although he was ignorant of such proceedings. (*Duffield v. Horton*, 16 B. R. 59; s. c. 17 N. Y. Supr. 140.)

The assignee is entitled to the money although a judgment was entered and an execution issued in the attachment suit after the commencement of the proceedings in bankruptcy, for the statute discharges the property then held by the attachment, and not merely such as may be so held at the time of the execution of the assignment. (*B. & M. Ins. Co. v. Davenport*, 17 N. Y. Supr. 264.)

If the debt of the attaching creditor exceeds the value of the property attached, the dissolution of the attachment will not entitle a judgment creditor to priority who levied an execution on the property after the attachment and before the commencement of the proceedings in bankruptcy. (*In re Roscoe R. Steel*, 16 B. R. 105.)

If an attaching creditor obtains judgment and levies an execution on the property, the lien of the execution relates back to the attachment and they are entitled to a lien as against the assignee although another creditor laid an attachment after his, and before the execution and the last attachment was dissolved by bankruptcy. (*In re Roscoe R. Steele*, 16 B. R. 105.)

## Section 5046.

A creditor who has instituted an action to set aside a fraudulent conveyance, may prosecute it after the commencement of proceedings in bankruptcy. (*Phelps v. Curts*, 16 B. R. 85.)

If an insolvent husband purchases property in the name of his wife, the assignee can not abandon the pursuit of the property, and seek a judgment against her *in personam*. (*Phipps v. Sedgwick*, 16 B. R. 64.)

## Section 5047.

An objection, that the assignee did not obtain permission from the bankrupt court to bring the suit, is of no avail unless it is pleaded. (*Avery v. Ryerson*, 34 Mich. 362.)

If the assignee of a mortgagee who held a second mortgage, dies after the entry of a decree *pro confesso*, for want of an appearance, and before a final decree in a proceeding to foreclose a prior mortgage, the sale will not affect the second mortgage. (*Avery v. Ryerson*, 34 Mich. 362.)

If the assignee is finally discharged after more than two years from the time of his appointment, he is not a necessary party to an action by a creditor, instituted before the commencement of the proceedings in bankruptcy, to set aside a fraudulent conveyance. (*Phelps v. Curts*, 16 B. R. 85.)

## Section 5067.

A trustee may prove his claim for services rendered under an assignment. (*In re George Lains*, 24 Pitts. L. J. 207.)

## Section 5073.

When a plaintiff becomes bankrupt, the defendant may, even in the State courts, plead any set-off which the bankrupt law allows. (*Hunt v. Holmes*, 16 B. R. 101.)

A consignee who has received goods for sale in excess of the advances made thereon, may hold such goods as a set-off against notes of the bankrupt, purchased by him in good faith, without suspicion of the consignor's insolvency. (*Goodrich v. Dobson*, 43 Conn. 576.)

A court of equity will not interfere by injunction to enforce a set-off, where the debt has been bought after insolvency on a speculation as to the probable dividend. (*Hunt v. Holmes*, 16 B. R. 101.)

A creditor who receives his composition under a resolution, thereby waives his right to set off the original debt against a judgment subsequently recovered upon a cause of action which existed prior to the commencement of the proceedings in bankruptcy. (*Holmes v. Hunt*, 16 B. R. 101.)

If a party fails to plead the set-off, he can not obtain relief in equity after judgment is rendered against him. (*Holmes v. Hunt*, 16 B. R. 101.)

If the mortgagor sets up a counter-claim in an action brought by an assignee to foreclose a mortgage, the assignee can not raise the objection that it is barred by the statute of limitations, if it was not so barred at the time of the commencement of the proceedings in bankruptcy. (*Von Sachs v. Kretz*, 17 N. Y. Supr. 95.)

If a partner sells his interest in real estate held by the firm to another, and takes a mortgage thereon to secure the payment of the purchase money, he will be entitled to priority over the creditors of a new firm, composed of his copartner and the purchaser, whose capital consists in part of such real estate, although the debts of the old firm are paid in a large part with moneys due from the new firm. Nor are his rights affected by a subsequent release of the mortgage and the taking of a new one, in order to give priority to another mortgage then made to another by the firm, for the new mortgage is a mere continuation of the first one. (*Beecher v. Stevens*, 43 Conn. 587.)

Under the laws of Colorado a creditor obtains a lien upon the property of the debtor by a delivery of the *fi. fa.* to the sheriff. (*Bartlett v. Russell*, 24 Pitts. L. J. 206; s. c. 9 C. L. N. 377.)

The right of a creditor to a lien is a strict legal right, and must stand or fall by the statute which gives it. In a controversy with the assignee there are no equities in favor of the creditor. (*In re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.)

If a judgment against two persons provides that it may be enforced against the property of one and the joint property of both, the judgment can not become a lien on the property of the other. (*In re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.)

To create a lien the docket of a judgment must be complete in itself, and can not be aided by reference to the judgment or other proceedings in the action. (*In re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.)

A docket entry which consists of mere abstract numbers, without any mark to indicate dollars, is not sufficient to create a lien. (*In re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.)

If the judgment is for gold coin, it must be so docketed. (*In re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.)

If a creditor who holds the guaranty of the firm for the debt of another, obtains judgment and makes the money out of the firm assets, one partner is not entitled to a lien on the individual estate of his copartner by right of subrogation to the creditor. (*In re G. W. Smith*, 16 B. R. 113.)

### Section 5106.

The running of the statute of limitations is suspended during the time that proceedings against the debtor may be stayed. (*Von Sachs v. Kretz*, 17 N. Y. Supr. 95.)



**Section 5107.**

If the debt was created by fraud, the bankrupt will not be released from arrest. (*In re Martin Alsberg*, 16 B. R. 116.)

The right of the debtor to a release from arrest depends on the evidence produced in the district court to prove that the debt is one from which a discharge will not release him, and not upon the reasons which may have been filed in the State court for the arrest. (*In re Martin Alsberg*, 16 B. R. 116.)

**Section 5110.**

If the bankrupt honestly regards a judgment as worthless, he may omit it from his schedule without being chargeable with false swearing and fraud. (*In re Zenas G. Winsor*, 9 C. L. N. 402.)

If the bankrupt, prior to becoming a trader, kept books of account which exhibited the state of his affairs, it is not necessary that he shall carry any part of their contents into the books opened and kept by him while he was a trader. (*In re Zenas G. Winsor*, 9 C. L. N. 402.)

To keep proper books of account is to keep an intelligent record of his business affairs with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business. (*In re Zenas G. Winsor*, 9 C. L. N. 402.)

If the bankrupt kept an intelligent record of his affairs, and evinced reasonable care and an honest purpose to fully enter or keep proper accounts, an omission to make an entry by mistake is no ground for withholding a discharge. (*In re Zenas G. Winsor*, 9 C. L. N. 402.)

An omission to enter a chattel mortgage given to indemnify the mortgagee against future liability is no ground for withholding a discharge. (*In re Zenas G. Winsor*, 9 C. L. N. 402.)

**Section 5112.**

In the absence of consent by creditors, in voluntary cases, no matter when commenced or when the debts were contracted, the assets must be equal to thirty per cent., or no discharge can be granted. (*In re Haviland Gifford*, 16 B. R. 135; s. c. 9 C. L. N. 389.)

**Section 5117.**

If the bankrupt obtained the possession of goods under a contract to pay cash on delivery, and at once shipped them beyond the control of the vendor, and then refused payment, such conduct may warrant the conclusion that the debt was created by fraud. (*Classen v. Schoeneman*, 16 B. R. 98.)

If the false representation as to means did not induce the creditor to sell the goods, then the debt is not created by fraud. (*In re Martin Alsberg*, 16 B. R. 116.)

If the creditor was induced to sell the goods by false representation as to means, then the debt was created by fraud. (*In re Martin Alsberg*, 16 B. R. 116.)

If the bankrupt, at the time of purchasing the goods, did not intend to pay for them in whole or in part, then the debt was created by fraud. (*In re Martin Alsberg*, 16 B. R. 116.)

A discharge releases the bankrupt from liability as surety on a guardian's bond. (*Reite v. People*, 16 B. R. 96.)

**Section 5119.**

A plea of a discharge can not defeat an action to set aside a fraudulent conveyance instituted before the commencement of the proceedings in bankruptcy. (*Phelps v. Curts*, 16 B. R. 85.)

If the bankrupt pleads his discharge in an action to set aside a fraudulent conveyance instituted before the commencement of the proceedings in bankruptcy, no personal judgment can be rendered against him. (*Phelps v. Curts*, 16 B. R. 85.)

A discharge will not preclude a recovery if the bankrupt promised to pay the debt after the granting thereof. (*Classen v. Schoeneman*, 16 B. R. 98.)

**Section 5128.**

In order to render a transfer void, it is not enough to merely show that the grantee knew that the grantor was insolvent. (*Campbell v. Waite*, 16 B. R. 93.)

The day on which the petition was filed must be excluded in making the computation of the time that a preference must stand in order to be valid. (*Dutcher v. Wright*, 16 A. L. J. 100.)

**Section 5129.**

The claim of an attorney for services in drawing up and attending to the business connected with the assignment can only be allowed on proof as any other claim. (*In re George Lains*, 24 Pitts. L. J. 207.)

A trustee is not entitled to priority on a claim for personal services rendered in the execution of the trust. (*In re George Lains*, 24 Pitts. L. J. 207.)

The trustee is entitled to an allowance for disbursements legitimately made in the execution of his trust before the debtor was adjudged bankrupt. (*In re George Lains*, 24 Pitts. L. J. 207.)



GENERAL ORDERS

WITH THE

FORMS IN BANKRUPTCY,

AS PROMULGATED BY

THE SUPREME COURT OF THE UNITED STATES.



# GENERAL ORDERS IN BANKRUPTCY.

OCTOBER TERM, 1874.

It is hereby ordered by the Chief Justice and Associate Justices of the Supreme Court of the United States, in pursuance of the powers conferred upon them by the several acts of Congress in that behalf, that the general orders in bankruptcy heretofore established by the court be, and they are hereby, amended so as to read as follows:

## I.

### DUTIES OF CLERKS OF DISTRICT COURTS.

The clerks of the several district courts shall enter upon each petition in bankruptcy the day, and the hour of the day, upon which the same shall be filed; and shall also make a similar note upon every subsequent paper filed with them, except such papers as have been filed before the register, and so indorsed by him; and the papers in each case shall be kept in a file by themselves. No paper shall be taken from the files for any purpose except by order of the court. Every paper shall have indorsed upon it a brief statement of its character. The clerks shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced; and the number of each case shall be indorsed on every paper. The docket shall be so arranged that a brief memorandum of every proceeding in each case shall be entered therein, in a manner convenient for reference, and shall at all times be open for public inspection. The clerks shall also keep separate minute-books for the record of proceedings in bankruptcy, in which shall be entered a minute of all the proceedings in each case, either of the court or of a register of the court, under their respective dates.

## II.

### PROCESS.

All process, summons, and subpoenas shall issue out of the court under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the registers.

## III.

### APPEARANCE.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Either party may appear and conduct the proceedings by

attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court. The name of the attorney or counselor, with his place of residence and business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed, shall be indorsed as above required; and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these rules, required to be served on the party personally, may be served upon his attorney.

#### IV.

##### COMMENCEMENT OF PROCEEDINGS.

Upon the filing of a petition in case of voluntary bankruptcy, or as soon as any adjudication of bankruptcy is made upon a petition filed in case of involuntary bankruptcy, the petition shall be referred to one of the registers in such manner as the district court shall direct, and the petitioner shall furnish the register with a copy of the papers in the case, and thereafter all the proceedings required by the act shall be had before him, except such as are required by the act to be had in the district court, or by special order of the district judge, unless some other register is directed to act in the case.

The order designating the register to act upon any petition shall name a day upon which the bankrupt shall attend before the register, from which date he shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the register a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.

A copy of the order shall forthwith be sent by mail to the register, or be delivered to him personally, by the clerk or other officer of the court.

#### V.

##### REGISTERS.

The time when and the place where the registers shall act upon the matters arising under the several cases referred to them, shall be fixed by special order of the district court, or by the register acting under the authority of a general order, in each case, made by the district court; and at such times and places the registers may perform the acts which they are empowered to do by the act, and conduct proceedings in relation to the following matters, when uncontested, viz.: making adjudication of bankruptcy on petition of the debtor; administering oaths; receiving the surrender of a bankrupt; granting protection thereon; giving requisite direction for notices, advertisements, and other ministerial proceedings; taking proofs of claims; ordering payment of rates and taxes, and salary or wages of persons in the employment of the assignee; ordering amendments, or inspections, or copies, or extracts of any proceedings; taking accounts of proceeds of securities held by any creditor; taking evidence concerning expenses and charges against the bankrupt's estate; auditing and passing accounts of assignees; proceedings for the declaration and payment of dividends, and generally dispatching all

administrative business of the court in matters of bankruptcy, and making all requisite uncontested orders and directions therein, which are not, by the acts of Congress concerning bankruptcy, specifically required to be made, done, or performed by the district court itself; all of which shall be subject to the control and review of the said court: *Provided, however,* That by the surrender of a bankrupt mentioned and referred to in this order and in the act in that behalf is intended and understood a personal submission of the bankrupt himself for full examination and disclosure in reference to his property and affairs, and not a surrender or delivery of the possession of his property.

## VI.

## DISPATCH OF BUSINESS.

Every register, in performing the duties required of him under the act, and by these orders, or by orders of the district court, shall use all reasonable dispatch, and shall not adjourn the business but for good cause shown. Six hours' session shall constitute a day's sitting if the business requires; and when there is time to complete the proceedings in progress within the day, the party obtaining any adjournment or postponement thereof may be charged, if the court or register think proper, with all the costs incurred in consequence of the delay.

## VII.

## EXAMINATION AND FILING OF PAPERS.

It shall be the duty of the register to examine the bankrupt's petition and schedules filed therewith, and to certify whether the same are correct in form; or, if deficient, in what respect they are so; and the court may allow amendments to be made in the petition and schedules upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt. The register shall indorse upon each paper filed with him the time of filing, and at the close of the last examination of the bankrupt, the register having charge of the case shall file all the papers relating thereto in the office of the clerk of the district court, and these papers, together with those on file in the clerk's office, and the entries in the minute-book, shall constitute the record in each case; and the clerk shall cause the papers in each case to be bound together.

## VIII.

## ORDERS BY THE REGISTER.

Whenever an order is made by a register in any proceeding in which notice is required to be given to either party before the order can be made, the fact that the notice was given, and the substance of the evidence of the manner in which it was given, shall be recited in the preamble to the order, and the fact also stated that no adverse interest was represented at the time and place appointed for the hearing of the matter upon such notice; and whenever an order is made where adverse interests are represented before the register, the fact shall be stated that the



opposing parties consented thereto, or that the adverse interest represented made no opposition to the granting of such order: *Provided, however*, if any party interested adversely to such order shall not, before the hearing of the application therefor, give reasonable notice in writing to the register that he intends to contest the same, and objects to its being heard by the register, the same shall be heard by the register as by consent. But all such orders may be reviewed by the district court at the request of any party aggrieved, upon his paying the cost of certifying the matter to said court within ten days from the making of the order; which request and payment shall be entered by the register on his docket; and he shall thereupon forthwith certify the said matter to the court, and said court, upon making its decision, may make such order with regard to the costs as justice shall require.

## IX.

## NOTIFICATION TO ASSIGNEE OF HIS APPOINTMENT.

It shall be the duty of the register, immediately upon the appointment of an assignee, as prescribed in sections twelve and thirteen\* of the act (should he not be present at such meeting), to notify him, by personal or mail service, of his appointment; and in such notification the assignee so appointed shall be required to give notice forthwith to the register of his acceptance or rejection of the trust.

No official assignee shall be appointed by the court or judge; nor any general assignee to act in any class of cases.

No additional assignee shall be appointed by the court or judge under section thirteen† of the act, except upon petition of one-fourth in number and value of the creditors who have proved their debts, and upon good and sufficient cause shown.

## X.

## TESTIMONY, HOW TAKEN.

The examination of witnesses before a register in bankruptcy may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. The depositions upon such examination shall be taken down in writing by or under the direction of the register in the form of narrative, unless he determines that the examination shall be by question and answer in special instances, and when completed shall be read over to the witness and signed by him in the presence of the register. Any question or questions which may be objected to shall be noted by the register upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the question; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just. In case of refusal of a witness to attend, or to testify before a register, the same proceedings may be had as are now authorized with respect to witnesses to be produced on examination be-

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\* §§ 5033, 5034, R. S.

† § 5034, R. S.

fore an examiner of any of the courts of the United States on written interrogatories.

## XI.

## MINUTES BEFORE REGISTER, FILING, ETC.

A memorandum made of each act performed by a register shall be in suitable form to be entered upon the minute-book of the court, and shall be forwarded to the clerk of the court not later than by mail the next day after the act has been performed. Whenever an issue is raised before the register in any proceedings, either of fact or law, he shall cause the same to be stated in writing in the manner required by the *fourth* and *sixth*\* sections of the act, and certify the same forthwith to the district judge for his decision. The pendency of the issue undecided before a judge shall not necessarily suspend or delay other proceedings before the register or court in the case.

## XII.

## ACCOUNTS FOR SERVICES OF REGISTER AND MARSHAL.

Every register shall keep an accurate account of his traveling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties in any case or number of cases which may be referred to him; and shall make return of the same under oath, with proper vouchers (when vouchers can be procured), on the first Tuesday in each month; and the marshal shall make his return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, publication of notices and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

## XIII.

## MARSHAL AS MESSENGER.—SURRENDER OF PROPERTY.

In cases of voluntary bankruptcy, the bankrupt, after being decreed such, and after the appointment of an assignee or trustee, and assignment duly made, shall, unless the court otherwise direct, deliver possession of all his property and assets (including evidences of debt and books of account) to said assignee or trustee, unless at or after such decree and before said assignment the court, on application of any creditor or creditors, and upon good cause shown by affidavit, shall deem it necessary for the interest of the creditors that possession of such property and assets should be sooner delivered up; in which case, as in cases of involuntary bankruptcy, the court may order said property and assets to be taken possession of by the marshal as messenger, directions for which may be inserted, in pursuance of such order, in the original warrant in bankruptcy, or in a special warrant to be issued for that purpose.

It shall be the duty of the marshal as messenger to take possession

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\* §§ 5009, 5010, R. S.

of the property of the bankrupt when required thereto by warrant or order of the court, and to deliver the same to the assignee or trustee when appointed and assignment made as aforesaid. The marshal, when taking possession as aforesaid, shall make an inventory of the property and assets by him received, and deliver the same, with the said property and assets, to said assignee or trustee, who shall verify the same, and if found correct and full, no further inventory shall be required: *Provided, however,* That if any goods or effects so taken into possession as the property of the bankrupt shall be claimed by or in behalf of any other person, the marshal shall forthwith notify the petitioning creditor, or assignee, if one be appointed, of such claim, and may, within five days after so giving notice of such claim, deliver them to the claimant or his agent, unless the petitioning creditor or party at whose instance possession is taken shall by bond, with sufficient sureties, to be approved by the marshal, indemnify the marshal for the taking and detention of such goods and effects, and the expenses of defending against all claims thereto; and, in case of such indemnity, the marshal shall retain possession of such goods and effects, and proceed in relation thereto as if no such claim had been made: *And provided further,* That in case the petitioning creditor claims that any property not in the possession of the bankrupt belongs to him, and should be taken by the marshal, the marshal shall not be bound to take possession of the same, unless indemnified in like manner. He shall also, in case the bankrupt is absent or can not be found, prepare a schedule of the names and residences of his creditors, and the amount due to each, from the books or other papers of the bankrupt that may be seized by him under his warrant, and from any other sources of information; but all statements upon which his return shall be made shall be in writing, and sworn to by the parties making them, before one of the registers in bankruptcy of the court, or a commissioner of the courts of the United States. In cases of voluntary bankruptcy, the marshal may appoint special deputies to act, as he may designate, in one or more cases, as messengers, for the purpose of causing the notices to be published and served as required in the eleventh \* section of the act, and for no other purpose. In giving the notices required by the third subdivision of the eleventh † section of the act, it shall be sufficient to give the names, residences, and the amount of the debts (in figures) due the several creditors, so far as known, and no more.

#### XIV.

##### PETITIONS AND AMENDMENTS.

All petitions, and the schedules filed therewith, shall be printed or written out plainly, and without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference; and whenever any amendments are allowed, they shall be written and signed by the petitioner on a separate paper, in the same manner as the original schedules were signed and verified; and if the amendments are made to different schedules, the amendments to each schedule shall be made separately, with proper reference to the schedule

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\* §§ 5019, 5032, R. S.

† § 5032, R. S.; § 5, act 1874.

proposed to be amended, and each amendment shall be verified by the oath of the petitioner in the same manner as the original schedules.

## XV.

## PRIORITY OF ACTIONS (INVOLUNTARY BANKRUPTCY).

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within six months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

## XVI.

## FILING PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and such petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same firm in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions, and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions for adjudication of bankruptcy shall be filed in different districts by different members of the same copartnership, for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed having jurisdiction shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petition shall be filed in the same district, action shall be first had upon the one first filed.

## XVII.

## CONCERNING REDEMPTIONS OF PROPERTY AND COMPOUNDING CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit

or lien upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound any debts or other claims or securities due or belonging to the estate of the bankrupt, the assignee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor in the office of the clerk of the district court; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given in some newspaper, to be designated by the court, at least ten days before the hearing, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the assignee.

### XVIII.

#### PROCEEDINGS IN CASE OF COPARTNERSHIPS.

In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy; and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property, in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

### XIX.

#### DUTIES OF ASSIGNEES.

The assignee shall, immediately on entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession, except where an inventory is furnished to him by the marshal; in which case, having verified the same, he shall add thereto a certificate that the same is correct, or that the same is correct as modified by a supplemental inventory, to be annexed thereto; in which supplemental inventory he shall state any deficiency of assets named in the marshal's inventory, and shall add any property or assets not contained therein.

The assignee shall make report to the court, within twenty days after receiving the deed of assignment, of the articles set off to the bankrupt by him, according to the provisions of the fourteenth section \* of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the assignee within twenty days after the filing.

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\* § 5045, R. S.

the report. The register may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. The substance of each monthly return of the assignee shall be sent by the register to any creditor who shall request it and pay the fee provided for notices to creditors. In case the assignee shall neglect to send any report or statement which it is made his duty to file or make by the bankrupt act, or any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the register to make an order requiring the assignee to show cause before the court, at a time specified in the order, why he should not be removed from office. The register shall cause a copy of the order to be served upon the assignee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of assignees shall be referred as of course to the register for audit, unless otherwise specially ordered by the court.

## XX.

### COMPOSITION WITH CREDITORS (ARBITRATION).

Whenever an assignee shall make application to the court for authority to submit a controversy arising in the settlement of demands against a bankrupt's estate, or of debts due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the subject-matter of the controversy and the reasons why the assignee thinks it proper and most for the interest of the creditors that it should be settled by arbitration or otherwise, shall be set forth clearly and distinctly in the application; and the court, upon examination of the same, may immediately proceed to take testimony and make an order thereon, or may direct the assignee to give notice of the application, either by publication or by mail, or both, to the creditors who have proved their claims, to appear and show cause, on a day to be named in the order and notice, why the application should not be granted, and may make such order thereon as may be just and proper.

## XXI.

### DISPOSAL OF PROPERTY BY ASSIGNEE.

Upon application to the court, and for good cause shown, the assignee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; and such account he shall file with his report at the first meeting of creditors after the sale. In making sale of the franchise of a corporation, it may be offered in fractional parts, or in certain numbers of shares corresponding to the numbers of shares in the bankrupt corporation.

## XXII.

### PERISHABLE PROPERTY.

In all cases where goods or other articles come into possession of the assignee or assignee which are perishable, or liable to deterioration in

value, the court may, upon application, in its discretion, order the same to be sold and the proceeds deposited in court.

### XXIII.

#### SERVICE OF NOTICE.

The notice provided by the eighteenth section\* of the act shall be served by the marshal or his deputy, and notices to the creditors of the time and place of meeting provided by the section† shall be given through the mail by letter, signed by the clerk of the court.

Every envelope containing a notice sent by the clerk or messenger shall have printed on it a direction to the postmaster at the place to which it is sent to return the same within ten days unless called for.

### XXIV.

#### OPPOSITION TO DISCHARGE.

A creditor opposing the application of a bankrupt for discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification of the grounds of his opposition, in writing, within ten days thereafter, unless the time shall be enlarged by order of the district court in the case; and the court shall thereupon make an order as to the entry of said case for trial on the docket of the district court, and the time within which the same shall be heard and decided.

### XXV.

#### SECOND AND THIRD MEETINGS OF CREDITORS.

Whenever any bankrupt shall apply for his discharge, within three months from the date of his being adjudged a bankrupt, under the provisions of the twenty-ninth section ‡ of the act, the court may direct that the second and third meetings of creditors of said bankrupt, required by the twenty-seventh and twenty-eighth sections || of said act shall be had on the day which may be fixed in the order of notice for the creditors to appear and show cause why a discharge should not be granted such bankrupt; and the notices of such meeting shall be sufficient if it be added to the notice to show cause, that the second and third meetings of said creditors shall be had before the register upon the same day that cause may be shown against the discharge, or upon some previous days or day.

### XXVI.

#### APPEALS.

Appeals in equity from the district to the circuit court, and from the circuit to the Supreme Court of the United States, shall be regulated by

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\* § 5039, R. S.

† § 5108, R. S.

‡ §§ 5039, 5041, R. S.

|| §§ 5092, 5093, R. S.

the rules governing appeals in equity in the courts of the United States. Any supposed creditor who takes an appeal to the circuit court from the decision of the district court rejecting his claim, in whole or in part, according to the provisions of the eighth section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the district court upon his claim; and he shall file his appeal in the clerk's office of the circuit court within ten days thereafter, setting forth a statement in writing of his claim in the manner prescribed by said section; and the assignee shall plead or answer thereto in like manner within ten days after the statement shall be filed. Every issue thereon shall be made up in the court, and the cause placed upon the docket thereof, and shall be heard and decided in the same manner as other actions at law.

## XXVII.

## IMPRISONED DEBTOR.

If at the time of preferring his petition the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus* by the jailor, or any officer in whose custody he may be, before the register, for the purpose of testifying in any matter relating to his bankruptcy; and if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court, to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged; if not he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge, the court shall cause notice to be served upon the creditor, or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

## XXVIII.

## DEPOSIT AND PAYMENT OF MONEYS.

The district court in each district shall designate certain national banks, if there are any within the judicial district, or if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee and the clerk of said court shall deposit all sums received by them, severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits, or payments have been made by him during the preceding month, and if any, he shall state the gross



amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository unless upon a check, or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks.

## XXIX.

## PREPAYMENT OR SECURITY OF FEES.

The fees of the register, marshal, and clerk shall be paid or secured in all cases before they shall be compelled to perform the duties required of them, by the parties requiring such service; and in the case of witnesses their fees shall be tendered or paid at the time of the service of the summons or subpoena, and shall include their traveling expenses to and from the place at which they may be summoned to attend. The court may order the whole or such portion of the fees and costs in each case to be paid out of the fund in court in such case as shall seem just.

The funds deposited with the register, marshal, and clerk shall, in all cases where they come out of the bankrupt's estate, be considered as a part of such estate, and the assignee shall be charged therewith, and shall not be allowed for any disbursements therefrom, except upon the production of proper vouchers from such officers, respectively, given after the due allowance of their respective bills.

## XXX.

## FEES AND COSTS.

*Clerks.*

The fees of the clerk shall be the same as now allowed by law for similar services in the general fee-bill, section 828 Revised Statutes, except as herein provided; but no charge shall be made for filing any paper previously filed with the register. Also,

For entering memoranda or minutes of register, each folio.....	\$0 10.
For sending notice to creditors by mail, each.....	15
For inserting notice in newspaper.....	50.

(The necessary cost of advertising to be paid as an expense of the estate.)

For taxing the costs in each case.....	1 00.
—and for each folio of taxed bill.....	10.

*Registers.*

The following and no other fees shall be allowed to the register :	
For filing and entry of the general order of reference, and for office-rent, stationery, and other incidental expenses of proceedings, conducted in the usual office of the register, to be allowed once only in any cause.....	\$5 00
When the proceedings are not conducted in the usual office of the register, but in some other city or town, he shall be allowed for each day employed in going, attending, and returning.....	5 00
Also, in such case, traveling and incidental expenses of himself and of any clerk or other officer attending him, which expenses and fees shall be appropriated among the cases, as provided in section 5 of the act, or section 5125 of the Revised Statutes.	
For each day's service while actually employed under a special order of the court, a sum to be allowed by the court, not exceeding.....	5 00
But only one <i>per diem</i> allowance to be made for a single day, and no duplication of such allowances to be made for different cases on the same day; and no other allowance shall be made for clerk hire except as above stated.	
For every affidavit to any petition, schedule, or other proceeding in bankruptcy, except proof of debt by a creditor or his agent, for each oath and certifying the same....	25
For examining petition and schedules, and certifying to their correctness.....	3 00
For every warrant in bankruptcy, or other process, issued and directed to the marshal (not including warrants for payment of money or anything other than process).....	2 00
For each day in which a general meeting of creditors is held, and attending same.....	3 00
For notification to assignee of his appointment.....	50
For assignment of bankrupt's effects.....	1 00
For every bond with sureties.....	1 00
For every application for a general meeting of creditors.....	1 00
For every summons or subpoena requiring the attendance of a bankrupt, a bankrupt's wife, or a witness for examination, for each person summoned.....	10
For taking depositions, including proofs of debts, and examination of bankrupt or his wife, for each folio.....	20
For certifying proof of debt as satisfactory.....	25
For copies of depositions and other papers, each folio.....	10
For each notice which the register may be required to send to or serve on any creditor (which shall include for postage and stationery).....	15
For mileage in making personal service when necessary, the same as allowed by law to the marshal.	
For inserting notice in newspaper when required.....	50
(Costs of advertising to be allowed as part of the expenses of the estate.)	
For each order for a general dividend.....	3 00
For computation of dividends.....	3 00
In addition thereto, for each creditor.....	10

For every judicial order made by a register, necessary or proper to be made by him, and not herein otherwise specially provided for, and not including matters merely ministerial .....	\$1 00
For every discharge where there is no opposition .....	2 00
For auditing the accounts of assignees .....	1 00
—and for each additional hour necessarily employed therein, after the first hour .....	1 00
For every certificate of question to the district court or judge, under sections four and six of the act, or sections 5009 and 5010 of the Revised Statutes .....	1 00
For preparing such certificate, each folio .....	20
For each folio of memorandum sent to the clerk .....	10
For countersigning each check of assignee .....	10
For filing every paper not previously filed by the clerk, and marking and identifying every exhibit .....	10
(Fees paid by creditors for establishing their debts shall be entitled to rank with other fees and costs in the case under section 5101, Revised Statutes.)	

2. The deposit of \$50 required to be made as security for the fees of the register, shall be delivered by the clerk to the register to whom the case is referred, and be by him accounted for at the termination of the case.

#### *Marshals.*

The fees of the marshal shall be same as are allowed for similar services by the general fee-bill in section 829 of the Revised Statutes, as modified by section 5126, including additional fees allowed by the latter section for distinct services; but no allowances shall be made under the last clause of section 5126, commencing with the words "For cause shown."

The marshal shall be allowed for each hour necessarily employed in making inventory of bankrupt's property .....	\$1 00
—and for each folio of inventory .....	20
For each hour actually and necessarily employed in personal attention in taking care of bankrupt's property .....	1 00
(No other allowance to be made for custody of property, except for actual disbursements, which shall in all cases be passed upon by the court.)	

#### *Assignees.*

The fees and allowances of assignees shall be as prescribed and provided for in sections 5099 and 5100 of the Revised Statutes; provided that, in addition to disbursements made, no allowance shall be made other than the commissions provided for in section 5100, except as hereinafter specified; and said commissions shall be calculated but once upon the amount of moneys received and paid, and not upon both the receipt and payment thereof. Besides which, there shall be allowed to the assignee as follows:

For serving or sending notices to creditors, or publishing the same, when required to be done by the assignee, the same amount allowed to the register for like services.	
For each hour necessarily employed in making inventory or supplemental inventory of bankrupt's property, or verifying marshal's inventory .....	\$1 00

For each folio of inventory or supplemental inventory made by assignee.....	\$0 20
For all services in designating the exempt property of a bankrupt, and filing report thereon .....	5 00
For attending a general meeting of creditors.....	3 00
For every deed for real estate sold .....	2 00
For drawing and filing each monthly report.....	1 00
For drawing and filing each quarterly report, not exceeding four, unless specially allowed.....	5 00
For each general account submitted to a creditors' meeting, not exceeding two, unless specially allowed.....	10 00
For all services in paying a general dividend, or executing an order of final distribution, and making report thereon, including all disbursements.....	5 00
In addition, for each creditor to whom a dividend is paid.....	25

*Witnesses and Jurors.*

The fees of witnesses and jurors shall be the same as prescribed in the general fee-bill, in sections 848 and 852 of the Revised Statutes.

*Attorneys.*

No allowance shall be made against the estate of a bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as a disbursement; and no allowance shall be made to the assignee for custody of the bankrupt's property, except necessary disbursements in relation thereto. The necessity and reasonableness of disbursements shall in all cases be passed upon by the court.

Any money received by either of the officers mentioned, in excess of lawful fees or compensation, shall be ordered by the judge to be paid into court, and such order may be enforced, if necessary, by attachment as for contempt.

No bankrupt's discharge shall be refused or delayed by reason of the non-payment of any fees except the fee for his certificate of discharge.

*Taxation of Costs.*

Ten days before the day fixed for the consideration of the assignee's final account, or at any other time fixed by the court on its own motion, or on the application of any person interested, the clerk, marshal, and register shall file with the clerk a statement of fees, including prospective fees for final distribution, which shall exhibit, by items, each service and the fee charged for it, and the amount received. Said clerk shall tax each fee-bill, allowing none but such as are provided for by these rules, which taxation shall be conclusive, reserving to any party interested exceptions to the bills as taxed, which shall be decided by the court. The office of auditor is hereby discontinued.

## AMENDMENT TO GENERAL ORDER XXX.

*Assignees.*

It being found that in certain special cases, requiring great care and exertion on the part of assignees in bankruptcy, the fees and allowances now provided are insufficient; it is, therefore, hereby

*Ordered*, That in such cases as are above mentioned, the district judge be, and is hereby, authorized, by and with the advice and concurrence of the circuit justice or judge, to make such additional allowance to the assignee or trustee, or to both, or either of them if there be more than one, as in his judgment shall be a fair and just compensation for his or their services, having regard to the amount of assets, the amount of labor required, and the special circumstances of the case; and that so much of General Order XXX as conflicts herewith be repealed.

## XXXI.

## COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, where the debtor resists an adjudication, and the court, after hearing, shall adjudge the debtor a bankrupt, the petitioning creditor shall recover, to be paid out of the fund, the same costs that are allowed by law to a party recovering in a suit in equity; and in case the petition shall be dismissed, the debtor may recover like costs from the petitioner.

When a debtor shall be adjudged a bankrupt on the application of a creditor, and shall be required under the provisions of the act to furnish a schedule of his creditors, and an inventory and valuation of his estate, the court, if the estate is large and the required schedule and inventory are likely to be voluminous or complicated, or other good reason exist, may, on the application of such debtor, allow him the services of a clerk or accountant to aid him therein, at such rate of compensation, not to exceed five dollars per day, as the court may deem reasonable.

## XXXII.

## AS TO FORMS AND SCHEDULES.

The several forms specified in the schedules annexed to the former general orders for the several purposes therein stated shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. The tabular forms hereto annexed shall be used respectively by the several officers named in section nineteen of the amendatory act of June 22, 1874, in making the returns required by said section. In all cases where, by the provisions of the act, a special order is required to be made in any proceeding, or in any case instituted under the act in a district court of the United States, such order shall be framed by the court to suit the circumstances of the particular case; and the forms hereby prescribed shall be followed as nearly as may be, and so far as the same are applicable to the circumstances requiring such special order. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may

e. In proceedings at law, instituted for the same purpose, the rules of the circuit court regulating the practice and procedure in cases at law shall be followed as nearly as may be. But the court, as the judge thereof, may, by special rule in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

### XXXIII.

#### OMISSIONS AND AMENDMENTS.

Whenever a debtor shall omit to state in the schedules annexed to his petition any of the facts required to be stated concerning his debts or his property, he shall state, either in its appropriate place in the schedules or in a separate affidavit to be filed with the petition, the reason for the omission, with such particularity as will enable the court to determine whether to admit the schedules as sufficient, or to require the debtor to make further efforts to complete the same according to the requirements of the law; and in making any application for amendment to the schedules, the debtor shall state under oath the substance of the matters proposed to be included in the amendment, and the reasons why the same had not been incorporated in his schedules as originally filed, or as previously amended. In like manner, he may correct any statement made during the course of his examination.

### XXXIV.

#### PROOF OF DEBTS.

Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a copartnership, it must appear on oath that the deponent is a member of the creditor firm; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, and the corporation has no such officer as cashier or treasurer, the deposition may be made by the officer whose duties most nearly correspond to those of cashier or treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates, the average due date shall be stated; in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account nor any judgment rendered thereon. Proofs of debt received by any assignee shall be delivered to the register to whom the cause is referred. The register may decline to file any deposition until the fee for filing the same is paid. When a proof of debt is sent by mail to the register, and it shall be accompanied by the fee for filing it, and the fee for sending a notice to a creditor, the register shall acknowledge the receipt of it, and state the amount at which he has entered it, and if it shall be insufficient or unsatisfactory to the register he shall state the reason.

Any creditor may file with the register a request that all notices to which he may be entitled shall be addressed to him at any place, to be

designated by the post office box or street number, as he may appoint, and thereafter and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

Claims which have been assigned before proof, shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, such deposition shall set forth the security, as is required in proving secured claims.

Upon filing with the register satisfactory proof of the assignment of a claim proved and entered on the register's docket, the register shall immediately give notice by mail, to the original claimant, of the filing of such proof of assignment.

And if no objection be entered within ten days, he shall make an order subrogating the assignee to the original claimant.

If objection be made within the time specified, or within such further time as may be granted for that purpose, the register shall certify the objection into court for determination. The claims of persons contingently liable for the bankrupt, may be proved in the name of the creditor, when known by the party contingently liable.

When the name of the creditor is unknown, such claims may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish, *pro tanto*, the original debt. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, or of the consent of a creditor to a bankrupt's discharge, may be proved or acknowledged before a register in bankruptcy, or a United States circuit court commissioner. When executed on behalf of a copartnership, or of a corporation, the person executing the instrument shall make oath that he is a member of the firm, or duly authorized officer of the corporation, on whose behalf he acts.

When the party executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

When the assignee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the register to whom the cause is referred, for an order for such re-examination; and thereupon the register shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail, addressed to the creditor.

At the time appointed, the register shall take the examination of the creditor, and of any witnesses that may be called by either party; and if it shall appear from such examination that the claim ought to be expunged or diminished, the register, if no objection be made, may order accordingly. If objection be made, the register shall require the parties then, or within a time to be fixed for that purpose, to form an issue to be certified into court for determination.

If the petitioner is in default in making up said issue, the petition shall be dismissed; if the creditor whose claim is re-examined is in default in making said issue, the claim may be diminished or expunged by the register.

All orders thus made by the register may be reviewed by the court on special petition, and upon showing satisfactory cause for such review.

## XXXV.

## TRIAL BEFORE MARSHAL.

If the debtor, under the provisions of section fourteen of the amendatory act relating to proceedings in bankruptcy, approved June 22, 1874, shall elect to have a trial of the facts before the marshal, he shall make such election in writing, and file the same with the clerk of the court; and thereupon the court, on application of the debtor, may award the *venire facias* in said section prescribed, upon and by virtue of which the marshal shall summon twenty-four good and lawful men, inhabitants of the vicinity of the place of trial, and indifferent between the parties, from whom to select a jury to try the said facts; and the names of the persons so summoned shall be drawn by lot to make the said jury, and each party shall be entitled to challenge four persons peremptorily; and if a sufficient number of jurors unchallenged and free from exception shall not appear to make the full panel of twelve men (or such less number as the parties may agree upon) to try the said cause, the marshal shall complete the number by forthwith summoning other proper persons for the purpose. And any person summoned by the marshal to sit on said jury, and failing to appear without sufficient excuse, shall be returned by the marshal and subject to be fined by the court.

The petitioning creditor shall be deemed the actor, give due notice of trial, and have the opening and close before the jury. Subpœnas may be issued to witnesses, and objections to evidence shall be decided by the marshal presiding at the trial, subject to review by the court. The trial shall be had upon the petition to have the debtor declared a bankrupt, and no other pleadings shall be necessary. The debtor may, on his part, prove any fact or state of facts which will entitle him to have the case dismissed. The jury, if desired, shall find a special verdict upon any point or question of fact stated for that purpose in writing by either party before the case shall have been submitted to them. The verdict shall be signed by the foreman of the jury and countersigned by the marshal, who shall immediately return the same to the court with the *venire*, and any points or questions raised and decided by him at the trial. The court, for good and legal cause shown, may set aside the verdict, and award a new *venire* as often as occasion shall require.

## XXXVI.

## COMPOSITION UNDER SECTION 17 OF AMENDATORY ACT.

If at any time after the filing of a petition for an adjudication in bankruptcy, a petition duly verified be filed by the debtor or bankrupt, or by any creditor of such debtor or bankrupt, setting forth that a composition has been proposed by such debtor or bankrupt, and that he verily believes that such proposed composition would be accepted by a two-thirds in number, and one-half in value of the creditors of such debtor or bankrupt, in satisfaction of the debts due from such debtor or bankrupt, the court shall forthwith order a meeting of the creditors to be called to consider of the said proposition as provided in the 17th section of the said amendatory act, whereupon such proceedings shall be had as are therein directed. The register acting in the case, or, if no



register has been assigned, a register to be designated by the court, shall, at the time and place specified in the notice for holding such meeting, hold and preside at the same, and report to the court the proceedings thereof, with his opinion thereon; upon the filing of which, the clerk shall give the notices to creditors required by said section, and the court shall, at the time therein fixed, proceed to hear and determine the matter as in said section is prescribed.

In like manner, additional meetings in relation to such proposed composition, or any modification thereof, may, upon like application, be called and held, and the proceedings returned in like manner.

## XXXVII.

### REFERENCE TO SECTIONS OF ACT, ETC.

All orders referring specifically to any section or sections of the original bankrupt act, shall be deemed and construed to refer to the corresponding sections respectively, in the Revised Statutes of the United States; for example, Order IX, in referring to sections 12 and 13 of the act, shall be construed to refer to sections 5033 and 5034, respectively, of the Revised Statutes; and so of the rest. And all forms heretofore prescribed shall be adapted to any modification of the law, or of these orders.

### REPORT OF MARSHAL.

Annual report of \_\_\_\_\_, marshal of the \_\_\_\_\_ district of \_\_\_\_\_, for the year ending June 30, 18\_\_\_\_, required by the 19th section of the amendatory act of Congress, relating to matters of bankruptcy, approved June 22, 1874.

Number of cases in bankruptcy in which warrants were received.....

Number of warrants returned during year.....

Fees for service of warrants so returned.....

For serving creditors with notice.....

Mileage thereon.....

Expenses of publication thereon.....

Expenses of postage thereon.....

Other expenses thereon, such as for.....

Other fees, costs, expenses, and emoluments, namely:

For service-fees for serving writs and process.....

For mileage thereon.....

For serving notices.....

For mileage thereon.....

Expenses of publication thereon.....

Expenses of postage thereon.....

For making inventories of property.....

For taking care of property.....

Expenses and disbursements thereon.....

All other fees and emoluments, such as for:

All other expenses and disbursements, such as for:

SUMMARY OF FEES, COSTS, AND EMOLUMENTS, EXCLUSIVE OF ACTUAL  
DISBURSEMENTS.

Service fees.....	
Mileage.....	
Making inventories.....	
Care of property.....	
Other fees and emoluments in bankruptcy.....	

## SUMMARY OF ACTUAL DISBURSEMENTS.

For publications.....	
For postage.....	
For custody of property.....	
For traveling expenses.....	
For other expenses, such as.....	

## REPORT OF REGISTER.

Annual report of \_\_\_\_\_, register in bankruptcy in  
and for the \_\_\_\_\_ district of the State and district of \_\_\_\_\_,  
for the year ending June 30, 18\_\_\_\_, in pursuance of section 19 of the  
amendatory act relating to proceedings in bankruptcy, approved June  
22, 1874.

Number of cases of voluntary bankruptcy referred.....	
Amount of assets of the bankrupts therein.....	
Amount of liabilities of the bankrupts therein.....	
Amount of dividends declared therein.....	
Average rate per cent. of dividends declared therein.....	
Number of cases in which discharge granted.....	
Number in which discharge not granted.....	
Number of compulsory cases referred.....	
Amount of assets of the bankrupts therein.....	
Amount of liabilities of the bankrupts therein.....	
Amount of dividends declared therein.....	
Average rate per cent. of dividends declared therein.....	
Number of cases in which discharge granted.....	
Number in which discharge not granted.....	
Amount of fees, costs, &c., received or earned in cases of volun- tary bankruptcy.....	
Amount of fees, costs, &c., received or earned in cases of invol- untary bankruptcy.....	



## REPORT OF CLERK, No. 1.

Annual statement of \_\_\_\_\_, clerk of the district court of the United States for the district of \_\_\_\_\_, for the year ending June 30, 18\_\_\_\_, in pursuance of section 19 of the amendatory act relating to proceedings in bankruptcy, approved June 22, 1874, of all cases of bankruptcy pending, &c.

Cases pending at beginning of year. Names of bankrupts.	Whether disposed of.	Amount of dividend.	Number of reports of assignee.	Disposition of case.	Number of assignee's accounts filed and settled.
Cases begun during year.					

REPORT OF CLERK, No. 2.

Names and residence of all marshals, registers, and assignees who have failed to make and file reports, as required by section 19 of amendatory act relating to proceedings in bankruptcy, for the year ending June 30, 18 , furnished in pursuance of said section.

MARSHAL.

[Here insert names and residences of delinquents.]

REGISTERS.

[Here insert names and residences of delinquents.]

ASSIGNEES.

[Here insert names and residences of delinquents.]

REPORT OF CLERK, No. 3.

Annual report of , clerk of the district court of the United States for the district of , for the year ending June 30, 18 , of all his fees, charges, costs, and emoluments earned or accrued in bankruptcy cases during said year; and also of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit, made in pursuance of section 19 of the amendatory act relating to proceedings in bankruptcy, approved June 22, 1874.

Services.	Amount.
For performing all ordinary duties of clerk, such as issuing process, filing and entering papers, orders, rules, &c., in bankruptcy cases .....	
For entering memoranda or minutes of registers.....	
For giving notice to creditors by mail or publication (exclusive of postage and cost of publication).....	
For taxing costs.....	
For receiving, keeping and paying out money .....	
For taking examinations.....	
For preparing and certifying papers on appeal to circuit court.	

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Moneys received in court in cases in bankruptcy.....	
Balance on hand at beginning of year .....	
Moneys paid out of court in cases in bankruptcy.....	
Balance on hand at end of year .....	
Balance on deposit at end of year .....	

# FORMS IN BANKRUPTCY.

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*Form No. 1.*

## PETITION BY DEBTOR

to the Honorable \_\_\_\_\_, Judge of the District Court of the United  
States, for the \_\_\_\_\_ District of \_\_\_\_\_:—

THE PETITION of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, in the  
County of \_\_\_\_\_, and State of \_\_\_\_\_, and District aforesaid,  
Respectfully Represents:—That he has  
for \_\_\_\_\_ months next immediately preceding the filing of this petition,  
at \_\_\_\_\_, within said Judicial District; that he owes debts exceeding  
the amount of three hundred dollars, and is unable to pay all of the same in  
full; that he is willing to surrender all his estate and effects for the benefit  
of his Creditors, and desires to obtain the benefit of the Act entitled “An  
Act to Establish a Uniform System of Bankruptcy throughout the United  
States,” approved March 2, 1867:

That the Schedule hereto annexed, Marked **A**, and verified by Your Pe-  
titioner's oath, contains a full and true statement of all his debts, and (so  
far as it is possible to ascertain) the names and places of residence of his  
creditors, and such further statements concerning said debts as are required  
by the provisions of said Act:

That the Schedule hereto annexed, marked **B**, and verified by Your Pe-  
titioner's oath, contains an accurate inventory of all his estate, both real and  
personal, assignable under the provisions of said Act:

WHEREFORE, YOUR PETITIONER PRAYS, that he may be adjudged by the  
Court to be a Bankrupt, within the purview of said Act; and that he may  
be Decreed to have a Certificate of Discharge from all his debts provable  
under the same.

\_\_\_\_\_, *Solicitor*, [or, *Attorney*,] &c.

### *Oath to foregoing Petition.*

[N. B.—If Petitioner is not a citizen, the last clause of this oath should be omitted.]

UNITED STATES OF AMERICA.

District of \_\_\_\_\_, ss:

I, \_\_\_\_\_, the Petitioning Debtor mentioned and described in the fore-  
going Petition, do hereby make solemn oath [or, affirmation] that the state-  
ments contained therein are true according to the best of my knowledge,  
information and belief; and I do further make oath [or, affirmation] that I  
am a citizen of the United States of America, and that I will bear true faith  
and allegiance to the same.

\_\_\_\_\_, *Petitioner*.

Subscribed and sworn [or, affirmed] to, before me, this \_\_\_\_\_ day of \_\_\_\_\_,  
A.D. 18 \_\_\_\_\_.

\_\_\_\_\_,  
*U. S. District Judge*, [Register in Bankruptcy,  
or, *U. S. Commissioner*.]

*Statement of all Creditors who are to be Paid in Full, or to whom Priority is Secured, according to the provisions of the 28th Section of said Act.*

Order of Payment; Preferred Claims.	Reference to Ledger or Voucher.	Names of Creditors.	Residences and Occupations.	Amount.		Where and When contracted.	Nature and Consideration of the Debt, and whether contracted as copartner or joint contractor; and, if so, with whom.
				\$	c.		
1. bills due to the United States, and taxes and assessments under the laws thereof.							
2. bills due to the State of , and taxes and assessments under the laws of said State.							
3. wages due clerk, servant, &c., to an amount not exceeding \$50, for Labor performed within six Months.							
4. other debts Preferred by said Act.							

\_\_\_\_\_, Petitioner.

ition by Debtor.]

**SCHEDULE A.**

*Creditors holding Securities.*

[N. B.—Particulars of Securities held, with dates of same, and when given, to be stated under the names of the several creditors, and also Particulars concerning each Debt, as required by the 11th Section of the Act, and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.]

Reference to Ledger or Voucher.	Names of Creditors.	Residences and Description.	When and where Contracted.	Value of Securities.		Amount of Debts.
				\$	c.	
ger [A.] page 50.]	[John Brown].	Residing at Lien, by Judgment of Estate, situate in Township of      Court, in the State of [Pennsylvania,] upon my Real Estate, situate in Township of      County of      in said State, (describing it.)		\$	c.	
ger [B.] page 5.]	[Samuel Johnson].	Residing at Pledge of 150 shares, Stock of [Cumberland Coal Company] a Company incorporated under the laws of the State of [Maryland,] and doing business at      Certificate of said Stock transferred to said [Johnson.]				
ger [C.] page 5.]	[William Peters].	Residing at Mortgages upon my Real Estate in      made to secure his Liability as Endorser on certain Promissory Notes made by me, and described as follows: Or for Liability as Surety. Or for Liability as Bail. Or for any other Liability for which Mortgages may be given.				
ger [D.] page 46.]	[John Jones].	Residing at Note of A. B. dated      at four months for \$ Note of C. D. dated      at six months for \$ Note of E. F. dated      at nine months for \$ Delivered to said Jones, as Collateral Security for his Debt, on the      day of      186.				
ger [E.] page 40.]	[George Smith].	Residing at Six bales of Cotton weighing      pounds, valued at      five bales of Wool weighing      pounds, valued at      six barrels Whisky, valued at      Delivered to said [Smith,] in pledge for his Debt, on the      day of      186.				

*Petitioner.*

[N. B.—The above examples will serve as a proper guide.]



**SCHEDULE A.**

(3.)

*Creditors whose Claims are Unsecured.*

[N. B.—When the Name and Residence (or either) of any Drawer, Maker, Endorser or Holder of any Bill or Note, &c., are unknown, the fact must be stated, and also the name, Residence, and Occupation of the last holder known to the Petitioner. The debt due to each creditor must be stated in full, and any claim by way of Set-off stated in the schedule of property. The Nature of each debt and demand, whether founded on Written Security, Obligation, Contract, or Otherwise, and also the True Cause and Consideration such Indebtedness in each case and the Place where such indebtedness accrued.]

Reference to Ledger or Voucher.	Names of Creditors.	Residences and Occupations.	Amount.		When and Where Contracted.	Nature and Consideration of the Debt, and whether any Judgment, Bond, Bill of Exchange, Promissory Note, &c., and whether contracted as copartner or joint contractor, with any other person ; and, if so, with whom.
			\$	c.		

\_\_\_\_\_, *Petitioner.*

EXHIBIT OF DEBTS.

STANDARD FORM NO. 100

*Liabilities on Notes or Bills Discounted which ought to be paid by the Drawers, Makers, or Acceptors*

IN. B.—The Dates of the Notes or Bills, and when Due, with the Names, Residences, and the Business, or Occupation of the Drawers, Makers, or Acceptors thereof, are to be set forth under the Names of the Holders. If the Names of the Holders are not known, the name of the last holder known to the petitioner should be stated, and his Business and place of Residence. The same particulars as to Notes or Bills on which the petitioner is liable as Endorser.]

Reference to Ledger or Voucher.	Names of Holders as far as known.	Place of Residence and Occupation.	Place where Contracted.	Amount.	Nature of Liability, whether same was contracted as copartner or joint contractor, or with any other Person; and, if so, with whom.
				\$	
				c.	

\_\_\_\_\_. *Petitioner.*

*Accommodation Paper.*

[N. B.—The Dates of the Notes or Bills, and when Due, with the Names, Residences, and Business or Occupation of the Drawers, Makers, and Acceptors thereof, are to be set forth under the Names of the Holders; if the Bankrupt be liable as Drawer, Maker, Acceptor, or Endorser thereof, it is to be stated accordingly. If the names of the Holder are not known, the name of the last Holder known to the Petitioner should be stated, with his Business and Place of Residence. Same particulars as to other commercial paper.]

Reference to Ledger or Voucher.	Names of Holders.	Residences of Holders and Particulars of Notes or Bills.	Place where Contracted.	Amount.	Whether liability was contracted as co-partner or joint contractor, or with any other Person; and, if so, with whom.
				\$ c.	

[N. B.—Here will follow oath to Schedule A, hereinafter prescribed.]

\_\_\_\_\_, *Petitioner.*

**SCHEDULE B.**

(A-5)

*Statement of all Real and Personal Estate and Effects Whatever, which are now in the Possession, Enjoyment, or under the Control of the Petitioner, or which are held by any other person, In Trust, for his use, or to the Possession or Enjoyment of which he is entitled at the date of filing Petition.*

[INTEREST IN LANDS.]

Particular Description of all Real Estate owned by Petitioner, or held by him, and whether under Contract or Lease.	Encumbrances thereon, if any, and Dates thereof.	Statement of all Particulars relating thereto.	Estimated Value.

\_\_\_\_\_, *Petitioner.*

Petition by Debtor.]

**SCHEDULE B.**

(2.)

*Personal Property.*

	Dollars.	Cts.
—Cash on hand.....		
—Bills of Exchange, Promissory Notes, or Securities of any description, (each to be set out separately).....		
—Stock in Trade, in my business of , at , of the value of .....		
—Household Goods and Furniture, Household Stores, Wearing Apparel, and Ornaments of the Person.....		
—Books, Prints, and Pictures .....		
—Horses, Cows, Sheep, and other Animals.....		
—Carriages, and other Vehicles.....		
—Farming Stock, and Implements of Husbandry.....		
—Shipping, and Shares in Vessels.....		
—Machinery, Fixtures, and Apparatus used in Business ; with the place where each is Situated.....		
—Goods or Personal Property of any other Description, with the place where each is Situated .....		

\_\_\_\_\_, *Petitioner.*

Petition by Debtor.]

**SCHEDULE B.**

(3.)

*Choses in Action.*

	Dollars.	Cts.
—Debts due Petitioner on open Account .....		
—Stocks in Incorporated Companies, and Interest in Joint-stock Companies.....		
—Policies of Insurance.....		
—Unliquidated Claims of every nature, with their Estimated Value .....		

\_\_\_\_\_, *Petitioner.*

[Petition of Debtor.]

**SCHEDULE B.**

(4.)

*Property in Reversion, Remainder, or Expectancy, including Property held in Trust for the Petitioner, or subject to any Power or Right to Dispose of, or to Charge.*

[N. B.—A Particular Description of each Interest must be Entered. If all or any of the debtor's Property has been Conveyed by Deed of Assignment, or otherwise, for the benefit of Creditors, the date of such Deed should be stated, the Name and Address of the Person to whom the Property was Conveyed, the Amount realized from the Proceeds thereof, and the Disposal of the Same, as far as known to the Petitioner.]

General Interest.	Particular Description.	Supposed Value of my Interest.
Interest in Land .....	Real Estate and Leasehold Property, with Locality, Names, and Descriptions of Parties now Enjoying the Same, and the Value thereof; also the Nature of my Interest therein, and from Whom, and in what Manner it is derived.	Dolls. Cts.
Personal Property .....	Personal Property, with Locality, Names, and Descriptions of Persons now Enjoying the Same; also the Nature of my Interest therein, and from Whom, and in what Manner it is derived .....	
Property in Money, Stock, Shares, Bonds, Annuities, etc., etc.	Annuities, Money in Public or other Funds, Shares in Railroad and other Companies, showing in whose names the same are standing, with Names and Descriptions of persons now Enjoying the Same; also the Nature of my Interest therein, and from Whom, and in what Manner it is derived.....	
Rights and Powers.....	Rights and Powers wherein I, or any other Person or Persons in Trust for me or for my benefit, have any power to Dispose of, Charge, or Exercise.....	
		Am't realized from proceeds of property conveyed.
		Dolls. Cts.
Property heretofore conveyed for benefit of Creditors.		
What portion of Debtor's Property has been Conveyed by Deed of Assignment, or otherwise, for Benefit of Creditors; Date of such Deed, Name and Address of Party to whom Conveyed; Amount realized therefrom and Disposal of same, so far as known to Petitioner.	Description of Property of Debtor heretofore conveyed for benefit of Creditor by deed of assignment, or otherwise; date of such deed or instrument of conveyance, with name and address of party to whom made; amount realized from same, and the disposal of such property, so far as known to Petitioner.	





Petition of Debtor.]

**SCHEDULE B.**

(6.)

*The following is a True List of all Books, Papers, Deeds, and Writings relating to my Trade, Business, Dealings, Estate, and Effects, or any Part thereof, which, at the date of this Petition, are in my Possession or under my Custody and Control, or which are in the Possession or Custody of any Person in Trust for me, or for my Use, Benefit, or Advantage; and also of All others which have been heretofore, at any time, in my Possession, or under my Custody or Control, and which are now held by the Parties whose names are hereinafter set forth, with the reason for their Custody of the same:—*

BOOKS.....

DEEDS .....

PAPERS, ETC. ....

\_\_\_\_\_, Petitioner.

[N. B. Here follows oath to Schedule B, as hereinafter prescribed.]

## OATHS TO SCHEDULES A AND B.

[N. B.—The following forms of oaths to Schedules A and B of the Petition by Debtor are prescribed, and they are to be annexed to the same, respectively.]

*Oath to Schedule A.*

UNITED STATES OF AMERICA.

District of \_\_\_\_\_, ss :

On this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, before me personally came \_\_\_\_\_, the person mentioned in and who subscribed to the foregoing Petition and Schedule, Marked **A**, respectively, and who being by me first duly sworn *or*, affirmed], did declare the said Schedule to be a statement of all his debts, &c., in accordance with the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867.

\_\_\_\_\_,  
*District Judge, [or, Register ; or, U. S. Commissioner.]*

*Oath to Schedule B.*

UNITED STATES OF AMERICA.

District of \_\_\_\_\_, ss :

On this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, before me personally came \_\_\_\_\_, the person mentioned in and who subscribed to the foregoing Petition and Schedule, Marked **B**, respectively, and who being by me first duly sworn *or*, affirmed], did declare the said Schedule to be a statement of all his state, both real and personal, in accordance with the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867.

\_\_\_\_\_,  
*District Judge, [or, Register, or, U. S. Commissioner.]*

*Form No. 2.*

## COPARTNERSHIP PETITION.

[In case of a Copartnership, the form will be as follows:]

To the Honorable \_\_\_\_\_ Judge of the District Court of the United  
 States for the \_\_\_\_\_ District of \_\_\_\_\_.

THE PETITION of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_,  
 of the County of \_\_\_\_\_, and State of \_\_\_\_\_, and District afore-  
 said, respectfully represents: That the said \_\_\_\_\_, and \_\_\_\_\_,  
 copartners transacting business at \_\_\_\_\_, in the County of \_\_\_\_\_,  
 and State of \_\_\_\_\_, and in said District, have \_\_\_\_\_ for the  
 months.

Or,

THAT the said \_\_\_\_\_ and \_\_\_\_\_ members of a copartnership  
 composed of themselves, and one \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
 and State of \_\_\_\_\_, have \_\_\_\_\_ for the \_\_\_\_\_ months:—  
 next immediately preceding the filing of this Petition at \_\_\_\_\_ within  
 said Judicial District: that the members of said copartnership owe debts ex-

eeding the amount of *three hundred dollars*, and are unable to pay all their debts in full; that they are willing to surrender all their estate and effects for the benefit of their creditors, and desire to obtain the benefit of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867.

That the Schedule hereto annexed, marked **A**, and verified by their oaths, contains a Full and True Statement of all the debts of said Copartnership, and, as far as possible, the Names and Places of Residence of their Creditors, and the further statements concerning such debts required by the provisions of said Act.

That the Schedule hereto annexed, Marked **B**, verified by their oaths, contains an accurate Inventory of all the estate of said Copartnership as required by the provisions of said Act.

And said further states, that the Schedule hereto annexed, marked **C**, verified by his oath, contains a Full and True Statement of all his Individual debts; and, as far as possible, the Names and Places of Residence of his Creditors; and the further Statements concerning such debts required by the provisions of said Act; and that the Schedule hereto annexed, marked **D**, verified by his oath, contains an accurate Inventory of all his Individual Estate as required by the provisions of said Act.

And said further states, that the Schedule hereto annexed, marked **E**, verified by his oath, contains a Full and True Statement of all his Individual debts, and, as far as possible, the Names and Places of Residence of his Creditors, and the further Statements concerning such debts required by the provisions of said Act; and that the Schedule hereto annexed, Marked **F**, verified by his oath, contains an accurate Inventory of all his Individual Estate as required by the provisions of said Act.

[N. B.—Similar clauses to be added for Individual Schedules of each Copartner joining in the Petition.]

WHEREFORE, YOUR PETITIONERS PRAY, that after due proceedings had, they may be adjudged by a Decree of the Court to be Bankrupts within the purview of said Act; and upon their compliance with all the requirements of the said Act, and all the orders and directions of the Court made in pursuance thereof, they may be severally decreed to have a CERTIFICATE OF DISCHARGE FROM ALL THEIR DEBTS provable under said Act, and otherwise entitled to all the benefits thereof.

\_\_\_\_\_  
\_\_\_\_\_

*Petitioners.*

[N. B.—The Form of the Oath to the Petition is to be modified by employing the plural for the singular number, and by the addition of clauses to cover the Schedules of each Copartner.]

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### *Form No. 3.*

#### CORPORATION PETITION.

[N. B.—If a Petition in Bankruptcy is filed by a Corporation, an authenticated copy of a vote or other action of the Stockholders, (or, party or parties entitled to act in behalf of such corporation,) authorizing such proceedings should be filed with the Petition, and which, in substance, should be as follows:—]

*Statement to accompany Petition of Corporation, (In Bankruptcy.)*

AT A MEETING OF THE STOCKHOLDERS, [or, of the Board of Directors, or, trustees, as the Case may be.] of the \_\_\_\_\_ Company [or Association or

Bank, or, Society,] a Corporation created by \_\_\_\_\_, of the State of \_\_\_\_\_, held at \_\_\_\_\_, in the county of \_\_\_\_\_, and State of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, the Condition of the Affairs of said Corporation having been inquired into, and it being ascertained to the Satisfaction of said meeting that the said Corporation was Insolvent, and that its Affairs ought to be wound up, it was Voted [or Resolved] by a Majority of the Cor- orators [or, Stockholders, or, Directors, or, Trustees] present at such Meeting, which was duly called and notified for the purpose of taking action upon the subject aforesaid;) that \_\_\_\_\_ be, and \_\_\_\_\_ thereby—Authorized, Impowered, and Required to file a Petition in the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, within which said Corporation has carried on its business, for the purpose of having the same adjudged Bankrupt; and that such proceedings be had thereon as are provided by the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867,

IN WITNESS WHEREOF, I have hereunto subscribed my name as President {Seal of Corporation.} [or, other officer or agent] of said Corporation, and affixed the Seal of the same this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 18\_\_\_\_;

\_\_\_\_\_  
President [or, other officer] of said Corporation.

[N.B.—In case of a Corporation, the following changes are to be made in the form of Petition already prescribed, viz.: The substitution of the Name of the Corporation for that of the individual Petitioner, and the omission of the Prayer for a Discharge and the following passage substituted: "*And that like proceedings may be had in the premises as in said act are provided in respect to natural persons.*" The language of the Oath to the Corporation Petition may be changed to correspond with the form of the Petition.]

#### Form No. 4.

#### ORDER OF REFERENCE TO REGISTER.

in the District Court of the United States,  
for the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

} IN BANKRUPTCY.

\_\_\_\_\_ Petitioner for Adjudication in Bankruptcy of himself.

\_\_\_\_\_ District of \_\_\_\_\_, ss.:

WHEREAS \_\_\_\_\_, of the County of \_\_\_\_\_, State of \_\_\_\_\_, and District aforesaid, has, on this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m., filed in the office of the Clerk of said Court a Petition for Adjudication in Bankruptcy against himself, according to the provisions of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867,

It is thereupon Ordered, That said Petition be referred to \_\_\_\_\_, one of the Registers in Bankruptcy of this Court, to make Adjudication thereon and take such other proceedings therein as are required by said Act:

and *further*, That the said                      shall, on or before the                      day of                      at                      o'clock                      m., file with said Register a duplicate copy of said Petition and the Schedules thereto annexed, and that he attend before said Register on said day, and thenceforth as said Register may direct, to submit to such orders as may be made by said Register, or by this Court relating to his said Bankruptcy.

And further, that until otherwise ordered by the Court, the said Register shall act upon the matters arising in this case at his office, at                      , at such times as he shall fix for that purpose.

Witness the Honorable                      , Judge of the said Court, and seal thereof, at                      , in said District, on                      the                      day of                      , A.D. 18                      .

{ Seal of  
the Court. }

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 5.*

ADJUDICATION OF BANKRUPTCY UPON DEBTOR'S PETITION.

in the District Court of the United States,  
for the                      District of                      .

In the Matter of

by whom a Petition for Adjudication of  
Bankruptcy was filed on the  
day of                      , A.D. 18                      , in said Court.

} IN BANKRUPTCY.

At                      , in said District,  
on the                      day of                      , A.D. 18                      .  
Before                      , one of the Registers,  
of said Court in Bankruptcy.

I, THE UNDERSIGNED, a Register of said Court in Bankruptcy, upon good proof before me                      , taken, do find, that the said                      has become a Bankrupt within the true intent and meaning of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; and I do hereby declare and adjudge him a Bankrupt accordingly.

\_\_\_\_\_  
*Register in Bankruptcy.*

[N.B.—When a Debtor is declared a Bankrupt upon a Creditor's Petition, the Order should be made by the Court and entered as an Order of the Court in substantially the form above described.]

## Form No. 6.

## WARRANT TO MESSENGER.

(Voluntary Bankruptcy.)

in the District Court of the United States,  
or the District of

In the Matter of

IN BANKRUPTCY.

by whom a Petition for Adjudication of  
Bankruptcy was filed on the day of  
, A.D. 18 , in said Court.

District of , ss:  
to the Marshal of the District of :—  
GREETING :—Whereas, a Petition for Adjudication of Bankruptcy and for  
relief, under the Act of Congress entitled “An Act to Establish a Uniform  
system of Bankruptcy throughout the United States,” approved March 2,  
1867, was, on the day of , 18 , filed by , of  
, in said District, upon which he hath been found and adjudged  
Bankrupt, there being no opposing party thereto :—YOU ARE, THEREFORE,  
HEREBY DIRECTED, AS MESSENGER, to publish times in the—[*Here  
name the newspapers in which the notice is to be published.*] (the first publi-  
cation to be made forthwith,) the following notice, to wit :—

THIS IS TO GIVE NOTICE: That on the day of , A.D. 18 , a  
Varrant in Bankruptcy was issued against the Estate of , of , in  
the county of , and State of , who has been adjudged a Bankrupt, on  
his own Petition; that the Payment of any Debts and Delivery of any Property belonging to  
said Bankrupt, to him, or for his use, and the Transfer of any Property by him are forbidden  
by Law; that a Meeting of the Creditors of the said Bankrupt, to Prove their Debts, and to  
choose one or more assignees of his Estate, will be held at a Court of Bankruptcy, to be holden  
*Here designate the Place, and Building, Room, or Office where the Court is to be held,* before  
, Register, on the day of , A.D. 18 , at o'clock M.

AND YOU ARE FURTHER DIRECTED to Serve Written or Printed Notice, forthwith, either  
by Mail or Personally, [*Those upon whom personal Service is to be made should be designated by  
the Court, or Register;*] on all Creditors upon the Schedule filed with said Bankrupt's Petition,  
or, where names may be given you in addition thereto by the Debtor,] at least ten days before  
the appointed meeting of said Court, in the following form, to wit :—

to Mr. , of , County of , and State of , Creditor of  
Bankrupt.

You are hereby notified that a Warrant in Bankruptcy has been issued out of the District  
Court of the United States, for the District of , against the estate of  
, adjudged a Bankrupt, upon his own Petition :—That the Payment of any Debts, and the De-  
livery of any Property belonging to said Bankrupt, to him, or for his use, and the transfer of  
any Property by him are Forbidden by Law :—That a Meeting of the Creditors of said Bank-  
rupt, to wit : [*Here insert names of the Several Creditors of Bankrupt, with their places of  
residence and amount of their debts, respectively, in the following form, e. g. :—*

A. B. , Boston, Mass. .... | \$500]  
to Prove their Debts and Choose one or more Assignees of his Estate, will be held at a Court  
of Bankruptcy, to be holden on the day of , A.D. 18 , at o'clock,  
1., at [*Here insert the Place, Building, Room, or Office where the Court will be held,*] before  
, Register.

And have you then there this Warrant, with your doings thereon.

Witness the Honorable , Judge of the said Court, and  
{ Seal of } the seal thereof, at , in said District, on the  
{ the Court. } day of , A.D. 18 .

Clerk of District Court, for said District.

## Form No. 7.

## RETURN OF MESSENGER TO ACCOMPANY WARRANT.

[N. B.—This Return may be Endorsed on the Warrant, or follow the signature of the Clerk.]

District of \_\_\_\_\_, ss.:

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.—By virtue of the within warrant, I have caused the notice therein ordered to be published, by advertisement, \_\_\_\_\_ times, in the Newspapers within mentioned; the first publication of which was on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, in [*Here mention Newspaper in which first publication was had*]:—And I also, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, sent by mail or served personally upon the creditors and others named in said Warrant a copy of the notice required thereby to be sent to, or served on them:—And all of the said notices were according to the directions set out in said Warrant.

## FEES.

For service of warrant.....	\$2	00
For necessary travel _____ miles, at 5 cents per mile, each way.....		
For each written note to Creditor named in the Schedule, 10 cents.....		
For actual and necessary expenses in publication of notices.....		
N.B.—If there are any other necessary expenses, the same may be inserted in specific terms, numbering the same consecutively.]		

\_\_\_\_\_  
*U. S. Marshal, as Messenger,*  
*District of \_\_\_\_\_.*

District of \_\_\_\_\_, ss.:

I, \_\_\_\_\_, A.D. 18 \_\_\_\_ . Then personally appeared \_\_\_\_\_, and made oath that the above Expenses returned by me, in addition to his fees, were actually and necessarily incurred and paid by him, and that the same are just and reasonable.

Before me,

\_\_\_\_\_  
*District Judge,*  
 [or, *Register in Bankruptcy.*]

## Form No. 8.

## REGISTER'S OATH OF OFFICE.

UNITED STATES OF AMERICA,

District of \_\_\_\_\_, ss.:

I, \_\_\_\_\_, having been duly nominated and recommended by the Chief Justice of the Supreme Court of the United States, and appointed by the District Judge of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, as a Register in Bankruptcy under the act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within

the United States hostile or inimical thereto. And I do further swear, that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter; and also, that I will not, during my continuance in office, be directly or indirectly interested in, or benefited by, the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in this District. So help me God.

Subscribed and \_\_\_\_\_ to, before me this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

\_\_\_\_\_  
*District Judge.*

*Form No. 9.*

OFFICIAL BOND OF REGISTER.

in the District Court of the United States,  
for the \_\_\_\_\_ District of \_\_\_\_\_.

IN BANKRUPTCY.

KNOW ALL MEN BY THESE PRESENTS: That we [*Insert names and residences in full of Bondsmen*] are held and firmly bound to the United States of America in the sum of \_\_\_\_\_ dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs and assigns, our executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this \_\_\_\_\_ day of \_\_\_\_\_, Anno Domini one thousand eight hundred and \_\_\_\_\_.

Whereas the said \_\_\_\_\_, having been on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, appointed by the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

Register in Bankruptcy, in and for said District, this Bond is executed pursuant to the Third Section of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, and is conditioned for the faithful discharge of the duties pertaining to said office of Register in Bankruptcy.

In witness whereof we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, A.D. one thousand eight hundred and \_\_\_\_\_.

\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]

Signed, sealed, and filed in office of the Clerk of said District Court.

Attest:

*Clerk* \_\_\_\_\_ *District of* \_\_\_\_\_.

[N. B.—The above Bond to be endorsed with the approval of the Judge of the District Court thus: "I HEREBY APPROVE THE WITHIN BOND, AND DECLARE THE SURETIES THEREON TO BE SATISFACTORY;" and the usual certificate of the Clerk of the District, as to the exact



*Form No. 10.*  
COMMON ORDER.

in the District Court of the United States,  
or the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.  
Before Mr. \_\_\_\_\_, one of the Registers  
of said District Court, in Bankruptcy.

District of \_\_\_\_\_, ss:

Upon the application of \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and  
state of \_\_\_\_\_, there being no opposing interest, [or, the party, or parties,  
appearing assenting thereto,] It is ORDERED: [*Here insert the order.*]

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
the seal thereof, at \_\_\_\_\_, in said District, on the  
{ Seal of } day of \_\_\_\_\_, A.D. 18 \_\_\_\_.  
{ the Court. }

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 11.*

CERTIFIED MEMORANDUM OF FIRST MEETING OF CREDITORS.

in the District Court of the United States,  
For the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.  
Before Mr. \_\_\_\_\_  
*Register in Bankruptcy.*

District of \_\_\_\_\_, ss:

MEMORANDUM.—This being the day appointed by the Court for the First  
meeting of Creditors under the said Bankruptcy, whereof the notice re-  
quired in that behalf has been duly given, I, the undersigned, Register of the  
said Court in Bankruptcy, sat at the time and place above mentioned, pur-  
uant to such notice, to take the proof of debts and for the choice of as-  
signee under the said Bankruptcy; and I do hereby certify that the greater  
part in number and in value of the creditors who have proved their debts  
were present, or duly represented, and made choice of \_\_\_\_\_, of \_\_\_\_\_, in  
the County of \_\_\_\_\_, and State of \_\_\_\_\_, as the Assignee of the said  
bankrupt's estate.

Or,  
Failed to make choice of an Assignee of said Bankrupt's estate, and there-  
being no opposing interest, I appointed \_\_\_\_\_, of \_\_\_\_\_, in the County  
of \_\_\_\_\_ and State of \_\_\_\_\_, as Assignee.

Or,

Failed to make choice of an Assignee of said Bankrupt's estate, and there being no opposing interest, I further certify to the Court the failure to make such choice of Assignee, in order that the Court may take action in the premises.

*Register in Bankruptcy.*

[N. B.—When the matter of appointment is referred to the Court, the Register may, if requested, certify the names of the persons proposed at the Creditor's meeting and the votes given for each.]

*Form No. 12.*

EXTRACTS OF PROCEEDINGS UNDER SECTION FOUR—FORM OF MEMORANDUM TO BE RETURNED TO CLERK BY REGISTER, OF HIS ACTION IN EACH CASE.

In the District Court of the United States,  
or the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_  
Before Mr. \_\_\_\_\_,

*Register in Bankruptcy.*

District of \_\_\_\_\_, ss :

MEMORANDUM.—This day attended the first meeting of Creditors of \_\_\_\_\_, the Bankrupt aforesaid, at said \_\_\_\_\_, where choice was made of assignee as appears by the papers herewith returned. [*Here insert particular statement of all that was done before the Register.*]

*Register in Bankruptcy.*

[N. B.—A memorandum of what is done in each case respectively must be returned on separate sheets of paper.]

*Form No. 13.*

CREDITORS WHO HAVE PROVED THEIR DEBTS AT FIRST MEETING.

In the District Court of the United States,  
or the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District, on  
the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_  
Before Mr. \_\_\_\_\_,

*Register in Bankruptcy.*

District of \_\_\_\_\_, ss.:

The following is a list of Creditors who have this day proved their debts:—

Names of Creditors.	Residence.	Debts Proved.	
		Dolls.	Cts.

\_\_\_\_\_,  
*Register in Bankruptcy.**Form No. 14.*

## FORM OF SPECIAL LETTER OF ATTORNEY.

<p>In the Matter of</p>   <p>Bankrupt .</p>	}	IN BANKRUPTCY.
--	---	----------------

To \_\_\_\_\_.

SIR: [*or*, Messrs., *or*, Gentlemen,] I, [*or*, we,] hereby authorize you, or any one of you, to attend the meeting of Creditors in this matter, advertised or directed to be holden at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, before \_\_\_\_\_, or on the day advertised in the [*Name the newspapers,*] or any adjournment thereof, and then and there \_\_\_\_\_ for \_\_\_\_\_, and in \_\_\_\_\_ name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting; and the choice of Assignee, or Assignees of the Estate of the said Bankrupt, and \_\_\_\_\_, or \_\_\_\_\_, to accept such appointment of Assignee.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

Witness to the signature of \_\_\_\_\_,

Exhibited to me this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_,  
*Register in Bankruptcy.*

## Form No. 15.

## CHOICE OF ASSIGNEES.

(First Meeting of Creditors.)

the District Court of the United States,  
or the District of

In the Matter of

Bankrupt .

IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_  
Before Mr. \_\_\_\_\_

Register in Bankruptcy.

District of \_\_\_\_\_, ss :

**MEMORANDUM.**—This being the day appointed by the Court for the First Meeting of Creditors in the above Bankruptcy, and of which due notice has been given in the [*Here insert the names of the Newspapers in which notice was published,*] and by special notice served personally, or through the mail. We, whose names are hereunder written, being the greater part in number and in value, of the Creditors of the said \_\_\_\_\_, Bankrupt aforesaid, present at this Meeting, and who have proved our Debts, have chosen, and do hereby nominate and choose [*Here insert the name, or names of assignees, with their places of residence, respectively*] to be the assignee of the said bankrupt's Estate and Effects, and we do desire that he [*or, they*] may be appointed such assignee, accordingly :

Names of Creditors above mentioned.	Residences of the Same.	Am't of Debt.	
		Dolls.	Cts.

I [*or, we*] do hereby accept the said Trust, [*or, Appointment.*]

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_

Assignee .

I, \_\_\_\_\_, a Register of the said Court in Bankruptcy, do hereby approve of, and confirm the said choice of Assignee .

\_\_\_\_\_, Register in Bankruptcy.

hereby appoint Mr. \_\_\_\_\_, of \_\_\_\_\_, to act as Solicitor, and Attorney in the above Bankruptcy.

\_\_\_\_\_, Register [*or, Assignee.*]

\_\_\_\_\_, District Judge.

\* N. B.—If no attorney be appointed, strike the latter form out, and when the appointment is made file an appointment as above, signed by the Assignee.

The District Judge will endorse hereon, in case of approval of the above, thus: "Ap-"

*Form No. 16.*

## NOTIFICATION OF APPOINTMENT OF ASSIGNEE.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of , ss:  
To , of , in the County of ,  
and State of :—

I DO HEREBY CERTIFY to you, that you were duly chosen [*or, appointed*] assignee [*or, one of the assignees*] of the Estate and Effects of the above named Bankrupt, at the first meeting of the Creditors, on the day of , A.D. 18 , and I do hereby approve and confirm said election *or* appointment; and I do further certify, that the greater part in value and number of the Creditors of said Bankrupt who had proved their claims were present, or were duly represented at said meeting.

Dated at , the day of , A.D. 18 .

*Judge of said District, [or, Register in Bankruptcy.]*

[N. B.—If the appointment is made by the Judge, the last clause should be omitted.]

*Acceptance of Assignee.*

[N. B.—To be endorsed on notification, or to follow it.]

TO WHOM IT MAY CONCERN: Be it known, that I hereby signify my acceptance of the Trust of Assignee of the Estate of the above [*or, within*] named Bankrupt this day of , A.D. 18 .

*Form No. 17.*

## BOND OF ASSIGNEE.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of , ss:

KNOW ALL MEN BY THESE PRESENTS: That we, , of ;  
; and of  
be held and firmly bound unto the United States of America in the just and

all sum of \_\_\_\_\_ dollars, to the payment whereof, well and truly to be made, we do bind ourselves, our and each of our heirs, executors, and administrators.

Signed, Sealed, and Delivered at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_.

The said \_\_\_\_\_, having been, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, by order of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_; IN BANKRUPTCY, appointed assignee of the estate of \_\_\_\_\_, Bankrupt, this Bond is executed pursuant to the thirteenth Section of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; and is conditioned for the due and faithful discharge of all \_\_\_\_\_ duties by the said \_\_\_\_\_, as such assignee, and in compliance with the Orders and Directions of the Court in the matter of Bankruptcy of the said \_\_\_\_\_.

Signed, Sealed, and Delivered in presence of—

\_\_\_\_\_, [L.S.]  
\_\_\_\_\_, [L.S.]  
\_\_\_\_\_, [L.S.]

[N. B.—To be Endorsed on the above "On the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_."]

Approved:

\_\_\_\_\_,  
*District Judge, [or, Register in Bankruptcy.]*

*Form No. 18.*

ASSIGNMENT OF BANKRUPT'S EFFECTS.

in the District Court of the United States,  
for the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt :

} IN BANKRUPTCY.

District of \_\_\_\_\_, ss :

KNOW ALL MEN BY THESE PRESENTS, that \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, in said District has been duly appointed assignee [*If more than one assignee is appointed, insert accordingly*] in said matter. Now, THEREFORE, I, \_\_\_\_\_, Judge of said District Court, [*or, Register in Bankruptcy of said District,*] by virtue of the authority vested in me by the 14th Section of an Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said \_\_\_\_\_, assignee, as aforesaid, all the Estate, Real and Personal, of the said \_\_\_\_\_, Bankrupt, aforesaid, including all the property, of whatever kind, of which he is possessed, or in which he was interested, or entitled to have on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, with all its Deeds, Books, and Papers relating thereto, excepting such property as is exempted from the operation of this Assignment by the provisions of said fourteenth Section of said Act.

TO HAVE AND TO HOLD all the foregoing premises to the said \_\_\_\_\_, and his heirs forever, IN TRUST, NEVERTHELESS, for the use and purposes, with \_\_\_\_\_, subject to the conditions and limitations set forth in said Act.

# FORMS IN BANKRUPTCY.

WITNESS WHEREOF, I, the said Judge [or, the said Register] have here-  
 L. S. } unto set my hand, and caused the seal of said Court to be affixed,  
 the Court. } this day of , A.D. 18 .

*District Judge, [or, Register in Bankruptcy.]*

## *Form No. 19.*

### NOTICE OF ASSIGNEE OF HIS APPOINTMENT.

(In Bankruptcy.)

District of , ss:  
 I, the day of , A.D. 18 .  
 the undersigned hereby gives notice of his appointment as assignee of  
 , in the County of , and State of , within said  
 trict, who has been adjudged a Bankrupt upon his own Petition, [or, on  
 ditor's Petition; or, as the case may be] by the District Court of said Dis-  
 t. , Assignee, &c.  
 to \_\_\_\_\_,

## *Form No. 20.*

### EXEMPTED PROPERTY.

the District Court of the United States,  
 the District of .

In the Matter of

IN BANKRUPTCY.

Bankrupt .

At , on the day of , 18 .

District of ss:

The following is a Schedule of property designated and set apart to be re-  
 ed by the Bankrupt aforesaid, as his own property, under the provisions  
 he 14th Section of the Act of Congress entitled "An Act to establish a  
 form System of Bankruptcy throughout the United States," approved  
 ch 2, 1867:

General Head.	Particular Description.	Value.	
		Dolls.	Cts.
essary household and kitchen rniture.....			
r articles and necessities.....			
ring apparel of Bankrupt and s family .....			
pments, if any, as a Soldier...			
r Property Exempted by the ws of the United States .....			
erty Exempted by State Laws.			

*District Judge [or Register]*

Form No. 21.

PROOF OF DEBT, WITH SECURITY.

In the District Court of the United States,  
for the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

District of , ss :

On this day of , A.D. 18 , before me , a Register in Bankruptcy [or, United States Commissioner, or other proper officer] of said District, personally appeared , of , in the County of , and State of , and who, after being duly sworn [or, affirmed] and examined, at the time and place aforesaid, upon his oath, says that , the person by [or, against] whom a Petition for Adjudication of Bankruptcy is filed, was at and before the filing of the said Petition and still , justly and truly indebted to this Deponent, [or, the firm of , composed of this deponent and , transacting business at ,] in the sum of dollars and cents, for which said sum of dollars and cents, or any part thereof, this Deponent has not nor any person by order, or to this Deponent's knowledge or belief, for use, received any security or satisfaction whatsoever, save and except the , hereinafter mentioned; that the claim was not procured for the purpose of influencing the proceedings under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; that no bargain or agreement, expressed or implied, has been made or entered into by or on behalf of this Deponent to sell, transfer, or dispose of said claim, or any part thereof, against said Bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this Deponent [or, the firm of which this Deponent is a member] for Assignee, or any action on the part of this Deponent, or any other person, in the proceedings under said act, has been, is, or shall be in any way affected, influenced, or controlled; [*Here insert a particular description of the debt, and also of the property held as security, and the estimated value of such property.*]

Deponent.

Subscribed and sworn [or, affirmed] to, at , on the day of , A.D. 18 .  
Before me

District Judge, [or, Register in Bankruptcy,  
Or, U. S. Commissioner.]

Received by me, at this day of , A.D. 18 .

Assignee.



*Form No. 22.*

## DEPOSITION FOR PROOF OF DEBT WITHOUT SECURITY.

in the District Court of the United States,  
 or the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, District of \_\_\_\_\_, ss.:  
 on the \_\_\_\_\_ day of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_,  
 I, \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, and  
 made oath, [or, affirmation,] and says, that the said \_\_\_\_\_, the per-  
 son whom a Petition for adjudication of Bankruptcy has been filed,  
 at and before the filing of the said Petition, \_\_\_\_\_ and still  
 justly and truly indebted to this Deponent in the sum of, [*Here state the*  
*amount, and describe the consideration of the Debt, and whether any, and*  
*what, payments have been made thereon,*] for which said sum of  
 \_\_\_\_\_ dollars and \_\_\_\_\_ cents, or any part thereof, this Deponent says that  
 he has not, nor has \_\_\_\_\_ any person by his order, or to this De-  
 onent's knowledge or belief, for \_\_\_\_\_ use, had, or received any  
 manner of satisfaction or security whatsoever.

And this Deponent further says that the said claim was not procured for  
 the purpose of influencing the proceedings under the Act of Congress en-  
 titled "An Act to Establish a Uniform System of Bankruptcy throughout  
 the United States," approved March 2, 1867; that no bargain or agreement,  
 express or implied, has been made or entered into by or on behalf of this  
 Deponent, to sell, transfer, or dispose of said claim, or any part thereof,  
 against said Bankrupt, or to take or receive, directly or indirectly, any  
 money, property, or consideration whatever, whereby the vote of this De-  
 onent for Assignee, or any action on the part of this Deponent, or any  
 other person in the proceedings under said Act, has been, is, or shall be in  
 any way affected, influenced, or controlled.

\_\_\_\_\_,  
*Deposing Creditor.*

Subscribed and sworn [or, affirmed] to, before me,

\_\_\_\_\_,  
*Register in Bankruptcy.*

*Form No. 23.*

## DECLARATION FOR PROOF OF DEBT BY OFFICER OF CORPORATION.

in the District Court of the United States,  
or the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

District of , ss:

I, , of , in the County of , and State of , President [or, Cashier, or, Treasurer, or, as the case may be] of , being a Corporation incorporated by and under the laws of the State of , and carrying on business at , in the State of , being duly sworn, do solemnly declare that I am such officer, and duly authorized to make this proof, and that the statement of the , between the said Corporation and the said Bankrupt, hereto annexed, is a full, true, and complete statement of account between the said Corporation and the said Bankrupt; and that it is within my own knowledge that the debt thereby appearing to be due from the estate of said Bankrupt to the said Corporation was incurred on, or before the day of , and for the consideration therein stated; and that to the best of my knowledge and belief the said debt still remains unpaid and unsatisfied. And I do further declare that said claim was not procured for the purpose of influencing the proceedings under said Act, and that no bargain or agreement, express or implied, has been made or entered into by or on behalf of said Corporation to sell, transfer, or dispose of the said claim or any part thereof, against such Bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such Corporation, or of any person in the proceedings under said Act was, is, or shall be, in any way, affected, influenced, or controlled.

\_\_\_\_\_  
President [or, as the case may be]  
of the Company, [or, Association.]

Declared under oath at , this day of , A.D. 18 .

Before me,

\_\_\_\_\_  
*Register in Bankruptcy.*

FORMS IN BANKRUPTCY.

Form No. 24.

AFFIDAVIT FOR PROOF OF DEBT BY AGENT OR ATTORNEY.

the District Court of the United States,  
the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of

, ss :

On this day of , A.D. 18 , before me, , Register  
Bankruptcy, [or, U. S. Commissioner, or other proper officer,] of said Dis-  
trict, personally appeared , of , in the County of ,  
State of , Attorney, [or, Authorized Agent,] of , in the  
County of , and State of , and after being by me duly sworn,  
affirmed,] says that the said , the person by [or, against] whom  
Petition for Adjudication of Bankruptcy has been filed, , at  
before the filing of the said Petition, and still justly and truly in-  
debted to the said , in the sum of dollars and cents,  
*here particularly describe the consideration of the debt, and whether any,*  
[,] for which said sum of dollars and cents , or any part  
thereof, this Deponent says that he has not, nor has any person by

Order, or to this Deponent's knowledge or belief, for use had or  
received any manner of satisfaction or security whatsoever. And this De-  
ponent further says, that the claim was not procured for the purpose of influ-  
encing the proceedings under the Act of Congress entitled "An Act to Es-  
tablish a Uniform System of Bankruptcy throughout the United States,"  
approved March 2, 1867; that no bargain or agreement, express or implied,  
has been made, or entered into, by, or on behalf of such creditor to sell, trans-  
fer, or dispose of said claim, or any part thereof, against said Bankrupt, or  
to take or receive, directly or indirectly, any money, property, or consid-  
eration whatever, whereby the vote of such Creditor for assignee, or any ac-  
tion on the part of such Creditor, or any other person in the proceedings un-  
der said Act, has been, is, or shall be, in any way affected, influenced, or con-  
trolled. And this Deponent further says, that he is duly authorized by his  
principal to make this Affidavit, and that it is within his knowledge that  
the aforesaid debt was incurred, as and for the consideration above stated,  
and that such debt, to the best of his knowledge and belief, still remains un-  
paid and unsatisfied.

Subscribed and sworn [or, affirmed] to, this day of , A.D. 18 ,  
before me—

\_\_\_\_\_  
District Judge, [or, Register in Bankruptcy ;  
Or, U. S. Commissioner.]

Received by me, this day of , A.D. 18 .

\_\_\_\_\_  
Assignee.

*Form No. 25.*

## PROOF OF DEBT WITH SECURITY BY AGENT.

In the District Court of the United States,  
For the District of \_\_\_\_\_

In the Matter of \_\_\_\_\_

Bankrupt .

IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_  
Before Mr. \_\_\_\_\_,  
*Register in Bankruptcy.*

District of \_\_\_\_\_, ss:

On the day above mentioned, personally came \_\_\_\_\_, attorney [or, authorized agent] of \_\_\_\_\_, who being duly \_\_\_\_\_ and examined at the time and place aforesaid, upon his oath, says that \_\_\_\_\_, the person whom a Petition for Adjudication of Bankruptcy is filed, was at and before the filing of the said Petition, and still \_\_\_\_\_ justly and truly indebted to the said \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, for which said sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, or any part thereof, this Deponent has not, nor \_\_\_\_\_ any person by \_\_\_\_\_ order, to this Deponent's knowledge or belief, for \_\_\_\_\_ the use of said \_\_\_\_\_, received any security or satisfaction whatsoever, save and except the hereinafter mentioned. And this Deponent further says that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated; and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied; that the claim was not procured for the purpose of influencing the proceedings under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; that no bargain or agreement, expressed or implied, has been made, or entered into, by or on behalf of such Creditor to sell, transfer, or dispose of said claim, or any part thereof, against said Bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such Creditor for Assignee, or any action on the part of such Creditor, or any other person in the proceedings under said Act, has been, is, or shall be in any way affected, influenced, or controlled.

[*Here insert a description of the debt, and also of the property held as security, and the estimated value of such property.*]

Subscribed and \_\_\_\_\_ to, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_

Before me,

\_\_\_\_\_,  
*Register in Bankruptcy.*

Received by me, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_  
\_\_\_\_\_, Assignee.

*Form No. 26.*

## LETTER OF ATTORNEY TO REPRESENT CREDITOR.

In the District Court of the United States,  
For the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

To \_\_\_\_\_,

Sir, [Messrs., or Gentlemen :]—

I, \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, do hereby authorize you [or, either of you] to attend the meeting, or meetings of Creditors of the Bankrupt aforesaid, advertised, or directed to be held at a Court of Bankruptcy at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, the day notified in the Warrant issued to the Messenger by said Court in said matter, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there, from time to time, and as often as there may be occasion, for \_\_\_\_\_, and in name to vote for or against any proposal or resolution that may be then submitted under the 12th, 13th, 14th, 18th, 19th, 21st, 22d, 23d, 27th, 28th, 33d, 36th, 37th, 42d, and 43d Sections of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; and in the choice of assignee, or assignees, of the Estate of the said Bankrupt, and for \_\_\_\_\_, [or, either of us] to accept such appointment of assignee; and with like powers to attend and vote at any other meeting, or meetings, of Creditors, or sitting, or sittings, of the Court, which may be held therein for any of the purposes aforesaid, or the Declaration of Dividend, or for any other purpose in \_\_\_\_\_ interest whatsoever.

In witness whereof, \_\_\_\_\_ have hereunto signed \_\_\_\_\_ name, and affixed \_\_\_\_\_ seal the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_.

Signed, Sealed, and Delivered in \_\_\_\_\_,

presence of— \_\_\_\_\_,

\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]

[NOTE.—The party executing the above letter of attorney may acknowledge the same before a Judge, Register, Clerk, or Commissioner of the Court, or any officer authorized to take the acknowledgment of Deeds or other Instruments in Writing.]

\* [N. B.—Upon the above letter of attorney should be endorsed the following Certificate of the Register, to wit: "Exhibited to me, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, at \_\_\_\_\_.]

\_\_\_\_\_,  
*Register in Bankruptcy.*

*Form No. 27.*

## AFFIDAVIT OF LOST BILL OR NOTE.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

District of ss :

On this day of , A.D. 18 , at , comes before me , of , in the County of , and State of , and makes and says that he has made a careful search for the Bill of Exchange, [or, note,] the particulars whereof are under written, and which has been proved under this estate by , but that he, this Deponent, has not been able to find the same, and verily believes that the same has been lost or mislaid; and this Deponent further says that he has not, nor has the said , or any person or persons, to their use, to this Deponent's knowledge or belief, negotiated the said Bill, [or, note,] nor in any manner parted with, or assigned, the legal or beneficial interest therein, or any part thereof; and that he, this Deponent, is the person now legally and beneficially interested in the same, and entitled to receive for his own use all dividends in respect thereof.

*Bill or note above referred to..*

Date.	Drawer or Maker.	Acceptor.	Sum.	

Subscribed and to, before me, , on this day of ,  
A.D. 18 .

*Register, or U. S. Commissioner [or, other proper officer.]*

Upon the above-named Deponent signing the annexed letter of indemnity, and giving security to the satisfaction of the official assignee, I direct the dividend to be paid to him.

*Register in Bankruptcy*

*Form of notice of Indemnification to Register.*

In the matter of \_\_\_\_\_, of \_\_\_\_\_, Bankrupt.

SIR: The Bill [*or*, Note] mentioned below, proved by \_\_\_\_\_, under this estate, having been lost or mislaid, and the following dividend having been declared thereon, but not yet paid, viz:— \_\_\_\_\_, in consideration of your paying to \_\_\_\_\_ or to \_\_\_\_\_ order the dividend \_\_\_\_\_ above mentioned \_\_\_\_\_, hereby undertake to indemnify you against all claims of any other person to the said dividend, or any part thereof; and from all loss, damage, and expense, which you or your Executors or Administrators may sustain by reason of your making such payment to me; and if it should hereafter appear that the said sum of \$ \_\_\_\_\_, or any part thereof, with the dividend already received or declared up to this day, exceed the amount of the Bill [*or*, Note] hereby engage to repay the same to you, or to the assignee, or assignees, of the above estate, with interest at the rate of \_\_\_\_\_ per cent. per annum from this day.

Dated at \_\_\_\_\_, this \_\_\_\_\_, A.D. 18 \_\_\_\_.

*Bill or Note above referred to.*

Date.	Drawer or Maker.	Acceptor.	Sum.	

\_\_\_\_\_  
\_\_\_\_\_  
*Sureties of Creditor receiving Dividend.*

To Mr. \_\_\_\_\_, Register in Bankruptcy.

*Form No. 28.*

## NOTICE AND REQUEST OF ASSIGNEE.

(2d meeting of Creditors.)

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

IN BANKRUPTCY.

Bankrupt.

To the Hon. \_\_\_\_\_, Judge of the District Court,  
[*or*, Register in Bankruptcy] in the above District.

SIR: I, [*or*, we,] the Assignee of the estate of said Bankrupt, respectfully

that the period of three months has elapsed since the date of the Adjudication of Bankruptcy in said case, and request that the Court will order a General Meeting of the Creditors of said Bankrupt, to which \_\_\_\_\_ may make report of proceedings in trust, according to the provisions of the Twenty-seventh Section of the Bankrupt Act of March 2, 1867.

\_\_\_\_\_, Assignee.

*Order Thereon—By the Court, or Register.*

Upon the foregoing application of \_\_\_\_\_, Assignee of the estate of \_\_\_\_\_ Bankrupt, it is *Ordered* that a second General Meeting of the Creditors of said Bankrupt be held at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m., at the office of \_\_\_\_\_, one of the Registers in Bankruptcy in said District, for the purposes named in the Twenty-seventh Section of the Bankrupt Act of March 2, 1867.

*And it is further Ordered*, That the Assignee give notice of said meeting by sending written or printed notices by mail, post-paid, of the time and place of said meeting to all known Creditors of said Bankrupt; and that \_\_\_\_\_ also notify the Bankrupt to be present thereat; and \_\_\_\_\_ shall also publish notice of the time and place of said meeting on two different days in the newspaper called the \_\_\_\_\_, printed at \_\_\_\_\_, at least \_\_\_\_\_ days prior to said meeting.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the  
 { the Court. } day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_.

\_\_\_\_\_,  
*Clerk of District Court, for said District.*

*Form No. 29.*

FORM OF RETURN OF ASSIGNEE TO BE SUBMITTED TO THE REGISTER IN BANKRUPTCY PRESIDING AT SAID MEETING.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

District of \_\_\_\_\_, ss :

I, [or, we,] Assignee of the estate of \_\_\_\_\_, a Bankrupt, do certify that \_\_\_\_\_ have caused the notices required by the foregoing order to be published in the newspaper called the \_\_\_\_\_, printed at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_; and that \_\_\_\_\_ have caused written or printed notices of the time and place of said meeting to be sent by mail, post-paid, to all known Creditors of said Bankrupt. Said notices were mailed at the post-office in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, at \_\_\_\_\_ days prior to the date appointed for the said meeting.

Subscribed and \_\_\_\_\_ to, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_.  
 Before me, \_\_\_\_\_, Assignee.

*Register in Bankruptcy.*



*Form No. 30.*

## DIVIDEND MEETING.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At , in said District,  
on the day of , A.D. 18 .  
District of , ss.:

MEMORANDUM.—That at a meeting of the Bankrupt's Creditors duly called and held this day for the purposes set forth in the 27th Section of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, we, the undersigned, being the majority in value of the Creditors of the said Bankrupt present, or represented at this meeting, seeing that it appears by the accounts of the Assignee , now filed, that there is a balance of dollars, standing to the credit of this estate, in the Bank of , and a balance of dollars in the hands of the , do *Resolve* that after payment of all proper costs, charges, and expenses, and after deducting and retaining a sum sufficient for all undetermined claims, which, by reason of the distant residence of the Creditors, or for other reason satisfactory to us, have not been proved, and for other expenses and contingencies, the sum of dollars remains for distribution among the Creditors of the above-named Bankrupt, who have proved their debts against the said Bankrupt's estate. And it was further *Resolved* by the undersigned Creditors that the said sum be divided among the Creditors who have proved their claims against said estate, and that such proceedings be had for declaring and paying said dividend as are required by the 27th Section of said Act.

\_\_\_\_\_  
\_\_\_\_\_  
Creditors.

I hereby certify to the above.

\_\_\_\_\_  
\_\_\_\_\_  
*Register in Bankruptcy.*

[N. B.—In case one half in value of the Creditors shall not be represented at such meeting, the fact shall be so stated in the Memorandum, and the amount to be divided, and the order for a dividend, shall be made and signed by the Assignee in accordance with the provisions of the 27th Section of said Act.]

[N. B.—Like forms may be used for the further proceedings provided for in the 28th Section of said Act.]

*Form No. 31.*

## NOTICE OF DIVIDEND.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At , on the day of , A.D. 18 .

SIR: I hereby inform you that you may, on application at my office, , on the day of , or on any day thereafter, between the hours of , receive a Warrant for the Dividend due to you out of the above estate. If you cannot personally attend, the Warrant will be delivered to your order on your filling up and signing the subjoined letter. The bills and securities, if any, exhibited at the time of the proof of your debt must be produced to me before the Warrant of Dividend can be received.

I am, sir, your obedient servant,

\_\_\_\_\_, Assignee.

To

*Subjoined letter authorizing Assignee to give Warrant to party other than Creditor.*

To Mr.

*Assignee in Bankruptcy of the estate of* , Bankrupt.

SIR: [*or, Messrs.*] Please to deliver to the Dividend Warrant payable to me out of the above estate.

Yours, &c.,

\_\_\_\_\_, Creditor.

*Form No. 32.*

## LIST OF PROOFS AND CLAIMS FOR DIVIDEND.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At , in said District,  
on the day of , A.D. 18 .

*A list of debts proved and claimed under the Bankruptcy of  
aforesaid, with Dividend at the rate of per cent. this  
day declared thereon by Mr. , one of the Registers in  
Bankruptcy of said District Court.*

No.	Creditors. To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.	Sum proved.		Dividend.	
		The claims to be set forth in the same manner at the end of the whole of the profits.			
		Dollars.	Cents.	Dolls.	Cts.

*Register in Bankruptcy.*

Form No. 33.

LIST OF PROOFS OF DEBTS AND CLAIMS FOR ASSIGNEE TO PAY DIVIDENDS.

the District Court of the United States,  
in the District of

In the Matter of

IN BANKRUPTCY.

Bankrupt.

District of , ss: At

, in said District, on the day of , 18 .

list of Debts proved and claimed under the Bankruptcy of , with the Dividend at the rate of per cent., this day declared thereon by Mr. , one of the Registers in Bankruptcy of said Court.

Creditors. To be placed Alphabetically, and the names of all the Parties to the Proof to be carefully set forth.	Residence and De- scription.	Sums proved or claimed. Claims to be set forth in the same manner after the whole of the Proofs.		Dividend.	Bills and Securities exhibited.					
		Dolls.	Cts.		Date of Bill or Note.	Drawer or Maker.	Acceptor.	Indorser.	Sum.	
										Doll. Cts.

[N. B.—The Dividends will be paid from this List; it is therefore required to be correctly extracted from the proceedings, signed by the Register, and delivered to the Assignee.] \_\_\_\_\_, Register in Bankruptcy.

*Form No. 34.*

## PETITION OF ASSIGNEE FOR POWER TO RELIEVE PROPERTY FROM LIEN.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

To \_\_\_\_\_,

, Assignee of the estate of said Bankrupt, respectfully represents that a certain portion of said Bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value,*] is subject to a mortgage, [*Describe the mortgage,*] or to a conditional contract, [*Describing it,*] or to a lien, [*Describe the origin and nature of the lien,*] or, (if the property be personal property,) has been pledged or deposited and is subject to a lien for, [*Describe the nature of the lien,*] and that according to the best judgment of your Petitioner it would be for the interest of the Creditors of said estate that said property should be redeemed and discharged from the lien thereon. Wherefore pray that may be empowered to pay out of the assets of said estate in hands the sum of \_\_\_\_\_, being the amount of said lien, in order to redeem said property therefrom.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_, Assignee.

[N. B.—If the prayer is for a sale of the property, strike out all after the words "*judgment of your Petitioner,*" and insert "it would be for the interest of the creditors of said estate that said property should be sold, subject to said mortgage, lien, or other encumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the encumbrance thereon, in the manner prescribed by the general order for the sale of property not encumbered."

*Form No. 35.*

## ASSIGNEE'S RETURN WHERE THERE ARE NO ASSETS.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss:

On the day aforesaid, before me comes \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, and makes \_\_\_\_\_, and says that he, this

Deponent, as Assignee [*or*, one of the Assignees] of the estate and effects of the above-named Bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and \_\_\_\_\_ to, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

Before me, \_\_\_\_\_,

*Register in Bankruptcy.*

*Form No. 36.*

ASSIGNEE'S NOTICE FOR SETTLEMENT OF HIS ACCOUNTS PREPARATORY TO FINAL DIVIDEND.

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

To \_\_\_\_\_ At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

SIR:

This is to give you notice that I have filed my final accounts as assignee of the estate of \_\_\_\_\_, Bankrupt, in said Court, and that on the day of \_\_\_\_\_ next, I shall apply to said Court for the settlement of my said accounts, and for a discharge from all liability as Assignee of said estate in accordance with the provisions of the twenty-eighth section of the Bankrupt Act of March 2, 1867.

Yours, &c., \_\_\_\_\_, *Assignee.*

*Form No. 37.*

AFFIDAVIT TO BE MADE BY ASSIGNEE.

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_,

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

District of \_\_\_\_\_, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 , before me comes \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of \_\_\_\_\_, and makes \_\_\_\_\_, and says that he, this Deponent, was, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 , appointed Assignee of the estate and effects of the above-named Bankrupt. and that as such \_\_\_\_\_ he has conducted the settlement of the

said estate. That the account hereto annexed containing \_\_\_\_\_ sheets of Paper, the first sheet whereof is marked with the letter \_\_\_\_\_ [*Reference may here also be made to any prior account filed by Deponent*] is true, and such account contains entries of every sum of money received by Deponent, on account of the estate and effects of the above-named Bankrupt, and that the payments purporting in such account to have been made by Deponent have been so made by him. And he asks to be allowed for said payments and for charges of settlement as set forth in said accounts.

\_\_\_\_\_, Assignee.

Sworn to and subscribed at \_\_\_\_\_, in said \_\_\_\_\_ District of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

Before me,

\_\_\_\_\_,  
*Register in Bankruptcy.*

Form No. 38.

ACCOUNT OF ASSIGNEE.

[To be annexed to affidavit of Assignee.]

Dr.	The estate of	, Bankrupt , in account with	, Assignee.	Cr.		
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.
					Dolls.	Cts.



*Form No. 39.*

## ORDER OF SETTLEMENT AND DISCHARGE OF ASSIGNEE.

In the District Court of the United States,  
For the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of

, ss:

The foregoing account having been presented for allowance, and having been examined and found correct, it is *Ordered*, That the same be allowed, and that the said Assignee be discharged according to the provisions of the 28th Section of the Bankrupt Act of March 2, 1867.

\_\_\_\_\_  
*District Judge, [or, Register.]*

*Form No. 40.*

## PETITION FOR REMOVAL OF ASSIGNEE.

In the District Court of the United States,  
For the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

To the Hon.

*Judge of the District Court, for the* District of

District of

, ss:

The petition of , one of the parties interested in the settlement of said Bankrupt's estate, petitioning, respectfully represents, that heretofore appointed Assignee of said Bankrupt's estate, [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore pray that notice may be served upon said Assignee as aforesaid, to show cause, at such time as may be fixed by the Court, why an order should not be made removing him from said trust.

Subscribed and sworn [*or, affirmed*] to, this day of , A.D. 18 ,  
at , in said District.

Before me,

\_\_\_\_\_  
*Register in Bankruptcy*

## Form No. 41.

## NOTICE OF MOTION FOR REMOVAL.

In the District Court of the United States,  
For the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

To \_\_\_\_\_,  
*Assignee of the estate of \_\_\_\_\_, Bankrupt.*

You are hereby notified to appear before this Court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m., to show cause (if any you have) why you should not be removed from your trust as Assignee as aforesaid, according to the prayer of the Petition of \_\_\_\_\_, one of the parties interested in said estate, filed in this Court on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, in which it is alleged, [*Here insert the allegation of the Petition.*]

Hereof fail not. \_\_\_\_\_, Clerk, &c.

[N. B.—To be served by the Marshal, and return to be made in usual form.]

## Form No. 42.

## ORDER FOR MEETING OF CREDITORS TO CONSIDER QUESTION OF REMOVAL OF ASSIGNEE AND APPOINTMENT OF HIS SUCCESSOR.

In the District Court of the United States,  
For the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

District of \_\_\_\_\_, ss.:

WHEREAS \_\_\_\_\_, of \_\_\_\_\_, has filed his petition in this Court for the removal of \_\_\_\_\_, heretofore appointed Assignee of the estate of said \_\_\_\_\_, Bankrupt, setting forth, [*Here insert the allegations of the Petition.*]

It is *Ordered*, That the Clerk of this Court give notice to the Creditors of \_\_\_\_\_, by letter to be mailed to each within \_\_\_\_\_ days after the date of this order, that a meeting of said Creditors will be held at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m., at which Mr. \_\_\_\_\_, one of the Registers of this Court, will preside, for the purpose of considering the question of recommending such removal, and appointing a successor in said trust. \_\_\_\_\_, District Judge.

[N. B.—If the meeting is called upon an application of a majority in number and value of the Creditors of the Bankrupt, the Form may be varied accordingly.]

[The vote for removal is substantially the same Form as that for the appointment of Assignee in Form No. 15, substituting "removal" for "appointment;" and the Form of vote for

*Form No. 43.*

## ORDER FOR REMOVAL OF ASSIGNEE.

In the District Court of the United States,  
For the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At , on the day of , A.D. 18 .  
District of , ss :

Whereas , of , did, on the day of , A.D. 18 , present his Petition to this Court, stating as therein set forth, and praying that , the Assignee of the estate of said Bankrupt, might be removed :

NOW, THEREFORE, upon reading the said Petition of the said and the evidence submitted therewith, and upon hearing what was alleged by Mr. , of counsel on behalf of said Petitioner, and by Mr. , of counsel for , Assignee as aforesaid, and upon the evidence submitted on behalf of said Assignee,

It is *Ordered*, That the said be removed from the trust of Assignee of the estate of said Bankrupt, and that the costs of the said Petitioner incidental to said Petition be paid by said , Assignee, [or, out of the estate of the said , subject to prior charges.]

Witness the Honorable , Judge of the said Court, and { Seal of } the seal thereof, at , in said District, on the { the Court. } day of , A.D. 18 .

*Clerk of District Court for said District.*

*Form No. 44.*

## FURTHER ORDER.

In the District Court of the United States,  
For the District of

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At , on the day of , A.D. 18 .  
District of , ss :

WHEREAS , heretofore appointed Assignee of the estate of said Bankrupt , has, upon the Petition of , and after hearing thereon, been removed from said trust,

It is *Ordered*, That a meeting of the Creditors of said be held at , in , in said District, on the day of , A.D. 18 , at which Mr. , one of the Registers of this Court, shall preside, for the choice of a new Assignee of said estate.

And it is further *Ordered*, That the Clerk of this Court give notice to said Creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail within \_\_\_\_\_ days from the date of this order.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the  
 { the Court. } day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 45.*

ORDER FOR BANKRUPT'S EXAMINATION.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of  _____ Bankrupt .	}	IN BANKRUPTCY.
--	---	----------------

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss:

On the application of \_\_\_\_\_, Assignee of said Bankrupt, [or, Creditor of said Bankrupt, as the case may be,] it is *Ordered*, That said Bankrupt attend before \_\_\_\_\_, one of the Registers in Bankruptcy of this Court, at his office, [*Describing the place*] on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock m., to submit to the examination required by the 26th Section of the Bankrupt Act of March 2, 1867, and that a copy of this order be delivered to him, the said \_\_\_\_\_, forthwith.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the  
 { the Court. } day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

[N. B.—Where the wife of the Bankrupt is to be examined the like form may be used, adding after the description of the application the words “and for good cause shown to this Court, she be required to attend before said court, [or, before \_\_\_\_\_, a Register in Bankruptcy.”]

*Form No. 46.*

EXAMINATION OF BANKRUPT OR ANY WITNESS EXAMINED RELATIVE TO THE BANKRUPTCY.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of  _____ Bankrupt .	}	IN BANKRUPTCY.
--	---	----------------

At \_\_\_\_\_, in said District, on  
 the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .  
 Before Mr. \_\_\_\_\_

*One of the Registers in Bankruptcy of said Court*

District of \_\_\_\_\_, ss:  
 \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_,  
 being duly \_\_\_\_\_ and examined at the time and place above mentioned,  
 upon his oath says [*Here insert substance of examination of party.*]  
 \_\_\_\_\_, Register.

*Form No. 47.*

DECLARATION TO BE MADE BY BANKRUPT OR HIS WIFE.

In the District Court of the United States,  
 For the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, in said District, on \_\_\_\_\_, A.D. 18 \_\_\_\_.

District of \_\_\_\_\_, ss:

The person declared a Bankrupt under a Petition for Adjudication of Bankruptcy, filed on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_, do solemnly \_\_\_\_\_ that I will make true answer to all such questions as may be proposed to me respecting all the property of the said \_\_\_\_\_, and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

*Bankrupt*, [ *Or*, \_\_\_\_\_, *the wife of the said* \_\_\_\_\_, *Bankrupt.* ]  
 Subscribed and \_\_\_\_\_ to, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.  
 Before me, \_\_\_\_\_,

*Register in Bankruptcy.*

*Form No. 48.*

SUMMONS OF WITNESS AFTER ADJUDICATION.

In the District Court of the United States,  
 For the District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

District of \_\_\_\_\_, ss:

Whereas, \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, has been duly declared and adjudged Bankrupt, within the true intent and meaning of the Act entitled "An Act to provide for the relief of debtors,"

System of Bankruptcy throughout the United States," approved March 2, 1867, and such Bankruptcy is in due course of prosecution in the District Court of the United States for the District of , at , in said District,

These are to require you, to whom this summons is directed, personally to be and appear before , Esquire, one of the Registers in Bankruptcy of the said Court, acting in the matter of the said Bankruptcy, on the day of , at o'clock m., precisely, at [*Here insert place of examination*], then and there to be examined in relation to said Bankruptcy according to the provisions of said Act.

And hereof fail not.

Witness the Honorable , Judge of the said Court, and  
 { Seal of } the seal thereof, at , in said District, on the day  
 { the Court. } of , A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

Form No. 49.

RETURN OF THE ABOVE SUMMONS.

In the District Court of the United States,  
 For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of , ss:

On this day of , A.D. 18 , before me came  
 of , in the county of , and State of , and  
 makes , and says that he, this Deponent, did, on , the day  
 of , one thousand eight hundred and , personally serve  
 of , in the County of , and State of , with a  
 true copy of the Summons hereto annexed, by delivering the same to ;  
 and he, this Deponent, further makes , and says that he is not inter-  
 ested in the proceedings in Bankruptcy named in said Summons.

Subscribed and to, this day of , A.D. 18 .  
 Before me, \_\_\_\_\_,

*Register in Bankruptcy.*

[N. B.—In case the witness is to be summoned before adjudication, the form may be altered by substituting for the recital the following words:—"By virtue of the *Petition for Adjudication in Bankruptcy filed in said Court by* , against , in the District Court

*Form No. 50.*

## FORM OF CERTIFICATE UNDER SECTION SIX.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

District of , ss.:

I, , one of the Registers of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. , who appeared for the Bankrupt, and Mr. , who appeared for , one of the Creditors of said Bankrupt, [*Add other names if others are interested,*] and [*Here follows a summary of the evidence upon the point or matter to be submitted to the Court, and the question of law arising thereon as agreed to by the counsel.*]

And the said parties requested that the same should be certified to the Judge for his opinion thereon.

Dated at , the day of , A.D. 18 .

*Register in Bankruptcy.*

*Form No. 51.*

## PETITION OF BANKRUPT FOR HIS DISCHARGE.

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

To the Hon. \_\_\_\_\_, *Judge of the District Court of the United States, for the District of*

A. B., of , in the County of , and State of , in said District, respectfully represents, that on the day of , last past, he was duly declared a Bankrupt under the Act of Congress in that case made and provided; that he hath duly surrendered all his property and rights of property, and fully complied with and obeyed all the orders and directions of the Court touching his Bankruptcy, and is ready to submit himself to any other and further examinations, orders, and directions which the Court may require.

[N. B.—If this Petition is filed within less than six months after the filing of the original Petition, it should state that no debts have been proved against the Bankrupt, or that no assets have come to the hands of the Assignee.]

WHEREFORE HE PRAYS that he may be decreed by the Court to have a full discharge from all his debts provable under said Bankrupt Act, and a certificate thereof granted according to the said Act of Congress.

Dated this            day of            , A.D. 18    .

\_\_\_\_\_, *Bankrupt.*

*Order of Court thereon.*

District of            , ss :

On this            day of            , A.D. 18    , on reading the foregoing Petition, it is *Ordered* by the Court, That a hearing be had upon the same on the            day of            , A.D. 18    , before said Court, at            in said District, at            o'clock    m.; and that notice thereof be published in            newspapers printed in said District for            times once a week; and that all Creditors who have proved their debts, and other persons in interest, may appear at the said time and place, and show cause, if any they have, why the prayer of the said Petition should not be granted.

*And it is further ordered* by the Court, That all such Creditors whose places of residence are known shall be entitled to a service of notice of the said Petition and order, either personally or by letter addressed to them at their known usual place of residence, attested by the Clerk of the Court, or served at their usual place of abode by the Marshal or his deputy, or sent by mail, whereof due notice shall be given.

Witness the Honorable            , Judge of the said Court, and  
{ Seal of } the seal thereof, at            , in said District, on the  
{ the Court. }            day of            , A.D. 18    .

\_\_\_\_\_,  
*Clerk of District Court, for said District.*

*Form No. 52.*

NOTICE BY LETTER TO CREDITOR THAT BANKRUPT HAS PETITIONED  
FOR DISCHARGE.

In the District Court of the United States,  
For the            District of            .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At            the            day of            , in said District, on            , A.D. 18    .

District of            , ss :

SIR: Take notice that a Petition has been filed in said court by            , of            , in said District, duly declared a Bankrupt under the Act of Congress of March 2, 1867, for a discharge, and certificate thereof, from all his debts, and other claims provable under said Act, and that the day of            next, at            o'clock    m., is assigned for the hearing of the same, when and where you may attend and show cause, if any you have, why the prayer of the said Petition should not be granted.

\_\_\_\_\_,  
*Clerk of the District Court.*



[N. B.—The certificate of the Clerk that these letters were duly mailed to each Creditor, and that the proper postage stamps were placed thereon, will be evidence of the fact of notice. If any are delivered to the Creditors or left at their usual place of residence, the persons so delivering or leaving them should make affidavit as follows :

*Affidavit of Service of Notice.*

District of \_\_\_\_\_, ss :

I, *Marshal*, [or, *Deputy Marshal*, as the case may be,] make oath, that I delivered letters of which a copy is hereto annexed to the following named persons, at the times and places stated in connection with the name of each, and that I left at the last and usual place of abode in said District copies of the same letter, with the following named persons, on the day and hour mentioned in connection with the name of each. [*Here insert names and other required particulars.*]

Served personally \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

\_\_\_\_\_,  
*Marshal*, [or, *Deputy.*]

[Or, left at last usual place of abode \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

\_\_\_\_\_,  
*Marshal*, [or, *Deputy.*]

This \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, subscribed and \_\_\_\_\_ to, before me.

\_\_\_\_\_,  
*One of the Registers in Bankruptcy of said Court.*

*Form No. 53.*

CREDITOR'S SPECIFICATION OF THE GROUNDS OF HIS OPPOSITION TO  
THE BANKRUPT'S DISCHARGE.

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

\_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, Creditor, having proved \_\_\_\_\_ debt against the estate of said \_\_\_\_\_, Bankrupt, and having received notice of his Petition for a discharge from his debts, do hereby oppose the granting of said discharge, and for the grounds of such opposition do file the following specification: [*Here insert one or more of the causes which should prevent the granting of the Bankrupt's discharge according to the provisions of Section Twenty-nine of said Act.*]

To \_\_\_\_\_, District Judge,

[or, *Register in Bankruptcy*] of said District

*Form No. 54.*

## CREDITOR'S PETITION.

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, Respectfully shows:—That he is a Creditor of \_\_\_\_\_, who for a period of \_\_\_\_\_ months next preceding the date of the filing of this Petition, has resided at \_\_\_\_\_, in County of \_\_\_\_\_, and State of \_\_\_\_\_, and District aforesaid;—That Your Petitioner's demand is provable against the said \_\_\_\_\_, in accordance with the provisions of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; That he believes that said \_\_\_\_\_ owes debts to an amount exceeding the sum of Three Hundred Dollars; That Your Petitioner's demand exceeds the amount of Two Hundred and Fifty Dollars; and that the nature of Your Petitioner's demand against the said \_\_\_\_\_ is as follows:—

A certain promissory note signed by said \_\_\_\_\_, payable to the order of Your Petitioner, [*or*, naming the party to whose order the said note is made payable,] of which the following is a Copy, to wit: [*or*, set forth evidence of indebtedness in any other form to a liquidated amount, exceeding Two Hundred and Fifty Dollars, to meet the case.]

And Your Petitioner further represents, that within the Six calendar Months next preceding the date of this Petition, the said \_\_\_\_\_ did commit an act of Bankruptcy within the meaning of said Act, to wit: In that the said \_\_\_\_\_ did heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, depart out of, and from the State of \_\_\_\_\_ of which he is an inhabitant as aforesaid, with intent to defraud his creditors, [*or*, being absent during said period, he has, with intent to defraud his creditors, remained absent from said State:—

[*Or*,  
That the said \_\_\_\_\_, within the period aforesaid, to wit: On the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, within said District, did conceal himself, [*or*, did disguise himself,] to avoid the service of Legal Process in an action for the recovery of a debt or demand, provable under said Act, to wit: To avoid the service of Legal Process in a suit \_\_\_\_\_ brought by \_\_\_\_\_ in the \_\_\_\_\_ Court, of the State of \_\_\_\_\_, [*or*, any other Court] in which such process had been issued, to be served upon the said \_\_\_\_\_, by \_\_\_\_\_, Marshal for said District, [*or*, Sheriff, Constable, or other Officer, or party, as the case may be,] at which time the said \_\_\_\_\_ did conceal himself, and remain secreted, to avoid the service of said Process, so that the said officer or party having the same to serve upon said Debtor was unable to find him, in order to make proper service of the same:—

[*Or*,  
That the said \_\_\_\_\_, within the period aforesaid, to wit: At \_\_\_\_\_, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_\_, being possessed of certain Property, to wit: [*Here describe the Property*,] and he, being aware that Legal process had been issued, [*or*, was about to be issued,] to be levied thereon at the Suit of some one or more of his Creditors, did conceal [*or*, remove; *or*, destroy the identity] of said Property to avoid its being Attached, Taken, or Sequestered on such Process:—

[Or,

That the said , within the period aforesaid, to wit:—At in said District, on the day of , A.D. 18 , being possessed of certain Estate, Property, Rights or Credits, to wit: [*Here describe the Property and where situated,*] did make an Assignment [*or, Gift, Sale, Conveyance, or Transfer, as the case may be*] of the same [*or, of any part thereof—mentioning the part*] to , of , in the County of , and State of , with intent to delay [*or, hinder; or, defraud*] the Creditors of him, the said :—

[Or,

That the said , within the period aforesaid, and within said District, to wit: At , has been arrested and held in custody under and by virtue of *mesne* process, [*or Execution; or, as the case may be,*] issued out of the Court of the United States for the District of , [*or, of any Court of any State, District, or Territory,*] within which such debtor resides or has property, founded upon a demand, in its nature, provable against the Bankrupt's Estate under said Act, and for a sum exceeding One Hundred Dollars; and that such Process is remaining in force, and not discharged by payment, or in any other manner provided by the Laws of such State applicable thereto, for a period of Seven days:—

[Or,

That the said , within the period aforesaid, and within said District, to wit:—On the day of , A.D. 18 , being Bankrupt, [*or, insolvent; or, in Contemplation of Bankruptcy, or Insolvency,*] did make to , of , in the County of , and State of , a payment [*or, Gift, Grant, Sale, Conveyance, or Transfer*] of money [*or, of any other Property, Estate, Rights or Credits,*] [*or, did give to* , of , in the County of , and State of , a Warrant to Confess Judgment, or, did procure, or Suffer his Property to be taken on Legal Process,] in favor of , of , in the County of , and State of ; the said judgment to be confessed, issuing out of the Court of ; with the intent to give a preference to , of , in the County of , and State of ; [*or, to one or more of his Creditors; or, with the intent, thereby, to give preference to* , of , in the County of , and State of , being a person, [*or, persons,*] who were liable for him as Endorser, Bail, Sureties, or otherwise, [*describing the particular relation,*] *or, with the intent by such disposition of his Property to Defeat, or Delay the operation of said Act.*]

[Or,

That the said , within the period aforesaid, and within said District, to wit: On the day of , A.D. 18 , being a Banker, [*or, Merchant; or, Trader; or, as the case may be,*] has fraudulently stopped, or, suspended (and has not resumed) payment of his Commercial Paper within a period of fourteen days.

[N. B.—*Whichever of the acts is relied upon as the act of Bankruptcy of Debtor, the same must be particularly described.*]

WHEREFORE YOUR PETITIONER PRAYS that he, the said , may be declared a Bankrupt, and that a Warrant may be issued to take possession of his Estate; that the same may be distributed according to law; and that such further proceedings may be had thereon as the law in such case prescribes.

---

*Solicitor [or Attorney.]*

---

*Petitioner.*

*Oath to Foregoing Petition.*

UNITED STATES OF AMERICA,

District of \_\_\_\_\_, ss.:

I, \_\_\_\_\_, the Petitioner above named, do hereby make solemn oath that the statements contained in the foregoing Petition subscribed by me are true, so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief, are true according to the best of my knowledge, information, and belief.

\_\_\_\_\_,  
*Petitioner.*

Subscribed and sworn [or, affirmed] to, before me, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_,  
*District Judge, [or, Register in Bankruptcy, or, U. S. Commissioner.]*

[N. B.—In case the parties proceeded against are a Copartnership, or a Corporation, the above forms may be varied accordingly.]

*Form No. 55.*

## DEPOSITION AS TO PETITIONING CREDITOR'S CLAIM.

[To be filed with Creditor's Petition.]

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Against whom a Petition for Adjudication of Bankruptcy was filed on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .  
Before \_\_\_\_\_, one of the Registers  
of said Court, in Bankruptcy.

District of \_\_\_\_\_, ss.:

\_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, being duly Sworn [or, affirmed] and Examined, at the Time and Place above mentioned, upon his Oath, [or, affirmation,] says that the said \_\_\_\_\_ was, [or, were,] on and before the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 , and still \_\_\_\_\_ justly and truly indebted unto this Deponent, in the sum of,—[*Here give a particular description of the Debt.*]

\_\_\_\_\_, *Petitioning Creditor.*

On the \_\_\_\_\_ day of \_\_\_\_\_, before me personally appeared \_\_\_\_\_, the above-named Petitioning Creditor, and was duly sworn to the truth of the foregoing statement.

\_\_\_\_\_, *Register in Bankruptcy.*

*Form No. 56.*

## DEPOSITION OF WITNESS TO ACT OF BANKRUPTCY.

[To be filed with Creditor's Petition.]

In the District Court of the United States,  
For the District of .

In the Matter of

Against whom a Petition for Adjudication of Bankruptcy was filed on the day of , A.D. 18 .

IN BANKRUPTCY.

At the day of , in said District, on the day of , A.D. 18 .  
Before , one of the Registers of said Court in Bankruptcy:—

District of , ss:

being duly Sworn, [or, Affirmed,] and Examined, upon his Oath, [or, Affirmation,] says that, [*Here set forth particularly the Witness's knowledge of the Act of Bankruptcy alleged to have been committed by the party proceeded against.*]

On the day of , appeared personally , the above-named Witness, and was duly sworn to the truth of the foregoing statement.

\_\_\_\_\_, Register in Bankruptcy.

*Form No. 57.*

## ORDER TO SHOW CAUSE, UPON CREDITOR'S PETITION.

In the District Court of the United States,  
For the District of .

In the Matter of

Against whom a Petition for Adjudication of Bankruptcy was filed on the day of , A.D. 18 .

IN BANKRUPTCY.

District of , ss:

Upon filing proofs sustaining the allegations of the Petition aforesaid, it is *Ordered*, That the said do appear at this Court, as a Court of Bankruptcy, to be holden at , in the County of , and State of , and District aforesaid, on the day of , at o'clock m., and show cause, if any there be, why the Prayer of said Petition should not be granted; and—

It is further *Ordered*, That a copy of said Petition, together with a copy of this order, be served on said by delivering the same to him

personally, or by leaving the same at his last usual place of abode, in said district, at least five days previous to the day herein required for his appearance.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day  
 { the Court. } of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 58.*

ADJUDICATION OF BANKRUPTCY—CREDITOR'S PETITION.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District, on the  
 \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss:

This cause came on to be heard at \_\_\_\_\_, in said Court, and  
*[Here state the proceedings, whether there was no opposition, or, if opposition, what proceedings were had, and when and where, and what counsel appeared for the several parties.]*

And thereupon, and upon consideration of the proofs in said cause, (and the arguments of counsel thereon, if any,) it was found that the facts set forth in said Petition were true, and it is therefore adjudged that \_\_\_\_\_ became Bankrupt within the true intent and meaning of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said Petition, and he is therefore declared and adjudged a Bankrupt accordingly. And it is further ordered that the said Bankrupt shall, within five days after the date of this order, make and deliver, or transmit by mail, post paid, to the Marshal, as Messenger, a Schedule of his Creditors, and Inventory of his estate, in the form, and verified in the manner required of the Petitioning debtor by the said Act.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day  
 { the Court. } of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 59.*

## WARRANT OF SEIZURE UPON ADJUDICATION OF BANKRUPTCY ON CREDITOR'S PETITION.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

District of , ss:

*To the Marshal of said District, [or, to either of his Deputies,] Greeting:*

WHEREAS a Petition for Adjudication of Bankruptcy was, on the day of , A.D. 18 , filed against , of the County of , and State of , in said District, under which he has been duly declared and adjudicated Bankrupt; you are therefore, by virtue of the said Petition and the adjudication thereon, according to the provisions of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867, required, authorized, and empowered, as Messenger, to take possession of all the estate, real and personal, of said , the said Bankrupt, except such as may be by law exempt from the operation of said Act, and of all his deeds, books of account, and papers, and to keep the same safely until the appointment of an assignee.

And you are also directed to publish notice twice in the newspapers called and , printed at , in the County of , the first publication to be made forthwith as follows:

District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

*A warrant in Bankruptcy has been issued by said Court against the estate of , of the County of , of the State of , in said District, adjudged a Bankrupt upon the Petition of his Creditors, and the payment of any debts and the delivery of any property belonging to said Bankrupt, to him or to his use, and the transfer of any property by him, are forbidden by law. A meeting of the Creditors of said Bankrupt to prove their debts and choose one or more Assignees of his estate will be held at a Court of Bankruptcy to be holden at , in said District, on the day of , A.D. 18 , at o'clock m., at the office of , [giving the street and number,] one of the Registers in Bankruptcy of said Court.*

*Marshal, [or, Deputy Marshal,] Messenger.*

And you will also serve written or printed notice by mail or personally on all Creditors whose names may be given to you by said Bankrupt within five days from the date of such adjudication, within            days after the date hereof, and also to said           , the Bankrupt, which notice shall be as follows:

In the District Court of the United States,  
For the            District of           .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

District of           , ss:

To           , one of the Creditors of said           , Bankrupt.

This is to give you notice:

- 1st. That a Warrant in Bankruptcy has been issued against the estate of           , Bankrupt aforesaid.
- 2d. That the payment of any debts, and the delivery of any property belonging to said Bankrupt, to him or to his use, and the transfer of any property by him, are forbidden by law.
- 3d. That a meeting of the Creditors of the debtor to prove their debts and choose one or more Assignees of the estate will be held at a Court of Bankruptcy to be holden at           , in said District, on the            day of           , at            o'clock            m., at the office of           , [giving the street and number,] one of the Registers in Bankruptcy of said Court.

And the following are the names of the creditors of said Bankrupt and the amount of their debts as given to me by him.

[*E. g.*—A. B., (of Boston,)            dollars.]  
\_\_\_\_\_ , *Messenger.*

And have you there this warrant, with your doings thereon.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this Court to be affixed at           , this            day of           , in the year of our Lord 18           .

[L. S.]

*Clerk of the Court.*

*District Judge.*

*Return by Marshal thereon.*

District of           , ss:

By virtue of the within warrant, I have taken possession of the estate of the within named           , Bankrupt, except such as is by law excepted from the operation of said warrant by the act of Congress, and of all his deeds, books of account, and papers which have come to my knowledge, and I have published notice by advertisement on two different days in the newspapers within mentioned, the first publication of which was on the day of           , A.D. 18           . I also within            days after the date of the within warrant sent written or printed notice, as within directed, to the within named           , Bankrupt, and to the creditors named on the schedule delivered to me by him, and herewith returned. The notices sent by mail were deposited in the post-office at           , on the            day of           , A.D. 18           , with the proper postage stamp affixed thereto, and those delivered personally by me to said creditors were delivered at the times and the places set opposite to the name of each, and all of said notices were according to the directions set out in this warrant.

\_\_\_\_\_  
*Marshal [or Deputy Marshal.] Messenger.*



## FEES AND EXPENSES.

1. Service of warrant .....	\$2	00
2. Necessary travel at the rate of 5 cents a mile each way .....		
3. Notice to creditors, 10 cents each .....		
4. Actual expenses in publishing notices as follows .....		
5. Actual expenses in custody of property and other services as follows.....		

[Here render the particulars.]

\_\_\_\_\_,  
*Marshal, [or, Deputy Marshal,] Messenger.*

*Affidavit as to Expenses.*

District of \_\_\_\_\_, A.D. 18 \_\_\_\_.

Personally appeared the said \_\_\_\_\_, Messenger, and made oath that the above expenses returned by him under numbers four and five have been actually incurred and paid by him, and are just and reasonable.

\_\_\_\_\_,  
*One of the Registers in Bankruptcy in said District.*

*Form No. 60.*

ADJUDICATION WHERE DEBTOR IS FOUND NOT BANKRUPT.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of

Bankrupt .

IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
 on \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

Before Honorable \_\_\_\_\_, Judge of the \_\_\_\_\_ District of \_\_\_\_\_,  
 ss.:

This cause came on to be heard at \_\_\_\_\_, in said Court, and [Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had, and when and where, and what counsel appeared for the several parties.]

And thereupon, and upon consideration of the proofs in said cause, (*and the arguments of counsel thereon*, if any,) it was FOUND that the facts set forth in said Petition were not proved; and it is therefore *Ordered*, That said Petition be dismissed, and that all proceedings under the same be vacated and annulled.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day  
 { the Court. } of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

[N. B. 1. If default be made by the Debtor to appear pursuant to the order upon a Creditor's Petition, the subsequent order may be made by a Register in Bankruptcy.]

[N. B. 2. If no Schedule of Creditors shall be delivered to the Messenger by the Bankrupt, the Messenger shall prepare such Schedule from the best information he can obtain, and send notices accordingly.]

*Form No. 61.*

DENIAL OF BANKRUPTCY, AND DEMAND FOR JURY BY DEBTOR.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of the Petition  
 of \_\_\_\_\_, Creditor,  
  
*vs.*  
  
 \_\_\_\_\_, Debtor.

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
 on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss.:

And now on this return day [*or*, adjourned return day] for the hearing of said Petition, the said \_\_\_\_\_ appears and denies that he has committed the act of Bankruptcy set forth in said Petition, and avers that he should not be declared Bankrupt for any cause in said Petition alleged, and this he prays may be inquired of by the Court, [*or*, he demands that the same may be inquired of by a Jury.]

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day  
 { the Court. } of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 62.*

## ORDER OF COURT UPON DENIAL OF BANKRUPTCY AND DEMAND FOR JURY TRIAL.

*(Involuntary Bankruptcy.)*

In the District Court of the United States,  
For the District of \_\_\_\_\_

of In the Matter of the Petition  
\_\_\_\_\_, Creditor,

*vs.*

\_\_\_\_\_, Debtor.

} IN BANKRUPTCY.

At \_\_\_\_\_, in the said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_  
ss: \_\_\_\_\_

District of \_\_\_\_\_

Upon the demand in writing filed by the Respondent to said Petition, that the fact of the commission of an act of Bankruptcy may be inquired of by a Jury, it is *Ordered*, That said issue be submitted to a Jury at the present term of this Court, (if a Jury be in attendance,) *or*, if in vacation, at the next term of this Court.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and  
{ Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the  
{ the Court. } day of \_\_\_\_\_, A.D. 18 \_\_\_\_

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 63.*

## APPOINTMENT OF TRUSTEES UNDER SECTION 43.

In the District Court of the United States,  
For the District of \_\_\_\_\_

In the Matter of \_\_\_\_\_

} IN BANKRUPTCY.

Bankrupt .

At this meeting of the Creditors of said Bankrupt, called specially by order of said Court for the purpose of determining in what manner the estate of said Bankrupt shall be settled, it was resolved by three fourths in value of the Creditors whose claims have been proved, as follows:

1st. That it is for the interest of the general body of the Creditors of said Bankrupt, that the estate of said Bankrupt should be \_\_\_\_\_

and distribution made among the Creditors by trustees under the inspection and direction of a Committee of Creditors.

2d. That this resolution be certified and reported to the Court.

3d. That \_\_\_\_\_ be nominated as trustee to take, hold, and distribute said estate.

4th. That \_\_\_\_\_, of \_\_\_\_\_, of \_\_\_\_\_, be the Committee of the Creditors under whose direction the said Trustees shall act.

Creditors.	Amount of Debts.	
	Dolls.	Cts.
•		

### *Affidavit of Bankrupt.*

A. B., the said Bankrupt, being duly sworn, [*or, affirmed,*] says that the names of the persons affixed to the foregoing resolution represent three fourths in value of all his creditors whose claims have been proven against his estate.

Subscribed and \_\_\_\_\_ to, before me, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

\_\_\_\_\_,  
*Register, [or, U. S. Commissioner.]*

### *Certificate of Register thereon.*

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

(In Bankruptcy.)

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_, I hereby certify that at a meeting of the Creditors of said \_\_\_\_\_, held this day in pursuance of a notice regularly given according to the provisions of the Act of Congress entitled, &c., approved March 2, 1867, [*or, according to the order of the Court, as the case may be,*] the above resolutions were adopted and signed by three fourths in value of the Creditors of said Bankrupt, who were present or were represented at said meeting.

\_\_\_\_\_,  
*Register in Bankruptcy.*

*Order of the Court on above Proceedings.*

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

The foregoing certificate having been filed and read, it is *Ordered*, That the said shall convey, transfer, and deliver all his property or estate to , as trustee by deed, in the following form:

District of , ss.:

In the District Court of the United States for said District.

This indenture made this day of , A.D. 18 , between , (the *Debtor*), of , in the County of , and State of , and , on behalf and with the consent of , Creditors of the said , WITNESSETH, that the said (the *Debtor*), hereby conveys, transfers, and delivers all his estate and effects to , absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said would have had or held the same if no proceedings in bankruptcy had been taken against him, to be applied and administered for the benefit of the Creditors of said , in like manner as if said had been at the date hereof duly adjudged Bankrupt, and the said (trustees) had been appointed assignee in bankruptcy under said act.

In testimony whereof, the said (debtor,) and the said (trustees,) in acceptance of said trust, have hereunto set their hands and seals, this day of , A.D. 18 .

Executed in presence of—

\_\_\_\_\_, [L. s.]  
\_\_\_\_\_, [L. s.]  
\_\_\_\_\_, [L. s.]

This day appeared before me, a Register in Bankruptcy, the above-named , (Bankrupt,) and acknowledged the foregoing instrument by him signed to be his free act and deed.

\_\_\_\_\_,  
*Register in Bankruptcy.*

We hereby give our assent to the execution of the above deed:

Names of Creditors.	Residence.	Amount.	
		Dolls.	Cts.
.			

*Oath of Bankrupt.*

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

IN BANKRUPTCY.

, the said Bankrupt, being duly sworn, doth depose and say that he has conveyed, transferred, and delivered all his property to the trustees in the above indenture named, and that the persons signing their consent to the above conveyance represent three fourths in value of all his Creditors whose claims have been proved against his estate.

Subscribed and sworn [*or, affirmed*] this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .  
Before me, \_\_\_\_\_,

*Register in Bankruptcy.*

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

{ Seal of  
the Court. }

\_\_\_\_\_,  
*Clerk of District Court, for said District.*

*Advertisement of Trustee.*

In the District Court of the United States,  
For the District of .

(In Bankruptcy.)

This is to give notice, that by an indenture bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 , \_\_\_\_\_ of \_\_\_\_\_, has conveyed and assigned all his estate and effects whatsoever to \_\_\_\_\_, as trustee, upon trust for the benefit of all the Creditors of \_\_\_\_\_, and that said conveyance was duly executed according to the provisions of the 43d Section of the Bankrupt Act of March 2, 1867.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,

*Order of Court.*

The foregoing proceedings under the 43d Section of the Bankrupt Act of March 2, 1867, having been placed on file and read, it is

*Ordered*, That all proceedings upon said Petition in Bankruptcy be stayed until the further order of the Court.

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

{ Seal of  
the Court. }

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 64.*

## ORDER CONCERNING SALE OF PROPERTY BY ASSIGNEE.

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

District of \_\_\_\_\_, ss.:

Upon the representation of \_\_\_\_\_, a Creditor of said \_\_\_\_\_, and upon the proofs filed therewith, it is *Ordered*, That the real estate of said Bankrupt, when offered for sale by his Assignee, shall be sold in lots or parcels as follows, [*Here follows the direction by reference to plat or any other specific description or order in which the property shall be sold.*]

Witness the Honorable \_\_\_\_\_, Judge of the said Court, and { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 65.*

## ORDER CONCERNING SALE OF PROPERTY OF CORPORATION.

In the District Court of the United States,  
For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of the Bankruptcy of

A corporation formed under the laws  
of the State of \_\_\_\_\_.

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

District of \_\_\_\_\_, ss.:

Upon the representation of \_\_\_\_\_, a Creditor, [or, the party in interest,] and upon the proofs filed therewith, it is *Ordered*, That the franchise of said corporation be sold in fractional parts according to the number of shares therein, as follows, [*If there be one thousand shares of the corporation, the order may require that the franchise be sold in fructions of \_\_\_\_\_, or, in any other proportion.*]

Witness the Honorable \_\_\_\_\_, Judge of said Court, and  
 { Seal of } the seal thereof, at \_\_\_\_\_, in said District, on the \_\_\_\_\_ day  
 { the Court. } of \_\_\_\_\_, A.D. 18 .

\_\_\_\_\_  
*Clerk of District Court, for said District.*

*Form No. 66.*

ORDER OF DIMINUTION OF CLAIM.

In the District Court of the United States,  
 For the \_\_\_\_\_ District of \_\_\_\_\_.

In the Matter of \_\_\_\_\_

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District, on  
 the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss.:

Upon the evidence submitted to this Court upon the claim of \_\_\_\_\_, against said estate, (and, if the fact be so, *upon hearing counsel thereon*,) it is *Ordered*, That the amount of said claim be reduced from the sum of \_\_\_\_\_, as set forth in the affidavit in proof of claim filed by said Creditor, in said case, to the sum of \_\_\_\_\_, and that the latter-named sum be entered upon the books of the Assignee as the true sum upon which a dividend shall be computed, [if with interest, insert, "with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

Witness the Honorable \_\_\_\_\_, Judge of the said United States District Court.

\_\_\_\_\_  
*Clerk of District Court, for said District.*



*Form No. 67.*

## EXPUNGING OR ALLOWANCE OF CLAIM.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

At \_\_\_\_\_, in said District,  
on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

District of \_\_\_\_\_, ss:

Upon the evidence submitted to the Court upon the claim of  
against said estate, (*and, if the fact be so, upon hearing counsel thereon,*) it  
is *Ordered*, That said claim be disallowed and expunged from the list of  
claims upon the Assignee's record in said case.

Witness the Honorable \_\_\_\_\_, Judge of said United States District  
Court.

\_\_\_\_\_,  
*Clerk of District Court, for said District.*

[N. B.—If the claim is found to be good, say, "*It is Ordered, That said claim be established to the full amount thereof.*"]

*Form No. 68.*IN CASE OF DISALLOWANCE THE CREDITOR MAY FILE THE FOLLOWING  
NOTICE OF APPEAL.

In the District Court of the United States,  
For the District of .

In the Matter of

Bankrupt .

} IN BANKRUPTCY.

To \_\_\_\_\_ At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

*Assignee of said estate:*

You are hereby notified that I claim an appeal from the decision of the  
Judge of said Court made on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 , refusing to  
allow my claim when presented against the estate of \_\_\_\_\_, Bankrupt, to  
the Circuit Court of the United States next to be holden at \_\_\_\_\_, in said  
District, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 .

[If the appeal is from a disallowance of part of the claim, instead of "*re-  
fusing to allow my claim,*" say, "*reducing my claim.*"]

\_\_\_\_\_, *Creditor.*

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# GENERAL INDEX.

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